Chapter 11 - Marijuana and the Law


In 1937, the "Marihuana Tax Act" was passed by Congress at the insistence of Harry Anslinger, then the Commissioner of the Federal Bureau of Narcotics. There was little debate on the measure, and the chief witness in support of the bill was Anslinger himself. It was signed into law by President Roosevelt with little public notice. While Howard Becker's "moral entrepreneur" argument takes us a long way in explaining the passage of the bill, it is really only a partial explanation. As Becker tells us, moral crusades are launched against every conceivable issue; often a seemingly apathetic public will become outraged over an issue under the fervent tutelage of a resourceful crusader. Sometimes, however, statutes can even be passed without public support or knowledge. In the case of the Marihuana Tax Act, most of the hysterical and exaggerated antimarijuana articles seem to have appeared after the federal law was passed, ostensibly to justify it.

But whether the act was passed for purely ideological reasons, or as a calculated measure to expand the operations and budget of the Federal Bureau of Narcotics, it had been preceded by a marijuana statute in every state of the union. In a sense, then, the federal law was redundant and unnecessary, as all states had a law prohibiting marijuana, and many of them were more rigorous than the federal law.

Moreover, the design of the federal act was peculiar. It did not outlaw the possession of marijuana. Rather, it penalized the failure to pay the prohibitive excise tax of $100 per ounce on the transfer of marijuana. However, if anyone attempted to comply with the law and filed the necessary form with the Internal Revenue Service declaring his intention to purchase a quantity of the drug along with the details of where, when, from whom, and how much, he would automatically have incriminated himself under the state law. Actually, the federal law was designed as a prohibitive measure. It was presumed that nobody would ever comply, file the forms, and pay the tax. No illicit user of marijuana could ever acquire the necessary license, even if he were willing to pay the tax. Because of the double jeopardy feature of the act, the Supreme Court, in Leary vs. United States, nullified it. It was impossible to comply with the law without facing sanction from the state laws because federal officials passed on the intention-to-purchase information to state officials.

The law was not struck down because the Supreme Court justices thought that marijuana should be legalized. Indeed, it is entirely possible (and even probable) that the Marihuana Tax Act will be replaced by another federal statute outlawing the use, possession, and sale of marijuana which is not marred by the self-incrimination feature. It is only because there are effective state laws that the federal statute was nullified, and the state laws will likely remain in force for some time to come.
The State Laws

It is, of course, impossible to detail the provisions of each state law within the space of a few pages. Occasionally crossing the state line can make a dramatic difference. Until 1969, South Dakota imposed a ninety-day sentence for marijuana possession, while North Dakota had a ninety-nine-year penalty. However, South Dakota stiffened its penalty, bringing it in line with that of the other, more punitive states. [4]. Many of the states have adopted the model Uniform Narcotic Drug Act, and thus, there is now a large degree of uniformity of state marijuana laws.

Not only is California the most populous state in the union, it is also a trend-setting state: much of what is fashionable in California later spreads to other states. There is no question about the state's dominance in marijuana use. In terms of the sheer numbers, as well as percentage, California has more marijuana users by far than does any other state. (In addition, the most reliable arrest statistics come from California's Bureau of Criminal Statistics.)

We will now examine California's laws pertaining to marijuana. Section 11530 of the Health and Safety Code prohibits the possession of marijuana, which is defined as a narcotic. A recent District Court decision limited the amount possessed to a useable amount. What amount is "useable" is not clear: it varies from one narcotic drug to the next, but a 1966 decision held that fifty milligrams of marijuana was not a useable amount. Judges usually dismiss possession cases based on a single "roach." A first violation of Section 11530 calls for a one-to-ten-year prison sentence; a second-time offender will be punished by a two-to-ten-year sentence, and any subsequent violation calls for a five-year to life penalty.

Section 11530.5 of the Health and Safety Code penalizes the possessor of marijuana for the purpose of selling it. No fixed amount is stipulated that defines the amount necessary to constitute a violation, although if the marijuana is packaged, presumably the intention to sell is evident. A two-to-ten-year first offense sentence is imposed, while there is a five-to-fifteen-year sentence (with a three-year minimum) for the second offense. The third and subsequent offenses are punished by ten-years-to-life imprisonment with a six-year minimum. Section 11531 of the California Code covers selling (and giving away) marijuana. The first offense provides for a five-years-to-life penalty; the offender is ineligible for parole before three years. A second offense calls for a minimum penalty of five years, and a third-time offender must serve at least ten years before being considered for parole. Section 11532 stipulates that if an adult "hires, employs, or uses a minor in unlawfully transporting, carrying, selling, giving away, preparing for sale... any marijuana or who unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give any marijuana to a minor, or who induces a minor to use marijuana" is subject to ten years to life imprisonment.

The above offenses are felonies. The California statutes also provide for a variety of less serious misdemeanor penalties, for less serious offenses. For instance, marijuana use in California, or being under the influence of marijuana, is penalized by a ninety-day-to-one-year sanction (Section 11721). Another section (11556) rules it illegal to visit or be in a room or any place wherein marijuana is being used "with knowledge that such activity is occurring." The harshness of these penalties is mitigated by the fact that Section I202b of the California Penal Code grants discretion to the judge if the felon is under the age of twenty-three. Thus, many mandatory minimum sentences may be reduced to six months.

In 1962, Rhode Island stiffened its marijuana penalties. Possession of marijuana calls for a three-to-fifteen-year penalty; possession with the intent to sell, a ten-to-thirty-year penalty; the
gift or sale of marijuana, a twenty-to-forty-year sentence; and the sale to anyone under twenty-one, a thirty-year-to-life penalty. Only first degree murder and treason carry such harsh penalties. Second degree murder, armed robbery, and rape are considered less serious under Rhode Island law than the sale of marijuana. Section 220.05 of the New York State Narcotics Laws holds the possession of any amount of marijuana to be a misdemeanor: a one-year penalty in prison. Section 220.15 rules that the possession of twenty-five or more marijuana cigarettes, or one ounce or more, is a felony: a four-year jail term. This section is comparable to California's Section 11530.5, possession with the intent to sell, and presumes that anyone with the stipulated quantities intends to sell. Actual sale is a seven-year penalty in New York, and sale to a minor, under twenty-one-years old, is a twenty-five-year felony. Several states (Georgia and Colorado) have the death penalty for selling marijuana to a minor.

**Strategies of Enforcement: Arrest**

In view of the extraordinarily high incidence of marijuana use and possession, these penalties might seem harsh, even barbaric. Let us look to see whether the provisions contained in the laws are carried out. If, as we pointed out earlier, one-fifth or one-quarter of America's college students have tried marijuana and if more will do so by the time they graduate, we are criminalizing the activities of several million human beings. The prisons of this country are insufficient to hold such immense numbers of inmates. What, then, are the patterns of enforcement of the marijuana laws?

It is a common belief in the marijuana subculture that the big-time, high-volume, large-scale profit dealer is protected by the police, largely because of pay-offs, and that the nondealing user and the petty low-volume dealers are arrested and convicted in order to give the police a respectable record. Rumors were rife after the massive raid at Stony Brook in February 1968, involving 200 policemen ("Operation Stony Brook") and two or three dozen college students, that the biggest dealers on the campus were not arrested, while all of those arrested were users or petty dealers.

The user often feels that arrests are motivated by personal or political reasons. A college student elaborates:

The police don't bust Mafia dealers. The cops are too busy playing games with little people who just, like, go home and smoke a joint. But I guess these people are a threat. They look pretty scary in their long hair and nasty clothes and things like that (laughs). And besides a cop can't understand, when you get some dumb cop—even some smart cop, they're still dumb—but they can't understand how these longhaired faggot commie pinkos can, like, can even get laid. What could a girl see in a cat that's so fucked up? I think this has a lot to do with it. Because the drug movement is so sexual. These people, they just can't understand how this happens. And this really insults this cop. Seriously, 'cuz he's probably having trouble getting it from his wife.
once a week. And this whole thing—jealousy, man, is an animal instinct. It's all an extension, man, a sexual extension. The cops are a strange phenomenon. They go after the people that look weird, because they figure that probably, well, this is my guess, they figure that these are the kids that are into the revolution, they're obviously revolting in some way.

Many observers of the American drug scene disagree with this characterization and maintain that, on the whole, the actual implementation of the harsh penalties for marijuana possession are very rarely carried out, especially for small quantities obviously intended for one's own use. Former Commissioner Giordano has been quoted as saying that the chance that an apprehended college student with a single marijuana cigarette will actually be jailed "is absolutely nil."

In fact, the police will often express disinterest in arresting the marijuana dabbler, the once, twice or a dozen-time user. They say that their real target is the supplier, the dealer, the narcotics peddler who makes a profit on misery:

Our Bureau is not interested in arresting the young student user especially those who become innocently involved. We are not interested in giving these youngsters a prison record which will hamper them throughout life, which will deny them, and society, professional careers. We are interested in getting at the source, the supplier, the pusher, the drugiteer, the rackiteer who is behind the distribution.... We are not interested in arresting students; we are interested in preventing... drugs from invading our campuses and student population; we are interested in apprehending the outside distributor who is working making the drugs available to our students; we are interested in protecting the bulk of the student population from being exposed to... drugs and from being innocently arrested or raided concerning violations or narcotics laws... [7]

Doubtless most police officers do not take so tolerant and lenient a stand on marijuana use. (In fact, Bellizzi himself also stated, in the same paper just cited, "Every user is a potential danger to the general public.") The level at which the clearest distinction is made between the dealer (especially the large-scale dealer) and the user is at the federal level; even before the nullification of the "Marihuana Tax Act," most arrests at the federal level were for dealing, not for simple possession. At the local level, however, the officer is more likely to see a grave threat even in the occasional user, and will arrest anyone whose use is detected on whom he can make a reasonable case. However, as we will make clear shortly, a great deal is determined by the strategies chosen for detection.

**TABLE 11-1**
Marijuana Arrests, State of California, 1960-1968

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In order to make the scope of the arrest picture clear, I present a table from California's official *Drug Arrests and Dispositions in California, 1968* (the most recent year available). It is the total number of arrests for the years 1960-1968 on marijuana charges. We use California's data because they are the most reliable, complete and detailed. (In fact, this chapter could not have been written without this excellent set of yearly statistics.) We are struck at once by the massive increases in the number of arrests in the past few years—increases which, by all indications, will continue for the foreseeable future. The increase from 1960 to 1968 was about eight times for the adults and more than eighteen times for juveniles. The rise did not begin until 1964 or 1965, and in 1965-1966 and 1966-1967 the rises were enormous. In fact, so recent is the expansion of marijuana arrests that in a book published in 1965, Alfred R. Lindesmith whose data on marijuana arrests ended in 1962, claimed that on the federal level, "... the number of marihuana arrests has steadily declined and by 1960 it was close to the vanishing point...."

In a table enumerating an admittedly incomplete count of marijuana arrests, federal, state, and local, for 1954, a grand total of 3,918 in the United States was listed. In 1967, in the county of Los Angeles alone, there were over four times as many marijuana arrests. In December 1967, there were almost as many California arrests on marijuana charges in one month as there were in the entire country for any entire year prior to 1960.

By any criterion, the number of arrests is enormous—except when compared with the number of users who are not arrested. The official who claims that marijuana use is generally tolerated and ignored by law enforcement agents does not have the facts. The claim that only dealers are arrested, too, is patently false. Included in the arrests are users of every "size." With these massive arrest figures, let us look at how users and sellers get arrested and what happens to their cases in court. Keep in mind that we are using California's data because they are the only

| Juvenile | 910 | 408 | 310 |

useable ones available. We assume, however, that the California situation pertains in some degree (and in general, to an explicit degree) to what is valid in other states. California differs principally in the size of arrest figures, and the close acquaintance of its judges with marijuana arrestees since they see so many of them. But the way most users and sellers are arrested, the trend of arrests, and their disposition, should not be radically different from that of the other states.

Detection of marijuana violations is typically extremely difficult. There is no victim and no complainant, so that systematic surveillance techniques inherently involve a certain loss of civil liberties. The success of any police venture is determined by various situational features having to do with the kinds of crimes that they are attempting to detect and prevent. For instance, it is obvious that acts conducted by two consenting adults who have a long-term relationship with one another, and who have no incentive to punish or discredit one another, conducted in privacy, are highly unlikely to be detected and sanctioned. On the other hand, acts perpetrated on many people by one person, previously unknown to them, in public, which they define as harmful, are highly likely to be detected, and the perpetrator punished for his act. Marijuana use, for instance, is clearly of the former type. It is generally conducted among intimates or semi-intimates, all of whom are compliant, in private; moreover, it rarely incurs negative consequences, at least in the microcosm of the single act of smoking during a single evening.

We would expect the ratio of undetected to detected acts relating to marijuana violations to be extremely high. Among our 204 respondents, we have a total of literally hundreds of thousands of instances of use, several thousand cases of sale and purchase, and tens of thousands of days of possession. That seven cases were brought to the attention of the law enforcement authorities indicates the low degree of access the police have to marijuana crimes. If we compare marijuana infractions with a high-access and high-victimization crime, such as murder, the contrast is dramatically clear. A tiny fraction of marijuana crimes, probably less than one one-hundredth of 1 percent, are detected with the violator arrested. With murder, probably over 90 percent of all violators are arrested and brought to trial. [9].

Even if we compare marijuana with another crime without a victim, narcotics possession and sale, the incidence of detection is extremely low. The narcotics addict must purchase heroin several times a day, in public. Even the heavy user of marijuana who does not sell for a profit will make a purchase once a month or so—one one-hundredth as often as the junkie—probably from a close friend, in an apartment, in a calm emotional atmosphere. He is, therefore, far less likely to be detected, and far less likely to be arrested.

It is therefore apparent that the police face serious logistic problems in apprehending the marijuana seller and user. To transcend the limitations and restrictions surrounding them, special efforts at detection must be made. Generally, the police have three methods at their disposal: informants, undercover agents, and patrol. The most common type of informant, in spite of frequent police denials, is the "arrestee informant." They cooperate with the police because they have themselves been arrested and promised lenience if they supply the names of marijuana violators known to them, usually their own dealers. The more names, and the bigger the names given to the police, the more lenient the police are. However, since most sellers known to the average marijuana user are probably his friends, this procedure is likely to bring conflicting pressures to bear on the suspect. It is not unknown for the informant to select the names not on the basis of the volume of sales, which is what the police are interested in, but on the basis of his attitude toward the person he is about to incriminate. The list of names often
reaches down the distribution ladder, rather than up. The use of the undercover agent is designed to allow the police to observe a criminal scene from inside. The agent poses as a user, seller, artist, poet, or student, and takes part in marijuana use and selling transactions himself. Often the agent will attempt to purchase progressively larger amounts from progressively bigger dealers to reach and eradicate the source, in which case, he will often ignore the petty dealers.

Another procedure is simply to arrest anyone on whom incriminating evidence has been gathered, as occurred with the Stony Brook arrests of 1968 and 1969. The agent will frequently use the technique of entrapment—i.e., request a purchase or sale himself, thus "creating" the crime de novo, although it is illegal. Often, instead of trying to make a case for selling, an extremely difficult proposition involving solid evidence, the agent will collect names on whom "probable cause" will be exercised—that is, their premises will be searched on the presumption that a quantity of marijuana will be found.

Actually, although these two methods, the use of informants and undercover agents, are dramatic and infamous in marijuana storytelling lore, they result in a small minority of arrests. A 100-page monograph published in the UCLA Law Review in 1968, based on 1966 data, attempted a complete exploration of marijuana arrests, carrying the cases down to their complete post-arrest disposition.

I will rely heavily on this report, which I will call the Los Angeles study, in the following exposition. Much valuable information, not available anywhere else, is presented in this document. For instance, the Los Angeles study revealed that very few marijuana arrests are the result of preplanned strategy on the part of the police. In the sample of arrestees in the study, only 3 percent of the adult arrestees and 7 percent of the juveniles were the work of undercover agents, while 23 percent and 15 percent of the adult and juvenile arrests, respectively, resulted from information supplied by an informant. Thus, in three-quarters of the cases (74 percent of the adults and 79 percent of the juveniles) neither an informant nor an undercover agent was used. The overwhelming bulk of these cases, nearly all in fact, resulted from patrol enforcement, in general, by far the most common source of marijuana arrests. All indications point to the fact that the vast majority of all marijuana arrests are not the result of a systematic search, but accident. No arrest warrant was used in 92 percent of the Los Angeles adult cases, and no search warrant in 97 percent of the adult cases; in only four out of almost 200 juvenile cases was either used.

Another indication of the accidental and unplanned character of most marijuana arrests, in the Los Angeles study at least, is the fact that more arrests were made in the arrestee's automobile than anywhere else (45 percent for adults, and 36 percent for juveniles). Nearly all of these arrests were, obviously, fortuitous.

A person is driving an automobile, and he goes through a red light. The police give him a ticket, and they notice a marijuana cigarette in an ash tray....

... in the routine case, what happens is an automobile is stopped because the tail light is out, or something is wrong and there is a traffic violation, and, as a result of the accident, a small quantity of marijuana is discovered, and the people that are in the car are then arrested....
Often the marijuana in the car is visible. Often it is not. Many automobiles are stopped because the occupants look like candidates for a marijuana arrest; if no marijuana is visible, the automobile will be searched. The line between "probable cause" for an automobile search, and no probable cause, and an illegal search, is thin. The smell of marijuana smoke may constitute probable cause. A hand motion may be interpreted by the patrolman as a "furtive gesture," perhaps to throw a joint out of the car window. Or shoulder-length hair on a teenaged boy may inform the policeman that he is unconventional enough to smoke pot. Many of the signs interpreted by the arresting officer as probable cause will be rejected by the judge. Often automobile searches will be an instrument in systematic harassment, rather than motivated by the desire to make a case that will hold up in court. At any rate, hundreds of such illegal automobile searches are made routinely in New York's Greenwich Village and East Village. By the law of chance, a sizable number inevitably turn up a quantity of marijuana. Since the searches are done on those who are likely to be marijuana smokers as well as the young and unconventional, a legitimate protest against such harassment would be ineffective. It does, after all, secure a great many arrests. The New York police automatically search all parts of impounded and towed away, illegally parked cars for drugs, any area of the car, in fact, that they don't have to break into. This routinely gathers a large number of arrests, but the American Civil Liberties Union claims illegal search and seizure on all of these arrests and most are actually dismissed because of their illegal character. [13]

Another large proportion of the arrestees were apprehended in a public place—21 percent of the adults and 35 percent of the juveniles. Public arrests are often the consequence of "stop and frisk" procedures, the suspect supposedly having given the arresting officer "probable cause" to be searched. Obviously, much of the same police conduct occurs with public arrests as those which take place in the automobile of the suspect. The remaining third or so (35 percent for adults; 29 percent for juveniles) of the arrests took place in a private place, most likely a house or apartment. [14] Most of the "systematic" arrests, i.e., those which result from the work of an undercover agent or an informer, take place in a private establishment. However, probably most of these "private" arrests are also a result of accident. A common sequence of events is as follows: "... a person gets in bad company, or ends up at an address where they (the police) have some information about a loud party, and they go there and they smell marijuana smoke, and four or five, six, perhaps seven, people are arrested and complaints are issued and these people are charged with the crime of marijuana." [15]

Obviously, the tactic used in law enforcement will influence the kind of suspect arrested; a change in methods will result in the capture of a different sort of person. Who gets arrested and
who doesn't when arrests take place by accident or patrol harassment? It seems clear that because of their sheer numbers, these methods are likely to result in the arrest of a great many mere users. The frequent user-petty seller is vulnerable to arrest, simply because he is around marijuana most of the time, and any random moment he is approached by the police will find him possessing incriminating evidence. The large-scale dealer who does not use is highly unlikely to be arrested if random patrol methods are employed if he disposes of his goods quickly. In fact, since nearly all fairly regular marijuana smokers have a supply on hand for their own use, the prevailing arrest tactics are most likely to snare users; medium-to high-level dealers who have marijuana on hand continuously are only slightly more likely to be arrested than the regular user—who also has marijuana on hand most of the time, although generally, a smaller amount.

The present enforcement methods, not being designed to arrest the dealer, are unlikely to make a dent in the source of the drug and will only result in feelings of injustice among users who are arrested, since the seriousness of the crime bears a scant relationship to detection and arrest. In fact, since the ratio of undetected to detected crimes is so high with marijuana violations, the relatively few (which is large in absolute numbers) who are arrested will always ask, "Why me?" In California alone in 1968 there were 50,000 arrests on marijuana charges. What proportion of this figure could possibly have been large-scale dealers? How many were dabblers, teenagers who had tried the drug a few times and possessed a few joints for experimentation? (Over 16,000 of these arrests were under 18 years of age.) More felons are arrested on marijuana charges than for any other felony. At the same time, a lower proportion of marijuana felonies and felons are detected and arrested than possibly for any other felony. And probably in no other crime is there so loose a relationship between seriousness and likelihood of arrest. It is unlikely that the present tactics will do anything about eradicating the marijuana traffic, but at least by arresting so many users, the police will create an illusion that an effective enforcement job is being done.

Arrestees, remember, do not represent all users. We do not have a cross-section of users when we look at arrest statistics. There are certainly systematic differences between them. It is no contradiction to say that most arrests are accidental and, at the same time, to say that arrestees do not form a random sample of all users. To begin with, "accidental" is not the same thing as "random." When an automobile is stopped for some trivial reason, marijuana is stumbled upon, and the occupants are arrested—this is an accident. But it is not a random event. Over one-third of all marijuana arrests took place in an automobile. What about the users who never drive, or never drive when they are in possession of marijuana? Obviously they will be underrepresented in arrest figures. Or those that never, or almost never, carry marijuana in public—these users are also less likely to be arrested, appearing only infrequently in the composition of arrestees.

Most state and local marijuana violation arrests are for simple possession—83 percent of the adults and 87 percent of the juveniles in the Los Angeles study. Only 9 percent of all marijuana arrests, both adult and juvenile, were for sale, regardless of quantity. [16] This is partly a reflection of the unsystematic character of patrol enforcement and partly a matter of a desire to make a case stick. In order to make a case for selling, actual undercover work must be done,
which is rare. Often a known seller will be arrested simply for possession because that is far easier to prove. Only seven of my respondents were arrested on marijuana charges, so that we do not have a complete picture of how arrests are made and cases disposed of. However, we can examine their experiences as a reflection of general law enforcement processes. In addition to the seven who were formally arrested, one was apprehended, but not arrested, possibly because of the illegal nature of the apprehension. One individual (arrested twice) involved in smuggling was not arrested in the United States. One of the arrestees was judged at his trial not to be in technical possession of the marijuana (one roach!), and the charges were dismissed. [17]

Of the five remaining cases, one was arrested twice. None of the five was incarcerated for his crime; four received suspended sentences, and one was still awaiting trial at the time of the interview.

With all of our cases, the detection of the crime was fortuitous; in no case did an undercover agent seek out use and selling. We cite three typical examples of the police accidentally stumbling upon marijuana crimes:

A friend of mine whom I turned on felt guilty and told his father about it. His father told the police, and the police followed him to my house. At four a.m., the police rang my doorbell, and, when I answered, beat me up, and then called my parents. I was adjudged a youthful offender, and placed on probation for 14 months.

twenty-year-old college student

I was playing pool with another guy, and two cops walked in, took us outside, and searched us, me and my friend, and then they searched our car. One joint was in the car. We were searched illegally; we were handcuffed before they even found anything. The charge is going to be dropped because I'm getting a recommendation from a youth counselor.

twenty-one-year-old clerk in a gift shop

I was sent one joint from Mexico through the mail. The customs officials delivered the letter to my apartment in person—they had a search warrant—and said that they were going to search my apartment. But I went and got my supply, and gave it to them. They said that they were going to arrest me, but they were willing to cooperate if I did. I supplied them with a name of a dealer—knowing that he was leaving for Canada that day. I wasn't arrested.

nineteen-year-old female clerk in a bookstore
Post-Arrest Disposition

Arrest is only the first step in a long legal process. The questions involved in the post-arrest disposition are often extremely complex and technical. The policeman, who operates on the basis of simple guilt or innocence, is frustrated and angered to see one of his cases dismissed on a minor technicality, feeling that the lawyers and judges are trying to abort law and order. However, these formalities were designed to protect the possibly innocent suspect, and they usually err on the side of being overly generous in letting many probably guilty suspects go free, rather than making the mistake of jailing a few possibly innocent suspects. That this happens to such a degree with marijuana charges points to the fact that many judges, district attorneys, and lawyers have lost faith in the justice of the marijuana statutes. A certain degree of leeway is allowed the public officials after arrest; where many decisions are resolved in favor of the suspect, we are forced to accept the conclusion that the prosecuting officials do not support the laws as they stand.

By making the arrest, the policeman is registering his presumption as to the guilt of the arrested party. Actually, in the overwhelming majority of the cases, he will be correct. The suspects he arrests are almost certainly guilty of some marijuana-related crime, if not at that instance, then probably at some other time. Anyone around a quantity of marijuana, who associates with marijuana smokers, who is arrested along with others who use, possess, and sell the stuff, is highly likely to have used, possessed, and sold at some time or another. The innocent suspect in the typical marijuana arrest is extremely rare; the suspect who, by some outlandish accident, happens to find himself, at the time of the arrest, for the first time in his life, among users, and is suddenly arrested, is almost nonexistent. Each arrest has a history of use behind it. Each arrest has built into it a past of marijuana crimes which carry with them heavy penalties. The arresting officer is dead right in his assumptions, and is consistent in his actions. The technicalities of court law obstruct his design. If guilt is certain, why not prosecute? If the law is on the books, why not back it up? If they are not firmly supported by the actors involved in the post-arrest procedures, then why have them in the books?

Post-arrest disposition consists of procedural steps leading from the arrest of the marijuana pusher or user to his imprisonment. At any one of these stages, the arrestee may be freed from having to proceed to the next step. The attorney may refuse to file a complaint against him; the judge at the preliminary hearing may refuse to "hold the defendant to answer" a complaint that has been filed; the trial judge (or jury) may find the defendant innocent; and finally, the defendant may be released on probation.

There are two types of factors which influence the district attorney and the judge in deciding whether to release the arrestee at any of the above stages. The first type of factors are those which the law requires the trier of fact to consider in determining guilt.... In marijuana offenses these include the legality of a search, sufficiency of the evidence, and knowledge on the part of the arrestee that he possessed marijuana....
[The] other factors which either the judge or district attorney may consider in making his decision to release... include the defendant's age his attitude, his previous contact with the law, his family situation, and what the judge or district attorney believes to be his moral culpability. [1]

Great discretion, then, is permitted judges in marijuana cases. Some who believe that marijuana use and sale are antisocial acts rarely initiate dismissal procedures; others are known for being lenient. Generally, small-town judges will dismiss less often than those in urban centers. There is probably a positive relationship between the frequency of marijuana cases brought before a judge and the likelihood of dismissal. In the Los Angeles study, 12 percent of the cases brought before the district attorney for filing were rejected, and the arrestee freed; in addition, 14 percent were rejected at the preliminary hearings. [19] Half of the cases wherein the judge dismissed the disposition before him and refused to hold the defendant to answer the complaint were because the police searched the defendant's person or apartment on no "probable cause," i.e., the search was random and unprovoked; the defendant was doing nothing which could have aroused the arresting officer's suspicion, and the search was illegal. About one-third of the dismissals were for insufficient evidence, a handful were dismissed on the basis of entrapment, and a few were dismissed because the amount possessed was insufficient (a few seeds, traces, or a roach). (Judges usually have an informal "one joint" rule on the sufficiency of the amount; a roach is technically useable, but few urban judges prosecute on that amount.)

Very few cases go before a jury; over 95 percent of the adult Los Angeles cases were tried before a judge. Defendants rightly feel that a judge who sees marijuana cases daily takes the seriousness of the offense more lightly than do members of a jury, who are far more likely to be ignorant of the immensity and extent of use today among the young. About two-thirds of the adult Los Angeles cases which finally reached the trial stage were adjudged guilty. This represents slightly under one-third of all arrests.

Of all the California adult marijuana dispositions registered in the official state statistics—in other words all of the dispositions which took place in the entire state of California—handled in 1967 (some of which were arrested that year, and some earlier), slightly over half, 56 percent, were released, dismissed, or acquitted, and one third (35 percent) were convicted. [20] Marijuana arrestees received much more lenient treatment at the hands of California judges than heroin suspects, 40 percent of whom had their cases dropped while 44 percent were convicted.

Of the adult convictees, 59 percent of those who were arrested on possession charges were "convicted as charged," while 41 percent were convicted on a lesser drug charge. For those charged with sale, 48 percent were convicted as charged, and 52 percent were convicted on a lesser charge. (Sale is more difficult to prove.) Of these almost 4,000 possession convictions, 44 percent received "straight probation," and 34 percent received a combination of probation and a minor jail sentence. Those convicted of marijuana sale were not quite so fortunate; 23 percent received probation, and 46 percent got probation and jail. Only 10 percent of the possession convictees received a straight jail or prison sentence; and 20 percent of the sale convictees got the same. [21]
Looking at the yearly trend, we see clearly that probation is becoming increasingly common. In 1961, under 50 percent of the adult convictees got either straight probation or a combination of probation and a light jail sentence; in 1967, the figure was almost 80 percent. It seems apparent that judges are gradually losing faith in jail sentences in rehabilitating marijuana users; they are increasingly thinking of marijuana infractions, particularly simple possession and use, as trivial offenses not worthy of a prison sentence. Of the variables which most strongly influence the granting of probation, probably the convictee's prior arrest record influences judges the most. Of all the adults convicted for marijuana possession, with no prior sentences, 65 percent received straight probation, with no jail sentence; for those with a record as a minor, 49 percent got only probation; for those with an adult record, only 25 percent received probation; and for those who actually had a prior prison record, 16 percent got probation.

The percentage getting a prison or jail sentence was 2 percent, 6 percent, 17 percent, and 41 percent for each of these categories, respectively.

Even a consideration of the incarceration sentences reveals more leniency than would be assumed from the length of sentences that are called for in the law books. Well over a third (39 percent) of the adult marijuana possession convictees who received a jail sentence served less than three months.

(Most of these received these light sentences in conjunction with probation.) Only 13 percent received jail sentences lasting more than nine months. However those convicted on sale charges received sentences comparable to heroin possession sentences; about one-quarter of both got the less than three-month sentences, and about the same amount received sentences of more than nine months.

Many judges take an arrestee's attitude of remorse seriously, even though users are likely to adopt a cynical and mocking attitude toward their own rehabilitation, which they consider a cruel joke. Since very few users think of marijuana use as a problem, they may adopt a pose of penitence for utilitarian purposes. During the months after the 1968 raid on the Stony Brook campus, which netted two dozen student users, a program was set up which resembled Synanon, and was designed to rehabilitate and "redeem" the marijuana user. The program was viewed by users and nonusers alike as a pathetic farce, but the arrestees participated in it because they believed that their presiding judge would be merciful as a result. It is this kind of thinking that led one lawyer-observer of the pot scene to write:

It is important for the defendant to have a cooperative attitude with the probation officer....
Stable employment, conforming dress and sincere remorse for having broken the law, combined with a positive plan for future rehabilitation must be presented.... One who stands convicted of a crime cannot expect lenient treatment if he goes before those who are about to sentence him with the attitude that his actions are acceptable and the law is wrong. Such an expression would probably encourage any judge, otherwise disposed to grant probation, to allow the offender to spend a substantial amount of time in jail to think about, and possibly modify, his attitude. It is better to play it cool. [25]

Arrest as a Status Transformation

Legal agencies have the power to define legal reality. They can, of course, create laws and criminals de novo. But in a narrower sense, the legal process is successful to the extent that it either (1) compels the individual to accept society's version of himself as in fact criminal, i.e., criminal in more than a technical sense, a person deserving of society's scorn and punishment, or (2) discredits the individual in important areas of his life, impugning his trustworthiness, moral rectitude, and integrity for many members of society. An arrest is able to do at least the latter. There are, of course, those for whom an arrest is a mark of honor, or at least has no moral significance. But public exposure is often unavoidable in an arrest. Consequently, one's private life is subject to public scrutiny. Surveillance involves encroachments of privacy. [26]

Policemen rarely make the fine distinctions between uncovering necessary evidence and a wholesale invasion of privacy.

Being suspected of committing a crime, being under surveillance, having one's dwelling and/ or person searched, being arrested, booked, brought to trial, and (if it comes to that) convicted, not to mention the nature of one's experiences in a penitentiary, all serve as public degradation ceremonies. [27]

The legal apparatus has immense power to determine the nature of a felon's public and private presentation. Although this is a variable and not a constant, in all likelihood he sees himself as a man who has done something which is technically against the law, but which in no way qualifies him for a criminal status, for "true" criminality. He may not see himself as being "a criminal." Nor does society, not knowing about his crimes. Marijuana users often state that they "don't think of marijuana use as a crime." But going through the procedure of being arrested impresses in the mind of the offender the view that one powerful segment of society (and perhaps, by extension, society in general) has of his activity's legality.
In other words, the elaborate legal procedure, and its attendant social implications, serve as a kind of *dramaturgic rite de passage*, which serves to transform the transgressor publicly into a criminal into "the kind of person who would do such a thing." Although many going through the ritual will reject the definition of them imposed by the process, it nonetheless leaves its impress.

### Formal Law, Substantive Law, and Law Enforcement

A common argument against marijuana use involves its legal status. Aside from the debate concerning its dangers, or lack thereof, to the human mind and body, the single irreducible fact regarding marijuana which is universally agreed upon is that its use, possession, and sale are illegal. The opponents of marijuana use this as an effective weapon in their dialogue with the drug's advocates. Regardless of one's point of view on marijuana, it is outlawed. Everyone who uses it is a criminal, someone subject to the risk of arrest and imprisonment who should expect to be punished.

Actually, this argument fails under close scrutiny. Many laws—perhaps *most* laws—are not enforced. Formal law, law as it exists on the books, is very different from substantive law, law as it is actually enforced. The breach of some laws engenders widespread moral outrage, while the enforcement of other laws incurs that same public wrath. "It's the law" can never be an excuse for sanctioning an act, because "the law" is a hodge-podge of archaic long-forgotten, and ignored statutes that are never executed, along with those that are respected and daily enforced. Masturbation is illegal in a number of states (Pennsylvania, for instance), and in Indiana and Wyoming, it is criminal to encourage a person to masturbate. In forty-five states, adultery is illegal; Connecticut calls for five-year imprisonment upon prosecution. Mere fornication is a crime in thirty-eight states, and a breach of this law theoretically carries a fine of $500 or two-years imprisonment, or both.

[28] Many states dictate the manner in which one may make love to one's spouse; cunnilingus and fellatio, for instance, are against the law in many legal jurisdictions.

[29] In view of the near-universality of masturbation among men and the fact that a majority of all couples marrying today engaged in premarital intercourse, the virtual absence of any prosecution for these crimes is remarkable. Although sanctioning all crimes without victims entails severe problems of logistical detection, with adultery at least, divorce suits constitute a fertile field. In New York state, where until recently adultery was the only legitimate grounds for divorce, thousands of divorces have been filed and granted in the past few years, yet almost no one is ever prosecuted for this crime.

[30]
The enforcement of certain laws, therefore, cannot be taken for granted. Enforcement is problematic. Thus, when a law is enforced, it is necessary to ask why. What is it that differentiates those laws that are enforced and those that are not enforced? The argument that a man should refrain from performing certain kinds of sexual acts with his wife, because "it's the law," is never invoked. Yet this same argument holds up in marijuana debates. Surely, it is not the formal status of the marijuana laws that dictates their enforcement, but attitudes toward its use prevailing among the public, law enforcement officers, and agents which make leniency improbable. Rather than a matter of formal laws, marijuana enforcement is a matter of morality.

The marijuana laws are an example of the many "crimes without victims," an effort to legislate morality. There is no victim, no complainant. The use of marijuana harms no one except the user. (And there is question whether the user is harmed.) The marijuana laws represent an example of the criminalization of deviance. The legal machinery creates, by fiat, a class of criminals. If a law is annulled, criminals magically become law-abiders. Prior to 1961, homosexual acts were a crime in Illinois; after that, they were legal. It is the law that creates the crime.

Yet, someone who violates a law is not necessarily a criminal, at least, he is not viewed so by society. He must violate a law which is more than formally illegal. Public attitudes toward the law must be supportive, and toward its violators, condemnatory. Arrest reinforces society's negative attitudes toward illegalized behavior, and arrest is facilitated, and made more likely, if society condemns, as well as illegализes, the behavior in question.

Every society is in varying degrees made up of disparate subcultures with competing versions of reality; the larger and more complex the society, the greater the corresponding diversity of subcultures in that society. Yet power is never distributed in any society randomly; members of some subcultures will always have more than members of others. And, although power over someone is by definition linear and hierarchical, subcultures are mosaic and incommensurable. Given the diversity of subcultures, some sort of effort has to be made in effectively neutralizing power challenges from members of another group not in power, or legitimating the validity of one special definition of reality. Differential power and its exercise represents attempts at moral hegemony, rather than simply protection and extension of economic interests. Society is rent by large groups of individuals who simply see right and wrong in radically different ways. And many individuals have a powerful emotional investment in the dominance of one particular subcultural point of view. These are the moral entrepreneurs, the cultural imperialists who wish to extend their way of life to all members of society, regardless of the validity of that way of life for the individual or group in question.

Although laws exist merely as a potentiality for sanctioning, the mere fact that a norm, regardless of whether it has any general community support, has been formally crystallized into law, makes a great deal of difference as to whether any given individual will be penalized for an activity condemned by the dominant culture. Since each subculture has differential access to the formal agencies of social control, a norm can have lost legitimacy for a majority of the citizenry, and yet there will be some individuals who continue to regard the law as just and legitimate, who happen to be in a position of determining and defining the legal process, and are therefore able to sanction in the absence of general societal licitness. Laws and formal agencies of social control may be thought of as a resource in the hands of one subculture to enforce their beliefs on other, dissident subcultures. So powerfully is this the case that members of a group may be punished, ostensibly for an act which is in fact illegal, but in reality for another act which is not formally illegal, but which the wielders of social control find repugnant. Known
political radicals are often arrested for marijuana possession by evangelistic law enforcement officers, frustrated because most forms of politically radical activity are not formally illegal. [31]

Clearly, however, most of the laws that are enforced have a high degree of moral legitimacy. But legitimacy is a matter of degree; the more widespread and deeply held a given norm is, the greater the likelihood that its transgression will be effectively sanctioned. The moral legitimacy of a given norm can be looked at as another resource in the hands of moral entrepreneurs to punish dissident groups.

It is, of course, highly relevant who accepts the norm. The ability to translate infractions into sanctions is differentially distributed throughout the social structure. Among some subgroups in a given society there will be a closer correspondence between their own norms and the law. Norms apply more heavily to subgroup and subculture members, but laws generally apply to all. It is likely that those groups which exhibit the greatest identity between norms (their own) and the laws are specifically those groups that have the greatest power to effect sanctions.

Moral entrepreneurs, of course, think of their work as protective in nature. They see their task as protecting society from the damaging effects of the criminal behavior, and the individual committing the criminal acts from damaging himself. There is the attempt, then, to extend beyond a simple prohibition of an act because it is "immoral," within the confines of a specific moral code; there is the further assertion that the act causes objectively agreed-upon damage to the individual transgressor himself, as well as to the society at large. Yet the very perception of the act as immoral structures one's perceptions concerning the actual occurrence of the "objectively agreed-upon" damage.

The Law and the Question of Legalization

The question is often raised as to the justness of the marijuana statutes, arrests, and sentences. A legal advisor to the Bureau of Narcotics wrote, in a prepared speech before the National Student Association: "With the exception of fringe elements in society, represented by confessed users, few authorities take issue with the present prohibitory scheme." [32] This charge was absurd in 1967; today it is even more so. In fact, aside from employees of the Federal Bureau of Narcotics, as well as other law enforcement agencies, the present legal structure has the support of very few. Many of the drug's toughest critics such as Donald B. Louria, advocate a considerable reduction in penalties on use and possession ("so that a minor crime is punished by a minor penalty"), an absolute elimination of the penalties for being in a place where marijuana is smoked, but a retention of the existing penalties for sale and importation.

[Louria calls his suggestions "the middle road.") And in a recent government publication, the
appropriateness of the federal penalties on marijuana and the basic antimarijuana arguments were seriously called into question; this federal scrutiny of marijuana was made specifically because "the law has come under attack on all counts."

Huge segments of the American population feel that the legal ban on marijuana use and possession should be lifted. There is not a majority in any geographical locale, but this sentiment has powerful support among many social segments—the young, for instance. There are probably age categories where close to a majority support some version of legalization. Certainly a referendum of college students, if effected, would call for a considerable reduction in the existing penalties; probably at least a sizable minority of all college students in a national survey would endorse outright legalization. However, a clear majority of college students support legalization in some form or another in a great many schools, especially those in or near urban centers—UCLA, California Institute of Technology and Stony Brook, for instance. A recent referendum at the last of these schools, showed the following degree of support for various legalization alternatives: (see Table 11-2).

<table>
<thead>
<tr>
<th>Support for legalization</th>
<th>Stony Brook (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increase penalties for sale and possession</td>
<td>7</td>
</tr>
<tr>
<td>No change</td>
<td>14</td>
</tr>
<tr>
<td>Decrease only penalties for possession</td>
<td>12</td>
</tr>
<tr>
<td>Abolish penalties for possession, and retain some penalty for sale</td>
<td>9</td>
</tr>
<tr>
<td>Restricted legalization (state licensing of distributors, sale only to adults, etc.)</td>
<td>38</td>
</tr>
<tr>
<td>Complete unrestricted legalization</td>
<td>21</td>
</tr>
<tr>
<td>N = 2,435</td>
<td></td>
</tr>
</tbody>
</table>

It is necessary to consider some fundamental questions. What do we want the laws to do? What is the purpose of the existing penalty structure? What are we trying to achieve by punishing the use, possession, and sale of marijuana? These questions are neither rhetorical nor scornful. By asking them, I am calling for a sincere, hard look at the laws and their basic underlying assumptions. If we have been deluded about how they work, perhaps it is time for a reassessment of their status.

As I see it, the laws against marijuana have at least the following five functions (which bear with them correlative assumptions about criteria of effectiveness): (1) deterrence, (2) rehabilitation, (3) public safety, (4) vengeance, and (5) symbolic representation.

The first three of these functions are what might be called "instrumental" goals, and the last two are "expressive." Deterrence, public safety, and rehabilitation are goals whose attainment can, within the very severe limitations of bias and differential perception—which influence everyone
at all times—at least ideally be determined. Of course, the public image of a given reality may be wildly different from the image that a panel of disinterested experts would have (were it possible to find them). Who determines whether and to what extent goals have been attained? Thus, the criteria for effectiveness, and the determination of whether the goals have been reached, although ideally perceptible, in practice become somewhat muddied. But we should be able to see, in theory, at least, that the first three of these goals are tangible. The last two are not tangible. We can establish whether punishment rehabilitates the user, but it is impossible to determine the effectiveness of the vengeance or the symbolism criterion. It is not that the task would be too imposing; it is that they are ends in themselves, given in the nature of things—for some observers—and they must be either accepted or rejected outright. Their rightness or wrongness depends entirely on intangibles, on emotion, sentiment, predisposition.

At first glance, a consideration of the first goal, deterrence, might seem a vain issue, after even the most cursory glance at the enormity of the arrest statistics. To the 50,000 California marijuana arrests in 1968, we have those of every state—none so great in number, singly, as California, but altogether at least doubling and possibly tripling the figure for the whole country. What of 1969 and 1970? Deterrence? Who, indeed, is being deterred? But consider the question of whether the use of marijuana would not actually be even higher were the drug legalized. The assumption about use being stimulated by the thrill of breaking the law—the "forbidden fruit" hypothesis—has no validity. Most users are not attracted by the risk of incarceration, on the contrary, most use marijuana in spite of the risks. Some psychiatrists feel that lawbreakers feel guilty about imagined past transgressions and seek a means to be punished. Such psychiatric judgments can often be used as an instrument to attack any and all protests of the existing legal structure. By giving scientific legitimation to such psychiatric claims concerning deviants, a case is made for slavish conformity to the law. Perhaps some psychiatrists' patients fit this description, but as a general characterization of marijuana users, it is clearly in error. Not only would the number who try the drug once or a dozen times be much greater were it legal and readily available, but regular (or "chronic") use would claim far more participants as well.

Concerning our deterrence criterion, we are impelled to ask: Are the laws "working"? The answer does not come easily; how we answer it depends on our notion of what constitutes the criteria of effectiveness. The marijuana laws probably work more ineffectively than laws against any activity which is taken seriously enough to draw a penalty regularly. That does not mean that some, or many, potential users are not deterred. In a classic work written over three-quarters of a century ago, *The Division of Labor in Society*, Emile Durkheim wrote that society's enforcement of the law has an effect on those who are punished less than on those who might violate the law otherwise. In a sense, those who go to jail are "sacrifices" in order to serve the function of deterring their peers. And potential marijuana users are deterred in massive numbers by the example of arrests and punishment meted out to the less cautious. Exactly how many are deterred, and how many the law fails to deter, is impossible to determine. We can safely say, however, that the deterrence function is breaking down yearly. I suspect that marijuana's appeal is greater to the young than that of alcohol. Therefore, I would say that were all restrictions removed, the under-twenty-five-years of age
range would use cannabis more than liquor today. Furthermore, I would guess that a significant
proportion would continue to use it into their 30s and 40s. In other words, I think that marijuana
would eventually partly supplant liquor as an intoxicant, were it legal and as available. Seen in
this light, the laws have a powerful deterrent impact.

Marijuana users, as we might expect, do not want to be rehabilitated. This is not true of many
lawbreakers who are caught. Narcotics addicts are extremely ambivalent about their addiction;
many have a sincere desire to kick the habit—although very few do. Not so with marijuana
smokers. They feel that they have no "habit" to begin with. They will claim that they can give it
up any time. It is not a problem with most users. They will simply not see the point of "rehabilitation." It would be like suddenly defining sexual activity as a dependency, and
attempting to rehabilitate those who wish to indulge in sex; they would ask, "What for?"

Arrestees are likely to be puzzled or angered by a marijuana sentence. They are, to a
considerable degree, isolated from the dominant American ideology on pot and deeply involved
in their own subculture's conception of it as harmless and beneficial. Moreover, the relatively
few (but absolutely, many) users who are arrested gives them cause for the accusation of
distributive injustice. Rehabilitation is predicated on the notion that the transgressor thinks of his
transgression as wrong. Users often give up use of the weed after arrest but for practical
reasons, not out of a desire to rid themselves of a nasty habit. To demonstrate these assertions,
a study of arrestees would have to be made. In the absence of such a study, two users who
were arrested or who are serving prison sentences for violation of the marijuana statutes voice
reactions to their legal experiences:

It's rather discouraging to spend time in jail for the "crime" of possessing a weed. I haven't hurt
anybody, I haven't stolen from anybody, I haven't raped anybody's daughter. Why am I in jail? I
don't feel like a criminal.

I committed a charitable act.... I agreed to turn this poor cat onto some grass at his request. He
promptly turned me in.

This silly grass law is only one small reflection of the mentality that rules America and dictates
what we can read, what we can think and what position we must use when we make love.

My love to all the gentle people. Our day is coming. [38]
Having been convicted of selling five dollars' worth of seeds and stems to an informer, I am currently serving a twenty-to-thirty year sentence.

... my bail was set at $45,000—an impossible sum for me to raise. So I sat in jail for four months before being tried. There were twenty-five other marijuana arrests in [the]... County in the past two years, but I am the only one who has been sent to the penitentiary. Why this special treatment for me? [39]

Law enforcement officers, however, often feel rehabilitation to be a worthy goal. Often a judge's sentence will hinge on his feeling that a jail sentence actually serves a rehabilitation function. We are reminded of Lindesmith's description of one such case:

... an occasional judge, ignorant of the nature of marihuana, sends a marihuana user to prison to cure him of his nonexistent addiction. The writer was once in court when a middle-aged Negro defendant appeared before the judge charged with having used and had in his possession one marihuana cigarette during the noon hour at the place where he had worked for a number of years. This man had no previous record and this fact was stated before the court. Nevertheless, a two-year sentence was imposed to "dry up his habit." [40]

What, in fact, are the effects of arrests, convictions, and jail sentences on users? Are they as likely to use again as they would if they were never arrested? This is, obviously, impossible to answer. Nor can we compare their later arrest figures with the arrest figures of a comparable group which was not arrested when they were. (We don't know the base figure—i.e., the total number of users we are making the comparison with.) Since a small percentage of marijuana arrests were arrested before—two-thirds of the 1967 California arrestees had no prior arrest record and a fifth had a "minor" record—we are not struck at once by any evidence of obvious recidivism. Over a third of the heroin arrestees in California and almost two-thirds of the "narcotic addict or user" arrests had either a major record or a prison sentence in his past. We know then that an immense percentage of heroin users are not "rehabilitated." We cannot draw such an obvious inference with marijuana users, since recidivistic arrests are so much lower for them.

In the absence of proper data, some guessing here may be justified. I would suspect that they use marijuana less after their arrest than they would have had they not been arrested. How much less? Two-thirds? Half? Enough to make it worthwhile? If rehabilitation is an absolute goal, then any degree of reduction is a positive gain. Viewed in this light, the laws are effective, merely because they bring about some degree of reduction in use. In this special sense, the judges may be right.
Some penologists are of the opinion that incarceration may have a subtle criminogenic effect. By being sent to prison along with professional criminals, drug addicts, and the violent, a lawbreaker with little or no commitment to crime as a "way of life" will absorb many attitudes, practices, and skills which will contribute to their post-release criminality. In a sense, prisons train people to become criminals. There is no doubt that this process occurs with juvenile delinquents. I suspect that marijuana users are well-insulated and sufficiently emotionally involved in their own subculture, which basically frowns on professional and violent forms of criminality, to be to some degree immune from such influences. Perhaps, however, this applies only to the middle-class, college-educated marijuana smoker who finds himself in prison. Blumer, in a study of marijuana in the ghetto, claims that a prison term is decisive in turning an ordinary pothead to a life of "hustling" criminality.

The player is to be seen... as an enterprising member of the adolescent drug world, alive to opportunities to get money by small-time dealing in drugs, ready to engage in a variety of other illicit sources of monetary profit, and strongly attracted toward moving into a full time job of hustling by associating with hustlers and learning of their hustling practices. It should be noted here that the most effective way of getting such practical work knowledge is through prison experience. If he is incarcerated he is likely to be thrown into contact with older and more experienced hustlers who, if they identify him as safe and acceptable, are almost certain to pass on accounts of their experience.

We suspect that prison incarceration is more decisive than any other happening in riveting the player in the direction of a hustling career. [41]

However, whether this process occurs at all, and it is certain to do so in some degree, it occurs with breakers of all laws, not only those concerned with marijuana.

Consideration of the public-safety issue is even more complex and unanswerable than the deterrence effect of the laws. Suppose marijuana were legalized: would society experience more damage than it does now? As stated in earlier chapters, this depends entirely on one's notions of what constitutes "damage." There are effects that some members of society would consider favorable which others would consider society's downfall. We need not go into this argument here. But what about those effects which all or nearly all members of society would consider damaging? Certain effects are nonpolitical; for instance, death, insanity, automobile accidents, lung cancer, violence, and brain and tissue damage. Are we contributing to public safety by outlawing pot? To begin with, the addition of another intoxicant to liquor would not be additive. (See Louria's argument on this.) [42] The evidence suggests that, although the user is more likely to drink liquor than the nonuser, he cuts down on consumption of liquor after his use of marijuana. Schoenfeld writes: "The incoherent vomit-covered drunk was a common sight in college infirmaries a few years ago. He is now rarely seen on campuses where students have switched to marijuana." [43] Seymour Halleck, another physician, comes up with the same answer:
Perhaps the one major effect of the drug is to cut down on the use of alcohol. In the last few years it is rare for our student infirmary to encounter a student who has become aggressive, disoriented, or physically ill because of excessive use of alcohol. Alcoholism has almost ceased to become a problem on our campuses. [44]

Tod Mikuriya, a physician, has recommended (not supplied) marijuana to his alcoholic patients, and claims improvement for them when the substitution is made. And Blum's data suggest that regular marijuana smokers have decreased their alcohol consumption markedly, and the more they smoke, the more they cut down on liquor.

It would, therefore, be improper to add the damaging effects that (we know) result from alcohol to those which (we suppose) will result from pot. Were marijuana legal, a great percentage of liquor drinkers, possibly some alcoholics, would desert their liquid intoxicant for the burning weed. In one sense, though, the result would be additive: we would have a greater total number than presently who become intoxicated. That is, the number who become high on marijuana (whether once, twice, occasionally, or regularly) plus the number who become drunk, would be greater than the two figures now. There are certainly many who would like to get high from time to time who do not now because of the laws, but who do not like to drink. Thus, the figure who use some intoxicant would increase were pot legalized, but it would be far lower than the additive effect of all those who now use liquor added to all those who might use pot.

If we want to consider the effect of the marijuana laws on public safety, we are therefore faced with the prospect of comparing the relative merits of alcohol and marijuana. As stated earlier, marijuana users cite the comparison as a powerful argument in the drug's favor, while physicians dismiss the argument. Where does that leave us?

In terms of tissue damage, the evidence is clear; no sane observer of the American drug use scene would claim for marijuana the ravaging effect that alcohol has. Daily moderately heavy usage of American or Mexican cannabis, say, six joints a day, produces no known bodily harm. (But we must remember that we have no valid studies of potsmokers which span any length of time.) Daily moderately heavy use of alcohol—the quantity comparable to the amount of marijuana which would intoxicate the user for an equal length of time, i.e., the whole day, would be about half a quart a day—will destroy, threaten or damage most of the body's vital organs over a long period of time. In terms of auto accidents, the evidence we have suggests a gain. The drunk driver behind the wheel is far more of a threat and a danger than the high pothead. Empirical tests show that alcohol discoordinates the driver far more than marijuana—if it occurs with marijuana at all. [45] Decrease in aggression, violence, and crime, too, would be only a positive gain. Alcohol moreover is often directly linked with the commission of crime; far from inciting crime, marijuana, contrastingly, possibly inhibits it. Our speculations on insanity would have to be even less firmly grounded in known fact than those for tissue damage, automobile accidents, and violence, but marijuana would have to strive to catch up with alcohol's record; one of four admissions to a mental hospital is an alcoholic. Here, too, I think, the use of pot would be a clear gain.

The members of the antipot contingent who claim that alcohol is preferable to marijuana, and that legalization would be nothing but a disaster for this or any nation, do have a single telling point, as I see it. This is that marijuana is always used to become intoxicated, or high, and alcohol is often, indeed, perhaps most of the
time, used for nonintoxicatory purposes. Alcoholic substances are frequently consumed on many occasions where the drinker does not become drunk or intoxicated. For instance, at many sporting events—football and baseball games—several bottles of beer may be drunk by a spectator without effect. The same may be said for wine at a meal, cocktails (sometimes) at a party, or sherry as a nightcap. Of course, many marijuana smokers do drink liquor, beer, and wine, on those very occasions in which the drinker also drinks them; drinking alcohol and smoking pot are not disjunctive and mutually exclusive activities. The very people who use one often use the other as well on those occasions when it may seem more appropriate. In fact, marijuana smokers are more likely to drink alcoholic beverages than nonsmokers are.

It is entirely possible that the legalization and widespread availability of marijuana will not necessarily result in a greater number of total events in which people wish to become intoxicated simply because users will continue to use pot selectively as they presently do. They become high when they feel that the occasion calls for it and use the same (potentially intoxicating) substances that the rest of society does, in moderation, when they feel that the occasion calls for that as well. However, it is an empirical question which cannot be answered beforehand as to whether those specific occasions where alcohol is now consumed without intoxication will eventually call for marijuana use. I suspect that pot smokers will continue to follow the same sorts of patterns in liquor consumption that their nonsmoking peers do, drinking their beer, wine, and sherry as a pleasant companion to other pleasant activities. The appropriateness of one's agent of choice is defined by the social group that uses it, and many occasions do not call for getting high.

But what of the other side? What social costs do we have to consider when examining the damages the present policy is causing? To begin with an issue most Americans assume that they are hard-headed and pragmatic about—money and resources—we would have to admit that the present policies are extremely costly. The deployment of huge numbers of law enforcement officers in the effort to stop pot use and sales necessarily takes resources away from heroin and amphetamine traffic. In this sense, the present laws encourage the use of truly dangerous drugs. And the court costs of processing a single marijuana case can be, and often are, staggering, and the number of cases handled every year in this country are beginning to run over 100,000. How many millions of dollars do we feel is worth spending? In addition, the laws contribute to a great deal of resentment on both sides. The police realize that they are enforcing a law without ideological support from large segments of the public. The murderer never questions the right of the police to arrest him; the marijuana user questions the legitimacy of the law, and thus, the police and the entire legal process. By multiplying the areas in which the police are expected to enforce the law, a variety of paranoia develops among the police—in Jerome Skolnick's terms, [46] they begin to see "symbolic assailants" in the populace. In the sense that they would be able to concentrate on truly dangerous crimes, as well as crimes on which there is public support for their prohibition, the police would score a clear gain were marijuana use to be relegalized. [47]

The damages to an individual traceable to the effects of marijuana are minimal when compared with the damages he sustains at the hands of the legal system. [48] Marijuana use and possession probably represents—next to numerous sex crimes without victims, such as cunnilingus—the clearest case where the penalty is incommensurate with the seriousness of the crime. In most cases, the user suffers no damage whatsoever from the use of this weed. In the
typical case, it is a harmless activity. Arguments will often be made, particularly by the police, that, of course, in the typical case, marijuana use is relatively innocuous, but that is only because of the relative innocuousness of currently available marijuana. If the user were to get his hands on really potent cannabis—North African hashish, for instance—some serious damage would manifest itself.

Thus, what is being done is to punish someone for something which is essentially harmless because if he weren't punished, he might do something which is harmful. (Even assuming that there are such great differences in harm to users due to the varying potency different of cannabis preparations.) To my knowledge, this principle is not applied to any other area of law. Moreover, no solid case has been made for the prohibition. In 1937, not a scrap of evidence existed for justifying the passage of the federal law. Today, over a generation later, the fairest statement that could be made is that adequate systematic evidence definitively testing the relative harm of this drug has simply not been gathered. And if a deprivation of liberties is to be imposed, a conclusive case has to be made, as Justice Goldberg declared in *Griswold v. Connecticut*. The burden of proof is clearly on he who would deprive liberties, not he who would exercise them.

It should be realized that although these "empirical" issues of public safety, rehabilitation, and deterrence are useful for *rhetorical* purposes, they are not the most powerful motives underlying the administration of the laws. The emotional and "expressive" goals of symbolism and vengeance are far more important, in my opinion. To someone who feels that marijuana use is evil, the laws are just no matter what their practical result. They are an expression of a moral stance, and are beyond criticism on that level. The question of "evil" is intrinsically unanswerable. Merely because crime is widespread is no indication that the laws attempting to prevent it (and failing, in a sense, to do so) are invalid and ought to be abolished. Over 10,000 murders occur in the United States every year; should laws against murder be nullified? There are about a half-million auto thefts yearly in this country, and over a million burglaries. Should laws outlawing these activities be done away with? The fact that the laws are relatively ineffective in deterring an activity is no argument for their abolition. If we feel the activity to be damaging to society—everyone has his own personal definition of what constitutes damage—we resent efforts to evaluate the law in terms of "effectiveness."

I feel that, essentially, pot is a bogus issue. The present hostility in some quarters toward its use and its users cannot be accounted for by a consideration of the pros and cons of its effects. The degree of emotion generated by the marijuana issue, on both sides, leads an observer to conclude that marijuana must be a symbol for other issues and problems. Psychoanalysts will often venture the opinion that marijuana use represents a symbolic rebellion against authority. But, curiously, the irrational motivation of their parents have never been entertained seriously by psychiatrists who devise such theories about the young—possibly because the psychiatrists who devise such theories are largely themselves parents with adolescent children. Is the present ferment of the young an attempt to kill the father? It might more plausibly be argued that
the reactions of the adult generation to the activities of the young is an attempt to kill their sons. Marijuana merely serves to crystallize a number of other issues, none of which bear any relation to empirical and rational issues connected with public safety. A rejection of the young for being young, for being different from the older generation, for having long hair, for being radical, for being uninterested in a plastic civilization, for being too sexually permissive, essentially, for having a different style of life, for drifting beyond parental control, for having different tastes and values—these issues, rather than the concrete issues of public safety, generate the conflict.

The United States is a cosigner of the 1961 Single Convention on Narcotic Drugs, which constrains its signees, among other things, to prevent the “abuse” of cannabis. The antimarijuana lobby is firm in emphasizing the obligation of the United States to respect this international treaty, perhaps one of the few cases on record where political conservatives urge compliance to an international law in preference to the hypothetical federal and state legalization which the liberal pro-pot forces urge. The argument is that when the American government became a partner to the SCND, it became legally impossible to change the federal or state laws to make marijuana possession legal. Harry Anslinger writes: “... the United States became a party to the 1961 Single Convention on the control of narcotic drugs which obligates the signatories to prevent the misuse of marihuana. Accordingly, it will be utterly impossible for the proponents to legalize marihuana to do so.” [51]

Actually, the Single Convention is so worded that it would actually be possible to remove the legal sanctions against cannabis without violating the conditions of the treaty. Article 36 of the Convention states that the signing nations shall devise sanctions for the possession and sale of cannabis “subject to its constitutional limitations,” and that “the offense to which it refers shall be defined, prosecuted, and punished in conformity with the domestic law of a Party.” In other words, a signing nation may decide, after signing, that the stipulations of the treaty violate its internal laws, and may nullify those portions which do so. Certain states of India, for instance, have retained the legalization of many cannabis products, deeming a prohibition in violation of local custom and law. In addition, the Single Convention only refers to the pressed resin preparations of the cannabis plant—that is, hashish—and not the leaf substances. The substance customarily used in the United States is not covered by the restriction. Thus, in most cases, the Single Convention would simply be irrelevant. [52]

* It is no contradiction to say that marijuana users are more likely to drink, or to have drunk alcohol, than nonusers are, and drinkers typically cut down on their alcohol consumption when they begin to smoke marijuana regularly, in fact, both statements are true empirically. (back)
3. Ibid., pp. 151-156. (back)
4. For the lament of one user, snared after the change in the marijuana law in South Dakota, see the letter to the editor, "Marijuana Law," in the July 1969 issue of *Playboy*. (back)
9. J. Edgar Hoover, *Crime in the United States* (Boston: Beacon Press, 1965), p. 21. Murder is more likely to take place among intimates than among strangers. Where there is a complainant or an obvious victim—a body, in this case—enforcement is facilitated; where there is no complainant, it is rendered more difficult, because the police have far less access. (back)
10. Allan Morton, Joel Ohigren, John Mueller, Roger W. Pearson, and Sheldon Weisel, "Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County," *UCLA Law Review* 15 (September 1968): 1499-1585. It should be kept in mind that the data on which the Los Angeles study are based are state and local arrests. *Federal* arrests include a much higher proportion of dealers while state and local arrests are mainly of users and petty sellers. Federal law enforcement officers utilize different techniques—undercover agents principally—while state and local arrests are primarily the product of accidental patrol procedures. (back)
15. McKissick, *op. cit.*, p. 63. (back)
18. Morton et al., *op. cit.*, p. 1543. (back)
19. Ibid. (back)
20. State of California, Department of Justice, Bureau of Criminal Statistics, *Drug Arrests and
Dispositions in California: 1967  

21. Ibid., p. 82.
22. Ibid., p. 85.
23. Ibid., p. 87.
24. Ibid., p. 89.


27. Harold Garfinkle, "Conditions of Successful Degradation Ceremonies," The American Journal of Sociology  


29. In partial contradiction to the general point concerning differential enforcement, Playboy magazine prints large numbers of letters from men in prison who were convicted for these crimes; our surprise at their legal status is surpassed only by our discovery that anyone is ever sanctioned for them.

30. Even the occasional exception illustrates the point. A case in a rural area of Vermont involving alleged adultery between a married black man and a divorced white woman demonstrates the need of a community to punish an activity which is legal (interracial intercourse) in the guise of an illegal activity (adultery). For a description of the events, see Life, April 4, 1969, pp. 62-74.

31. The "yippie" ideologue, Jerry Rubin, recently arrested on a marijuana possession charge by officers who emphatically acknowledged their solely political concern in the arrest, reconstructs questions directed at him by the policemen: "Why do you hate America?" "Why did you go to Cuba when your government told you not to?" "Hey don't you have any patriotic magazines, any American magazines?" In concluding his article, Rubin writes, "My case will show cops whether or not it is easy to get away with political persecution disguised as drug busts," Cf. Jerry Rubin, "The Yippies Are Going to Chicago," The Realist, no. 82 (September 1968): pp. 1, 21-23. See also Don McNeill, "LBJ's Narco Plan: Lining Up the Big Guns: Crackdown on the Way?" Village Voice, March 14, 1968, pp. 1ff., and Irving Shushnick, "Never Trust a Man with a Beard," The East Village Other, January 12-19, 1968, p. 4. All of these journals favor legalizing marijuana.

The Bureau of Narcotics seems curiously cut off from communication with other government agencies. In addition to Haslip's charge—so wildly different from the view presented by the President's Commission survey of the literature—another Bureau lawyer, Donald Miller, in an article published in the fall of 1968, argued that the Marihuana Tax Act does not constitute self-incrimination, and that its operation was "critically different" from the gambling and firearms statutes, recently ruled upon by the Supreme Court; a few months later the Court, in an unanimous decision, ruled precisely that the Marihuana Tax Act constituted self-incrimination, as it had in the gambling and firearms statutes. See Miller, "Marihuana: The Law and Its Enforcement," Suffolk University Law Review 3 (Fall 1968): 80-100.

33. Louria, op. cit., p. 120.


37. "Election Results," Statesman, State University of New York, Stony Brook (October 1968). The Ns for "other" responses and "abstain" were eliminated from the computation. There is, of course, the methodological problem that students who are interested enough to respond to the survey are those who most favor legalization. That does not vitiate the notion that prolegalization is a common sentiment on college campuses however.

38. Trod Runyon "Marijuana Blues," Letter to the Editor, Playboy, April 1968. Partly as a result of this letter's publication in Playboy, its author was freed after a liberalization of Alaska's marijuana laws. See Runyon's letter in the September 1968 issue of Playboy.


40. Lindesmith, op. cit., p. 239.

41. Herbert Blumer et al., The World of Youthful Drug Use (Berkeley: University of California, School of Criminology, January 1967), p. 71.

44. Seymour L. Halleck, "Marijuana and LSD on the Campus" (Madison: Health Services, University of Wisconsin, 1968). (back)
47. See the letter to the Editor of *Playboy*, published in the March 1970 issue, written by a former police officer, Richard R. Bergess, who retired from the San Francisco police force after twelve years, in part as a result of his feeling that the marijuana laws were unjust and unenforceable. Bergess writes: "... police efforts to enforce these laws only increases the disrespect and hatred of large numbers of young people. This loss of public respect is no small problem: It concretely hampers police efficiency in dealing with real crimes against people. The true crisis in law enforcement today is police alienation from the public they are sworn to serve" (Bergess' emphasis). (back)
48. Even some critics of marijuana use admit this. See Stanley F. Yolles, "Pot is Painted Too Black," *The Washington Post*, Sunday, September 21, 1969, p. C4. Yolles states: "I know of no clearer instance in which the punishment for an infraction of the law is more harmful than the crime." At the same time, Yolles feels that the legal restrictions against use and possession of marijuana should not be removed. (back)
50. These points, and others as well, are brilliantly and passionately argued by J. W. Spellman, in "Marijuana and the Laws: A Brief Submitted to the Committee of Inquiry into the Non-Medical Use of Drugs—Government of Canada" (Buffalo: LEMAR, 69). (back)