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**MARIJUANA AND HASHISH:
A PROPOSAL FOR DECRIMINALIZATION**

Honorable John J. Degnan
Attorney General of New Jersey



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MARIJUANA AND HASHISH: A PROPOSAL FOR DECRIMINALIZATION

Honorable John J. Degnan
Attorney General of New Jersey

STATEMENT BY:
ATTORNEY GENERAL
JOHN J. DEGNAN *

Our criminal law is based upon a close correlation of moral notions and actual social conditions. Such a correlation is especially important with regard to consumption-oriented statutes, like our Controlled Dangerous Substances Act. However, alterations in social conditions often necessitate adjustments in the criminal law. We, who are specifically charged with the duty of enforcing that law, also have a responsibility to recognize and support those alterations essential to maintaining the viability of the criminal justice system and effective utilization of its resources. To accomplish these goals, I believe that New Jersey's statutory scheme should be amended to provide for significantly increased penalties for offenses which involve the distribution, or planned distribution, of controlled dangerous substances. With our increased focus on distributional offenses, I believe that it is equally necessary to effectuate a limited decriminalization of simple possession of relatively small amounts of marijuana and hashish.

The issue of decriminalizing possession of marijuana and hashish has generated considerable public attention during the 1970's. New Jersey's Controlled Dangerous Substances Act was passed in 1970. This legislation, still in force, prescribes draconian penalties for the simple possession of marijuana and hashish. Possession of more than 25 grams of marijuana, or five grams of hashish, is a high misdemeanor punishable by up to five years imprisonment and a fine of up to \$15,000. Anyone possessing a quantity of less than 25 grams of marijuana, or five grams of hashish, is guilty of a disorderly persons offense and liable to up to six months' incarceration and a fine of up to \$500. At the time these penalties were enacted into law, our society was in the throes of a widespread public alarm over the growing use of cannabis-based drugs and the potential harmfulness of those drugs. Subsequent events have demonstrated that this alarm may have been founded upon a serious misapprehension of the nature of marijuana and hashish, and the effects created by the use of these substances.

A series of comprehensive reports, prepared on the national level, have analyzed all existing data on the possible harmful effects of marijuana use on the human mind and body. The first of these reports was issued in 1972 by the National Commission on Marijuana and Drug Abuse. Its findings have been echoed in the reports of subsequent national commissions, in a 1975 Presidential White Paper, and in a series of comprehensive reports on marijuana and health issued by the federal Department of Health, Education and Welfare. All of these studies have generally concluded that, while there is a short term impairment of physical and psychological functioning, there

* This statement is derived from a speech delivered by Attorney General John J. Degnan to the Narcotics Enforcement Officers Association.

is no definitive evidence that the long term use of marijuana or hashish creates mental or physical hazards. Moreover, there is no empirical substantiation for the claim that marijuana use of itself engenders the subsequent use of the so-called "hard" drugs such as heroin or cocaine.

Thus, the data indicate that the principal threat to the user, and society, arises from the short term consumption of marijuana, although there exists a possibility of danger from its long term use. More importantly, it is now clear that a very large segment of our population has voluntarily elected to undergo this risk. Polls have shown that marijuana and hashish have been used by about half of the American population between the ages of 18 and 25. Perhaps a quarter to a third of all Americans have used marijuana or hashish at least once, although there exists evidence that consumption decreases and eventually terminates as people begin to approach middle age.

This enormous pattern of cannabis consumption, coupled with the inconclusive data on the long-range harmful effects of marijuana use, has created a tremendous burden for the criminal law. The deleterious consequences of this burden have, I am sure, been experienced by every member of this Association. Huge numbers of Americans have been legally branded as criminals. A great disrespect for the law, and especially the drug laws, has arisen in this substantial portion of our population. This disrespect is particularly pronounced among the young, who form the bulk of active cannabis consumers. But disdain for the statutes governing possession and use of marijuana is manifested in all classes of our society. Statistical studies have shown a decided reluctance on the part of juries to convict for possessory offenses. Conviction rates on the federal level have shown a decline of over 40% for such offenses over the last dozen years. In addition, the average period of incarceration imposed where convictions are obtained has dropped by almost 50%. Law enforcement's response to these phenomena has been varied. Many prosecutorial agencies have adopted policies that result in the downgrading of charges to the level of minor offenses. In some instances, prosecutors will, where legally permissible, support the imposition of diversionary treatment on offenders charged with mere possessory crimes. The investigative emphasis has been altered. The efforts of drug enforcement personnel have been refocused on those persons who commit distributional offenses and reap significant commercial profits from their crimes.

However, these responses are largely *ad hoc* and do not address the root problem, namely our anachronistic statutory scheme which treats as a serious crime the simple possession of small amounts of marijuana and hashish. Surely the time has arrived for a comprehensive legislative solution to this problem.

The prosecutors of New Jersey have recognized the necessity for legislative reform of our Controlled Dangerous Substances Act. In 1975 the New Jersey Prosecutors Association adopted a resolution in favor of the treatment as disorderly persons offenses of all possessory offenses involving marijuana and hashish. In formulating this position, the Prosecutors Association specifically acknowledged the futility of expending resources in an attempt to eliminate the abuse of marijuana and hashish through the imposition of harsh criminal sanctions. Nonetheless, the prosecutors felt that the use of these drugs should be discouraged and it was therefore appropriate to impose less severe penal sanctions in such cases. This view is broadly consistent with the limited decriminalization that has been urged by national commissions on marijuana, by such groups as the American Bar Association and the Board of Governors of the

American Medical Association, and in 1974 and 1975 by the New Jersey Joint Legislative Commission created to review the penalty provisions of the Controlled Dangerous Substances Act.

I, too, support the limited decriminalization of possession and use of marijuana and hashish. But I must stress that my present support for decriminalization does not include support for legalization, which is another matter entirely. Marijuana and hashish are psychoactive drugs and their abuse should not be encouraged. There is an undesirable short-term impairment of the physical and psychological faculties of persons under the influence of marijuana and hashish. This risk is heightened if the consumer is engaged in certain activities, such as the operation of a motor vehicle. In addition, the inconclusive data on the potentially harmful long term effects of marijuana use, counsel against a policy that would make this drug widely available and seem to endorse its consumption.

I would support legislation that will retain criminal punishments for the possession of large quantities of marijuana and hashish since there exists a greater risk of possible distribution in such circumstances. Sanctions for possessing lesser quantities should be graduated with monetary penalties retained for the possession of even small amounts of these drugs. For example, possession of 56 grams or more of marijuana, or 12 grams or more of hashish would still be treated as a crime punishable, as under present law, by up to five years' imprisonment and a fine of up to \$15,000. Decriminalization would occur for possession of smaller quantities. Any person possessing more than 28 but less than 56 grams of marijuana, or more than six but less than twelve grams of hashish, would be subject to a \$500 fine. Possession of less than these amounts would be punishable by fines of up to \$250. A deterrent against recidivism should be retained for the decriminalized offenses. This can be accomplished by providing for an enhanced potential fine for subsequent offenses. A similar gradation of fines should be retained for subsequent offenses that involve being under the influence of marijuana and hashish. Thus, an initial offense would be punishable by a fine of up to \$250 which would double upon a subsequent conviction. We should retain judicial discretion to suspend driving privileges for any possessory offenses. Suspension for up to six months would, however, appear to be more consistent with the rehabilitative purposes of the recent amendment of our drunk driving statute.

Finally, prosecution of the decriminalized offenses should be streamlined to the extent possible. Jurisdiction over these violations should be vested in the municipal courts. Summary proceedings would be available for the collection of fines, and certifications of laboratory analyses of contraband should be made admissible in such proceedings. Proposed legislation, consistent with this position, is now pending in the New Jersey Legislature.

Decriminalization of marijuana and hashish is an emotional subject on which reasonable people can differ. I am convinced, however, that the social fabric of New Jersey will not be harmed by a formal decriminalization. Over the past five years decriminalization has been adopted in at least seven states. The earliest decriminalization program occurred in Oregon in 1973. Oregon has since been joined by such states as California, Ohio and, only last year, by New York. These jurisdictions have neither undergone any significant increase in the use of marijuana and hashish, nor have they suffered from any "immigration" of so-called drug culture. The experience of these

states, many of which have social conditions approximating those in New Jersey, militates strongly in favor of decriminalization.

Moreover, I believe that decriminalization of simple possession of small amounts of marijuana and hashish will significantly enhance the effectiveness of law enforcement in general and the members of this Association in particular. The greater utilization of municipal court proceedings and summary mechanisms for the disposition of offenses will help to alleviate the backlog of criminal cases. This will assure swifter punishment and reduce possible injustices to innocent defendants who are incarcerated prior to trial. Speedy and summary disposition of cases should also free witnesses, especially law enforcement witnesses, from the necessity of remaining on call for trials in Superior Court and also help to reduce what can sometimes be almost endless delays in judicial proceedings during which police witnesses must be physically present in the courthouse. These delays must be eliminated to the extent possible. While it is true that drug enforcement personnel must, on occasion, serve as witnesses, I firmly believe that they should be permitted to concentrate on their principal mission, which is the prevention and detection of drug related offenses. Decriminalization will aid in accomplishing this goal. It may also, by reducing distrust of law enforcement among the young, increase the willingness of the public to cooperate in criminal investigations.

Our criminal justice resources are precious, and few of those resources are as vital to our society as the professional expertise embodied in the membership to this Association. I believe that this asset can be best utilized, with respect to marijuana and hashish, through a concentration on the distributional, rather than possessory, offenses. In this regard, I wish to express my support for an increase in the penalties for the high misdemeanor crimes, many of them involving distribution, proscribed by our Controlled Dangerous Substances Act.

At the time the Act was adopted in 1970, the maximum fine for a high misdemeanor, unless otherwise specified, was \$2,000. The Act was intended to impose much higher potential fines and, in its principal penalty sections prescribes fines of \$15,000 to \$25,000 for the high misdemeanor offenses. An anomaly was created last year when the Legislature amended the general high misdemeanor statute to provide a maximum fine of \$100,000. Thus, at present the maximum fines for high misdemeanor offenses contained in the Controlled Dangerous Substances Act are considerably lower than those generally applicable to high misdemeanors. This is a serious incongruity which is inconsistent with the general statutory scheme as well as the heinousness of the high misdemeanors set forth in the Act. Rectification is necessary. I would wholeheartedly support a legislative initiative to increase to at least \$100,000 the maximum fines for high misdemeanors proscribed by the Controlled Dangerous Substances Act. Such an amendment would be especially appropriate for distributional offenses in which huge illicit profits can often be reaped. The collective efforts of enforcement and prosecutorial agencies would be enhanced by stripping away these profits from those who have grown rich at the expense of the misery of others.

Police and prosecutorial agencies share a partnership in the enforcement of the criminal law. But that law must be constantly updated to assure its continued effectiveness. I believe that the narrowly limited decriminalization proposal, and the increased penalties for distribution type offenses, that I have set forth will enable all of us to better perform our respective functions. Inertia has no place in the criminal law, and especially not in our drug laws. Together we can, and should, support those reforms that will enable us to maintain the viability of the statutes we have sworn to uphold.

REPORT CONCERNING LIMITED DECRIMINALIZATION OF MARIJUANA AND HASHISH *

Various governmental bodies in this country have spent enormous amounts of money for studies, education, rehabilitation, and law enforcement. Drug abuse, however, still burdens the citizens of New Jersey. The problem of drug abuse, never the less, has not been entirely intractable. Rather, policy makers have concluded that drug abuse is a contemporary Hydra, whose many heads must each be removed by the appropriate weapon. That removal must start with a recognition by the authorities that alcohol, tobacco, marijuana, heroin, and the other controlled substances all differ in many and significant ways.

Scientific advances and a better-informed public have required increasingly sophisticated, legal approaches to the problem posed in particular by marijuana and hashish. Recently, New Jersey's drug laws underwent both fundamental and minor reforms as State policy makers monitored the changing circumstances affecting drug use. The Division of Criminal Justice¹ has participated closely in the process of informing public opinion and effecting legal change. In 1973, for example, the Division exhaustively examined the Uniform Controlled Dangerous Substances Act,² surveyed the law enforcement agencies and other communities, and offered numerous suggestions to strengthen that Act. As part of that review, the Division concluded that the State's marijuana and hashish laws were no longer the best approach to the problems posed by those drugs. While legalization did not appear warranted by the evidence, neither was it thought wise to continue squandering the criminal justice system's resources on mere drug users. An intermediate position was decriminalization for personal use, with fines instead of jail terms as an expression of the State's continued disapproval of consumption of psychoactive drugs. The criminal sanction would remain for those trafficking in these substances.³

Subsequent events (for example, the continued failure of scientific efforts to demonstrate substantial harm from the typical, American usage of marijuana and the adoption of numerous study groups - - including one commissioned by the New Jersey Legislature⁴ - - of proposals similar to the Division's) confirmed the Division's views. In 1974, the Division reaffirmed its findings, and it did so again in 1975.

Recent developments continue to support the Division's position and to increase the urgency with which reform should be undertaken. The intermediate position of decriminalization for personal use would most effectively utilize the State's resources, and appropriately meet the level of danger posed by these drugs. Nevertheless, social disapproval of their use and penal sanctions for commercial trafficking would remain unaffected.

In the spirit of the speech delivered by the Attorney General to the Narcotic Enforcement Officers Association this Article attempts to discern the best responses to the marijuana and hashish problem. It reviews the conclusions of major reports, clarifies the policy goals and finally proposes various methods of implementing those goals.

1 The Division of Criminal Justice is a division of the Department of Law and Public Safety, New Jersey Attorney General's Office.

2 N.J.S.A. 24:21-1 *et seq* (1973); (New Jersey Division of Criminal Justice, *Report on the Controlled Dangerous Substances Act*. (Trenton, 1973). (Hereinafter cited as *Division Report*).

3 See Baime, "Marihuana and Hashish" The Role of the Criminal Justice System," 1 *Criminal Justice Quarterly* 176 (1973).

4 See note 51, *infra* and accompanying text for a more detailed review of that study.

I. A GENERAL PERSPECTIVE OF THE DRUG PROBLEM AND DECRIMINALIZATION

Numerous reasons compel society's concern about the dangers of drug abuse: the personal health of the drug user, his potential for anti-social conduct, the violation of moral standards, the weakening of social bonds. The criminal law, however, must particularly emphasize the potential, and actual, anti-social behavior, and the governmental response must depend upon an analysis of the social consequences of drug use and the feasibility of policies designed to minimize the harmful affects of that use.

We do not mean that individual, health risks are irrelevant to the formulation of social policy. Such risks, however, are only one of the many factors that the policy-makers must consider. The policy of the criminal law should be based on the social consequences of drug use, and on the impact of drug-induced behavior. It is no longer satisfactory to impose criminal liability for the use of a particular drug solely because it is psychoactive, stimulating, or relaxing. Alcohol, tobacco, and prescribed barbiturates as well fall within one of those categories.

Similarly, it is illogical to proscribe the use of all drugs currently denominated "dangerous" and simultaneously to sanction the use of other drugs that pose as great a health hazard. Thus, while it is established that frequent use of alcohol produces brain pathology, some currently prohibited drugs do not.

It is plain, then, that factors other than health risk have significantly influenced drug policies. Those factors have been termed the "symbolic" aspects of the issue. One author, for example, has concluded that "[m]arijuana is criminalized, to a great extent, because of the threatening life style with which it is correlated in the public mind."⁵ To the extent that decriminalization has occurred, it may be due to the community's reception that smoking marijuana - - which has expanded to the middle and upper classes - - is no longer the threat of a counter-culture.⁶

The symbolic aspects of drug use apply not only to drug users, but to drug laws as well. Laws and enforcement policies signify to the public meanings that reach beyond the narrow subject of this concern to give generalized impressions about a government's attitudes. Changes in law or policy are vested with a symbolic thrust of their own. For example, "[t]he symbolic effect of repealing a law is far greater than that of not passing one. While not enacting a law may be interpreted as societal ignorance or indifference, the act of repeal is perceived as sanctioning that which was formerly outlawed. The legislative behavior seems more a reversal of the earlier statutory communication . . . and less a return to neutrality by the state."⁷

Society, when it determines the role to be played by the criminal law in preventing drug abuse, must consider how well that law deters such abuse. Certainly, a prohibitory, legal policy toward drug use will have some deterrent effect. It is not possible, however, to calculate that effect.⁸ On the other hand, the law does appear to discourage indiscreet or continued use of a prohibited substance. To the extent that the

⁵ Stanley Ingler, *A Dialectic: The Fulfillment and Decrease of Passion In Criminal Law*, 28 Rutgers L. Rev. 861, 874 (1975). (Footnote omitted).

⁶ *Id.* at 875.

⁷ *Id.* at 876. (Footnote omitted).

⁸ Plainly drug users are not deterred. The deterrent effect on non-users, however, is what can not be systematically measured.

law does deter, we suggest retaining proscriptions against substances that do present a threat to the health, safety, and welfare of the individual and especially of the community.

II. PREVIOUS STUDIES OF THE MARIJUANA ISSUE

A landmark in the history of the marijuana issue in this country was the first report by the National Commission on Marijuana and Drug Abuse, known as the Shafer Commission.⁹ The report dispelled many widely held misconceptions and gave the nation a reliable basis of factual information pursuant to which policies could be formulated.

The Commission charted the full extent of marijuana use. It estimated that by 1972, 24 million persons had used marijuana and approximately 8.3 million were current users.¹⁰ More recent estimates are that twenty percent of Americans above the age of 11 (25 to 30 million people) have used it at least once, so that marijuana has joined alcohol and tobacco as one of the most widely used drugs in the United States.¹¹

Moreover, the Shafer Commission examined the available evidence to determine the effects resulting from use of the drug. It recognized, as the principle that remains unchallenged in this area, that "[a]ny psychoactive drug is potentially harmful to the individual, depending on the intensity, frequency, and duration of use."¹²

The effects of marijuana and hashish depend on many variables: the manner of intake into the body, the setting, the user's tolerance and reverse tolerance, the dosage, the user's metabolism, the duration and pattern of use.¹³ There is a risk of harm in heavy, prolonged use, especially of the most potent preparations. "Clear-cut behavioral changes and a greater incidence of associated biological injury occur as duration of use increases."¹⁴ Large doses of marijuana, for example, cause distortion of body images, loss of personal identification, sensory and mental illusions, fantasies, and hallucinations.¹⁵

On the other hand, "[t]here is no conclusive evidence that short-term marijuana use alone directly results in any physical damage to man."¹⁶ The Shafer Commission indeed concluded that "marijuana is a rather unexciting compound of negligible immediate toxicity at the usual doses consumed in this country."¹⁷ Thus, marijuana and hashish should not be confused with physically addictive drugs causing severe, organic injury.

Implicit in our present law is the assumption that society in some way is injured when its constituents use marijuana or hashish. Indeed, many people have asserted that these two drugs pose a serious threat to public order. The drugs, however, have not always had such a reputation.

9 *First Report of the National Commission on Marijuana and Drug Abuse (Marijuana: A Signal of Misunderstanding)* (March 22, 1972) [Hereinafter cited as *Signal*].

10 *Id.* at 7.

11 *A Report to the President From the Domestic Council Drug Abuse Task Force (White Paper for the President, Drug Abuse)*, September 1975, 25-26. [Hereinafter cited as *White Paper*].

12 *Signal*, *supra* note 9, at 65.

13 *Id.* at 50-53.

14 *Id.* The Commission noted, however, that there is in this country no present pattern of heavy use or accompanying changes.

15 *Id.* at 56.

16 *Id.* at 56-57.

17 *Id.* at 57.

Marijuana was used therapeutically nearly five thousand years ago.¹⁸ Much later, in the early nineteenth century, it became a popular intoxicant of the intellectual classes in Europe.¹⁹ In other countries, its use has been condoned if not encouraged. Here, however, use of the drug has long been prohibited. "Crime, insanity and idleness were thought to be the inevitable consequences of its use."²⁰ Furthermore, many people assumed that the use of marijuana often induces experimentation with other, more harmful drugs.

The Shafer Commission clearly established that many of these fears are unfounded and that others are exaggerated. The belief that marijuana inexorably leads to violent criminal behavior, while deeply embedded in the public mind, is not based upon scientific evidence. To the contrary, "[m]arijuana-induced relaxation of inhibitions is not ordinarily accompanied by an exaggeration of aggressive tendencies."²¹ By itself, marijuana is not a potent producer of behavioral changes, nor of criminal conduct.²² Laboratory studies have provided no evidence that marijuana produces effects that can be construed as criminogenic. Indeed, an examination of certain arrests and convictions has demonstrated that marijuana does "not initiate criminal careers."²³ While statistics do indicate that more marijuana users than non-users are involved in (non-drug) crimes, this difference is attributable not to marijuana use, but to other factors.²⁴

The persistent belief that marijuana and hashish cause criminal behavior is based in part upon the erroneous view that these drugs are physiologically addictive. Prolonged and heavy use of marijuana may cause psychological dependence, but there is no evidence that crimes are committed in a desperate attempt to obtain it. Rather, it seems that "sociolegal and cultural variables account for the apparent statistical correlation between marijuana use and crime or delinquency."²⁵

Studies have "confirmed the association between marijuana usage and the consumption of other drugs for curiosity and pleasure."²⁶ In fact, marijuana users are about twice as likely to have used another illicit drug than are persons who have stopped using the drug.²⁷ It would be wrong, however, to conclude that in the typical case marijuana use necessarily introduces serious and chronic drug involvement. Other factors contribute to further experimentation and use. The drug culture, for example, provides a readily available supply of other dangerous substances. To some extent, peer-group pressure and that ready availability of drugs supply the motivation for experiment. "Heavy drug use . . . may reflect and aggravate a total alienation and

18 There may again exist a therapeutic use for marijuana. Recently, various scientists have quietly been demonstrating the usefulness in treating glaucoma. See, e.g., Note: *Medical Necessity as a Defense to Criminal Liability*, 46 *Geo. Wash. L. Rev.* 273 (1978); S. Cohen, *A Progress Report: Marijuana as Medicine*, *Psychology Today*, April 1978, at 60.

19 *Signal*, *supra* note 9, at 4 app.

20 *Id.* at 67.

21 *Id.* at 73.

22 E. Goode, *Marijuana Use and Crime* 452-453 (January 1972). Excerpted in *Signal*, *supra* note 14, at 447-453 app.

23 W. Bromberg, *Marijuana: A Psychiatric Study*, 113 *J.A.M.A.* 4, 12 (1939).

24 Goode, *supra* note 27, at 452-453, n.27.

25 *Signal*, *supra* note 9, at 76.

26 *Id.* at 45.

27 *Id.*

disaffiliation from American society and its institutions.”²⁸ “Whether or not marijuana [use] leads to other drug use depends on the individual, on the social and cultural setting in which the drug use takes place, and on the nature of the drug market.”²⁹

Another factor that should be considered in determining the extent to which marijuana and hashish ought to be proscribed is a behavioral condition, termed the “amotivational syndrome,” that is associated with heavy and prolonged use of the drugs.³⁰ Studies have revealed that very heavy, long-term users of marijuana are unlikely to show conventional levels of motivation. Such individuals become lethargic and passive, and tend to lose interest in work and other long-term goals. Diminished drive, apathy, decreased motivation, and lessened ambition might represent an organic syndrome decreasing individual effectiveness. A similar, though less intense, decrease in motivation has been observed among young persons in the Western world. In common parlance, the phenomenon in this country has termed “dropping out.”

At present, the incidence of the “amotivational syndrome” is light. Indeed, some researchers have questioned the syndrome’s very existence.³¹ Nevertheless, the Shafer Commission was concerned, and concluded that “expanded epidemiologic studies are imperative to obtain a better understanding of this complex behavior.”³²

After reviewing all of the evidence, the Shafer Commission concluded that “marijuana does not emerge as a major issue or threat to the social order.”³³ It followed that the drug’s relative potential for harm to individuals and society did not justify severe sanctions against those who used it. The Commission recognized that prohibition of the drug was unachievable but, maintaining that society should not encourage recreational use of drugs, it stopped short of urging legalization and unanimously recommended a partial, prohibition scheme. Such an approach would continue societal disapproval, remove the disadvantages and costs of the criminal justice system, and maximize the flexibility of future public responses as new medical evidence emerges.³⁴

The major features of the Commission’s scheme were: production and distribution of marijuana would remain criminal activities, as would possession with intent to distribute commercially. Marijuana would be contraband, subject to being confiscated from users in public places. Criminal sanctions would be withdrawn from private use and possession incident to such use, but states could still impose fines for public use.³⁵

All the commissioners agreed that all use of marijuana should be discouraged. They further agreed that criminalization and incarceration of mere, possessory offenders was neither a necessary nor desirable means of implementing that policy. Two commissioners, however, felt that the contraband concept was not a strong enough expression of social disapprobation. They recommended an additional civil fine for possession of any amount of marijuana, in public or private. No warrants to

28 *Id.* at 46.

29 *Id.* at 49.

30 *Marijuana and Health; Fourth Annual Report to the U.S. Congress From the Secretary of Health, Education and Welfare* 106-111 (1974).

31 *Id.* at 111.

32 *Signal, supra* note 9, at 87.

33 *Id.* at 102.

34 *Id.* at 150.

35 *Signal, supra* note 9, at 151 (Footnote omitted).

search private residences were to issue, however, absent probable cause that a crime was being committed.³⁶

The Shafer Commission issued its second report on March 22, 1973.³⁷ That report reaffirmed the findings and recommendations of the earlier report. The conclusions of neither were consistent, however, with those of two other, comprehensive studies. In Canada, the LeDain Commission published its findings in 1972.³⁸ The majority proposed that the prohibition against simple possession be repealed, although it favored a continued ban on distribution and cultivation.³⁹ Similarly, Consumer's Union conducted a study, the conclusions of which went beyond decriminalization: the possession and use of marijuana should be legalized, subject to governmental regulation.⁴⁰

The Shafer Commission's two reports stimulated a rethinking of the marijuana problem in New Jersey. In 1973, the Division of Criminal Justice issued its own Comprehensive report on New Jersey's Controlled Dangerous Substances Act.⁴¹ The Division relied upon the findings of the Shafer Commission and other studies, but also surveyed law enforcement officials, prosecutors, and others in the State. The Division concluded that "there is strong support for the view that possession of marijuana and hashish for personal use should no longer be subject to criminal penalties."⁴²

The Division's Report advocated the abolition of the 25- and 5-gram marijuana and hashish quantity limitations which presently appear in our statute. Possession of the drugs for personal use would be reduced to a disorderly persons offense regardless of the quantity involved. The report recommended that the maximal penalty for the possession and use of the drugs should be a \$500 fine, with a \$1,000 maximum for habitual offenders. No penalty of incarceration for possession and use would be imposed and the fine would be payable without the necessity of a court appearance.⁴³

The Shafer Commission's minority view⁴⁴ has in the ensuing years achieved greater vitality than the proposals of the majority. The appeal seems to lie in the symbolic factor associated with the marijuana issue. People who favor decriminalization often want to avoid even the appearance of endorsing drug use. The civil fine has the merit of avoiding the well-known hardships imposed by the criminal justice system, while simultaneously symbolizing society's continuing suspicion of marijuana and officially discouraging its use.

The inference cannot be ignored, however, that a society that legalizes the use of some drugs (e.g., nicotine) and intoxicants (e.g., alcohol) is still discriminating against a particular class of citizens who prefer the disfavored drug. To the degree that the civil fine is made harsh, it reinforces both society's disapproval and society's discrimination.

36 *Id.* at footnote *.

37 Second Report of the National Commission on Marijuana and Drug Abuse, *Drug Use in America: Problem in Perspective* (1973).

38 *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa 1972).

39 *Id.* at 301-303.

40 Brecher, *Licit and Illicit Drugs* 535-539 (Boston, 1972).

41 See note 3 *supra*.

42 *Division Report*, *supra* note 2, at 52.

43 See Baime, *supra* note 3, at 176.

44 See note 41, *supra* and accompanying text.

That discrimination, it must not be forgotten, is often at the heart of the feelings of antagonism so often expressed by marijuana users towards those responsible for the drug laws.

The Division of Criminal Justice advocated retention of criminal penalties with respect to the offenses of distribution and of possession of marijuana or hashish with the intent to distribute. At present, both offenses are high misdemeanors subject to five years imprisonment and/or \$15,000 in fines.⁴⁵

In 1974, a report⁴⁶ was issued by a New Jersey Legislative commission that had been authorized to conduct yet another study of the marijuana-hashish problem. The Commission's conclusions were seven: Marijuana does not pose a serious threat to the user or to society. Marijuana has become a popular and accepted form of recreation for a large segment of the population, including residents of New Jersey. The present policy of criminalizing marijuana use in New Jersey has failed to act as an effective deterrent and has engendered various social adversities. The societal costs of attempting to enforce the existing New Jersey anti-marijuana statutes, in light of medical knowledge and public expectation, far outweigh the possible benefits that may be derived from the continuation of such a policy. In order to alleviate the social adversities emanating from our present marijuana policy, and to provide a rational and enlightened social policy in light of medical knowledge and public expectation, marijuana legislation reform is needed. Immigration of "drug culture" persons does not occur where marijuana use is decriminalized. No adverse, measurable effects were noted in election campaigns of proponents of decriminalization in Oregon.⁴⁷

Despite the above conclusions, which could support the inference that legalization should follow, the Commission decided that this course was inadvisable because of the continuing uncertainty regarding long-term effects of marijuana. Instead it sought the advantages of an intermediate position. It reported:

Therefore, this Commission recommends the enactment of a partial prohibition scheme, the decriminalization of small amounts of marijuana intended for personal consumption, as the most rational approach toward the marijuana problem in New Jersey. Decriminalization, the Commission believes, would symbolize a continuation of societal disapproval of marijuana use as indicated in the retention of severe penalties for possession of large quantities of the drug and for dispensing the substance. But by removing the criminal sanctions from personal use of small quantities of marijuana and imposing a nuisance offense, thousands of New Jersey residents will not have to be stigmatized as criminals and subjected to the threat of incarceration. In addition, the reduction in marijuana cases will alleviate the overburdened criminal court system. Furthermore, decriminalization will obviate some of the myriad adversities emanating from our present policy, and maximize the flexibility of future public responses as new medical evidence comes to light.⁴⁸

45 N.J.S.A. 24:21-19a(2).

46 The Commission to Study and Review the Penalties Imposed Upon Individuals Convicted of Using Certain Substances Subject to the Provisions of the "New Jersey Controlled Dangerous Substances Act," P.L. 1970, c. 226 (C.24:21-1 *et seq.*) and to Study the Nature and Scope of Drug Treatment Programs, *Final Report to the Legislature* (Trenton 1974).

47 *Id.* at 60-68.

48 *Id.* at 64.

On October 14, 1975, President Ford reviewed a report⁴⁹ that reviewed the overall, federal effort to stem drug abuse. It called for concentration of federal, drug, control efforts on substances posing greatest risk to users, and lower priority enforcement against less "destructive" drugs including marijuana, which the paper labeled the "least serious" drug, although not harmless.⁵⁰ The Council reported that marijuana is the most widely used illicit drug in the country and maintained that its use should be "strongly discouraged."⁵¹

The Domestic Council noted both the widespread, recreational use of marijuana and the attendant, low, social cost. It also noted that the federal government has been "deemphasizing simple possession and use of marijuana in its efforts for several years."⁵² The Council endorsed this approach, but an addendum to the White Paper by the Bureau of Customs warned that selective enforcement of the drug laws would erode respect for law and law enforcement officers.⁵³

It should be noted that the report to the President followed by only four months a decision by the Justice Department to no longer recommend against enactment of decriminalization legislation. This decision was announced by Donald E. Miller, chief counsel of the Drug Enforcement Administration at Senate Judiciary Subcommittee hearings on the concept of decriminalization.⁵⁴

Not all the studies were favorable, however. Specifically, the United States Senate Committee on the Judiciary, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, published in 1974 a minority view that marijuana was dangerous.⁵⁵ The report's impact was minimal.

III. MODES OF DE-EMPHASIZING THE CRIMINAL LAW.

A. The Variety of Responses

The passage of a statute through the Legislature decriminalizing marijuana may be the most obvious way of affecting the legal process but it is surely not the only approach. Indeed, several, alternative routes have already been followed throughout this country, as well as in New Jersey.

One of the most common methods has been the reduction of the maximal sentence imposed for marijuana use or possession. Thus, federal and state penalties were harsh when marijuana was most feared. Statutes drew no distinction between marijuana and narcotic drugs. New Jersey's statute, modeled upon the Uniform Narcotic Drug Law, permitted from two to fifteen years' imprisonment for simple possession.⁵⁶

As society learned more about marijuana and hashish, the Controlled Dangerous Substances Act⁵⁷ was passed in New Jersey as well as in many other states.⁵⁸ The

49 *White Paper*, *supra* note 11.

50 *Id.* at 33

51 *Id.* at 25

52 *Id.* at 24.

53 *The New York Times*, October 15, 1975, at 1.

54 *The Washington Post*, May 17, 1975, at A2.

55 Committee on the Judiciary, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, 93d Congress, *Marijuana-Hashish Epidemic and Its Impact on United States Society* (1974).

56 *N.J.S.A.* 24:18-47(c) (Repealed by *L.* 1970, c. 226).

57 *N.J.S.A.* 24:21-1 *et seq.*, effective January 30, 1971.

58 See the introduction to *N.J.S.A.* 24:21-1 *et seq.*

two drugs were no longer defined as narcotics⁵⁹ and the penalty for simple possession was reduced to a maximum of five years' incarceration.⁶⁰ Most importantly, possession of fewer than 25 grams of marijuana or five grams of hashish was made a disorderly persons offense.⁶¹

Other examples of statutory lenity in sentencing can be seen in Nebraska, where possession of one pound of marijuana can be punished by a maximum of seven days incarceration or a fine of \$500, or both.⁶² In New Mexico, a first possession of no more than one ounce brings a fine of \$50 - \$100 and imprisonment of not more than fifteen days.⁶³

Another device that diminishes the harsh impact of the criminal law is the conditional discharge. In New Jersey, first, possessory offenders are eligible for this discharge (a suspension of criminal proceedings against the accused), and they may be eligible to have the arrest expunged.⁶⁴

The judiciary has also participated in the process of buffering individuals from the harshest aspects of the law through its own sentencing policies. The Supreme Court of New Jersey has emphasized that the policy of the law is to reform the youthful offender. Thus, that Court has held that "a suspended sentence with an appropriate term of probation was sufficient penalty for a person who is convicted for the first time of possessing marijuana for his own use."⁶⁵ The Court further noted that "where appropriate under the facts of a case, the offender might be dealt with as a 'user' under the disorderly persons statute . . . rather than as a 'possessor' under the criminal act . . . in order that the conviction will not result in a criminal record."⁶⁶

It is also a fact that, as a general rule, judges throughout the country have tended to avoid incarcerating those convicted of possession of marijuana and hashish. A survey conducted by the Shafer Commission disclosed that in 1965, approximately fifty-two per cent of convicted possessors were incarcerated. By 1971, only 28.5 per cent of convicted possessors were imprisoned. Moreover, the average length of the sentences imposed (in months) had shrunk from 58.2 in 1965 to 39.9 in 1971.⁶⁷

A similar study has been done by the State of New Jersey's Department of Law and Public Safety, Division of Systems and Communications, Data Analysis Center. This study, which analyzed only the marijuana and hashish disorderly persons offenses,⁶⁸ also showed a declining percentage of convictions, from 50.7 per cent in 1972 to 45.0 per cent in 1976.⁶⁹ Furthermore, only 2.6 per cent. of those convicted were incarcerated in 1976 (a decline from 4.8 per cent in 1972), while well over eighty per cent received only a fine (almost a third more than in 1972).⁷⁰

59 N.J.S.A. 24:21-2.

60 N.J.S.A. 24:21-19(a)(1).

61 *Id.*

62 Neb. R.S. §28-4.125(4).

63 N.M.S.A. 54-11-23. Subsequent offenses carry a \$100-\$1,000 fine, or up to one year's imprisonment, or both.

64 N.J.S.A. 24:21-27; N.J.S.A. 24:21-28.

65 *State v. Ward*, 57 N.J. 75, 82; 270 A.2d 1 (1970).

66 *Id.* at 83; 270 A.2d at 5.

67 *Signal*, *supra* note 9 at 107. Data predicated upon federal arrests.

68 *A Study to Assess the Impact of a Proposed Amendment De-Criminalizing Possession of Small Amounts of Marijuana and Hashish* (Trenton, 1978).

69 *Id.* at 9.

70 *Id.* at 15, 23.

A legal system is more than statutes. It is also the whole apparatus of enforcement personnel and, in the form of juries, includes as well the views of lay citizens. De-emphasis of the criminal law solution has been approached as a result of their attitudes and actions. On a national basis, "as one proceeds through the criminal justice system . . . , the people responsible for the functioning of that system seem to be decreasingly enthusiastic about the appropriateness of criminal control" ⁷¹ Thus, one national survey established that from 1965 to 1971, the rate of jury convictions in marijuana and hashish cases dropped from 90 to 60 per cent. ⁷²

Decreased enforcement of the laws has accompanied the other movements toward lenity. As the National Council on Crime and Delinquency noted, ⁷³

And where legislators are failing to act, law enforcement officers, choking from an ever-growing number of marijuana arrests, are taking matters in their own hands and are refusing to enforce or are downgrading enforcement of the marijuana laws on the books.

* * *

New York City district attorneys have circumvented stiff penalty laws by permitting persons accused of simple possession of up to two pounds to plead guilty to a single misdemeanor count.

Commissioner Cleveland B. Fuessenich of the Connecticut State Police has told his men to go easy on marijuana arrests. Many other administrators have done the same and the evidence is that police officers are agreeing more with this approach on the grounds it will free them for more important cases and because of the difficulty of enforcing the narcotics prohibitions. ⁷⁴

Lawmakers, judges, prosecutors, policemen, and jurors are not behaving-eccentrically. Rather, their actions reflect an unwillingness to stigmatize young offenders or incarcerate mere users. ⁷⁵ We should note, moreover, that an organization as prestigious as the American Medical Association has lent its approval to the concept of decriminalization. ⁷⁶ Apparently, decriminalization is a proposition welcome in places other than the bastions of radicalism.

B. Legislative Declarations of Decriminalization.

Plainly, the most direct way of disengaging the criminal justice system from the pursuit and punishment of marijuana users is a legislative declaration that personal, marijuana use and possession are no longer criminally punishable. In fact, a number of

⁷¹ *Signal*, *supra* note 9 at 114.

⁷² *Id.* at 107.

⁷³ *Criminal Justice Newsletter*, Vol. 5, no.23 (December 16, 1974).

⁷⁴ Reproduced also in the comment to *Me. Rev. Stat. Tit. 17A §1107*.

⁷⁵ The Shafer Commission undertook a survey disclosing that slightly more than half the public is unwilling to give young users a criminal record and that almost 90 per cent of the public condemns incarceration. *Signal*, note 9 *supra* at 144.

⁷⁶ "Health and Marijuana Use," a resolution adopted December 6, 1977, proposes pecuniary penalties only for use, but seeks the retention of "criminal sanctions" for trafficking. We note too that another organization with great impact on the community-at-large has recommended decriminalization. The National Education Association adopted this position during its July, 1978, conference. See Resolution 78-22. Additionally, the National Conference of Commissioners on Uniform State Laws (drafters of the *Uniform Controlled Substances Act*, upon which *N.J.S.A. 24:21-1 et seq.* is modeled) favored decriminalization as early as 1973. See the August 21, 1973, draft of §409 of the *Uniform Controlled Substances Act*.

jurisdictions have taken this path, although none has legalized the drug.⁷⁷ All, on the other hand, have adopted the recommendation of the dissenting members of the Shafer Commission. Those members believed, among other things, that fines should be retained for all possession and use.⁷⁸

Alaska

Decriminalization has been a fact in Alaska since late 1975, and is currently expressed through *Alaska Stat.* §17.12.110. Subsection (d) of the statute applies only to individuals 18 years old or older and punishes public possession of as much as one ounce of marijuana merely by a civil fine. The proceedings against the offender must be initiated by a civil complaint or citation.⁷⁹ Another subsection⁸⁰ proscribes public use and use or any possession by any operator of a car or airplane. This subsection additionally prohibits public use by people older than eighteen as well as possession of any amount by people under that age. Subsequent violations of these subsections are treated as the first.⁸¹

Alaska, however, has clearly not lent the stamp of approval to the use or possession of marijuana. Possession of more than one ounce in public remains a criminal offense, subject to as much as one year of incarceration and a fine of as much as one thousand dollars.⁸² Sale of the drug, moreover, is also illegal.⁸³

It should be noted, however, that Alaska is the only state where the court system has reacted favorably to the argument that society cannot ban private marijuana use. Thus, the Alaska Supreme Court has concluded that, under the Alaska constitution, a fundamental right exists to privacy in the home. Consequently, the State could not constitutionally enact legislation prohibiting the private possession or use of marijuana.⁸⁴

California

Possessing⁸⁵ and transporting⁸⁶ less than one ounce of marijuana, as well as furnishing less than one ounce of the drug to another person without consideration⁸⁷ are all acts punishable by no more than a one hundred dollar fine, initiated by citation.⁸⁸ These violations are all denominated misdemeanors. Nevertheless, the

77 But see the discussion *infra* concerning the position adopted by Alaska.

78 *Signal*, *supra* note 9 at 151, n* and accompanying text. See also *supra*, at 103, n.36, and accompanying text.

79 *Alaska Stat.*, §17.12.110(e). The fine may not exceed \$100.

80 *Alaska Stat.*, §17.12.110(d). The fines in these cases may not exceed \$1000.

81 The Alaska Statutes contain no sentence enhancement feature for simple possession.

82 *Alaska Stat.*, §17.12.110(d).

83 *Alaska Stat.*, §17.12.010. Punishment for a first offense is imprisonment for not more than 25 years and a fine of not more than \$20,000, or both. For a second offense, incarceration may be for life and the fine may reach \$25,000. *Alaska Stat.*, §17.12.110(b). Furthermore, if the purchaser is under the age of 18, this latter, harsher penalty may be imposed. *Alaska Stat.*, §17.12.110(c).

84 *Ravin v. State*, 537 P.2d 494 (Alaska 1975). This decision invalidated that portion of *Alaska Stat.*, §17.12.110(d) prohibiting private use of marijuana.

85 *Cal. Health and Safety Code* §11357(b).

86 *Cal. Health and Safety Code* §11360(b).

87 *Cal. Health and Safety Code* §11357(b).

88 *Cal. Health and Safety Code* §11360(b).

individual receives no permanent, criminal record because all records for possessory, marijuana arrests and convictions can be destroyed after two years.⁸⁹ Moreover, no public agency may deny any license or privilege on account of a conviction for these marijuana-related offenses.⁹⁰ A third violation occurring within a given, two-year period triggers diversion to an educational or treatment program. Only if such a program cannot be found is the fine imposed.⁹¹

Possession of more than one ounce of marijuana carries up to six months' incarceration and a five hundred dollar fine.⁹² Transporting or selling a similar quantity, however, exposes the actor to a two-to-four year State Prison sentence.⁹³ Furthermore, distribution of any amount by an adult to a minor carries a three-to-five year State Prison term.⁹⁴ Cultivation of marijuana is punishable by a State Prison term.⁹⁵

Lastly, we observe that California distinguishes marijuana from hashish. Possession of the latter drug exposes the possessor to a State Prison term.⁹⁶

Colorado

Another jurisdiction that has adopted a liberal policy toward marijuana use and possession is Colorado. Thus, in Colorado, possession of less than one ounce of marijuana is a minor offense carrying a maximal penalty of a one hundred dollar fine.⁹⁷ Possession or consumption of that same amount in public, however, adds another element to the penalty: fifteen days in jail, maximally.⁹⁸ Furthermore, possession of greater quantities exposes an individual to progressively greater fines and longer periods of imprisonment. The penalty is predicated not on the quantity involved, but on the number of the conviction.⁹⁹

A transfer of marijuana under one ounce is treated like possession of that amount.¹⁰⁰ A transfer, however, by a person above the age of eighteen to a person below that age is an indictable offense. The fine may reach ten thousand dollars, and incarceration may range from three to fourteen years.¹⁰¹ Upon a second or subsequent conviction, a custodial sentence is mandatory.¹⁰²

89 *Cal. Health and Safety Code* §11361.5.

90 *Cal. Health and Safety Code* §11361.7.

91 *Cal. Health and Safety Code* §11357(b).

92 *Cal. Health and Safety Code* §11357(c).

93 *Cal. Health and Safety Code* §11360(a). Note, however, that transporting or furnishing without consideration one ounce or less of marijuana is punishable by a fine not to exceed \$100. *Cal. Health and Safety Code* §11360(b).

94 *Cal. Health and Safety Code* §11361.

95 *Cal. Health and Safety Code* §11358.

96 *Cal. Health and Safety Code* §11350.

97 *Col. Rev.Stat.* §12-22-412(12)(a).

98 *Col. Rev.Stat.* §12-22-412(12)(c).

99 *Col. Rev.Stat.* §12-22-412(12)(d). The penalty for the first conviction is a fine of up to five hundred dollars and as much as one year's imprisonment. For the second conviction, the fine ranges from five hundred to one thousand dollars, and the jail term from one to ten years. For the third and subsequent offenses, the fine is between one and two thousand dollars, and the jail term from one to fourteen years.

100 *Col. Rev.Stat.* §12-22-412(12)(e).

101 *Col. Rev.Stat.* §12-22-412(12)(g).

102 *Id.*

Maine

In its comment to the revision of the State's drug laws, the Maine Legislature observed:¹⁰³

It is especially important that a complete revision of the criminal laws, as this code represents, seek to distinguish conduct that is truly anti-social and the proper subject for criminal penalties from that which may be looked upon as undesirable, but nonetheless not a fit object for the moral condemnation which a criminal conviction should represent or for the severely handicapping effects most often experienced by ex-convicts.

Consequently, the Legislature exempted the possession of marijuana from the new drug law. Instead, possession of any usable¹⁰⁴ amount of marijuana is a civil violation, punishable by a fine of no more than two hundred dollars.¹⁰⁵ There is, however, a rebuttable presumption that possession of greater than one and one-half ounces is with intent to distribute,¹⁰⁶ and there is a further presumption that possession of greater than two pounds is by a trafficker.¹⁰⁷

Distribution is punished, by New Jersey's standards, relatively leniently: a maximum of one year's incarceration and/or a fine of five hundred dollars.¹⁰⁸ Distribution to a person under the age of sixteen, however, is treated more harshly: the jail term may range to ten years, and the fine may reach \$2,500.¹⁰⁹

Although subsequent offenses do not trigger any enhancement feature, the State does have an alternative theory of punishment. As an alternative to the fines (in distributory offenses), a levy of as much as twice the "pecuniary gain" from the sale may be imposed.¹¹⁰

Minnesota

Possession of marijuana in Minnesota is punishable by as many as three years' imprisonment and a fine of up to \$3000, or both.¹¹¹ The possession of "small amounts," however, is merely a petty misdemeanor. The punishment for possessing this latter amount is a \$100 fine. Additionally, the actor must be enrolled in a drug, rehabilitation program.¹¹²

The sale of marijuana is punished more harshly: the penalty can be as much as five years in jail and a fine as great as \$15,000.¹¹³ The distribution of "small amounts" of marijuana for no remuneration is punished in the same way as possession of small amounts.¹¹⁴ Although Minnesota does have a drug-sentencing, enhancement statute, it does not apply to offenses committed with small amounts of marijuana.¹¹⁵

103 See *Me. Rev.Stat. Tit. 17A:1107*, which notes that certain drug offenses have specifically been removed to *Me. Rev.Stat. Title 22*. The "code" referred to in the Comment is *Me. Rev.Stat. Title 17A*.

104 See *Me. Rev.Stat. Tit. 17A:116(3)*. *A few seeds, or residue found in a pipe, is insufficient.*

105 *Me. Rev.Stat. Tit. 22:2383*.

106 *Me. Rev.Stat. Tit. 17A:1106(3)*. Punishment is incarceration for less than one year, or a fine not to exceed \$1,000, or both.

107 *Me. Rev.Stat. Tit. 17A:1103(3)*. Punishment is incarceration for less than five years or a fine not to exceed \$1,500, or both.

108 *Me. Rev.Stat. Tit. 17A:1103(2)(B)*.

109 *Me. Rev.Stat. Tit. 17A:105*.

110 *Me. R.S. 17A:1301(1)(D)*.

111 *Minn. Stat. Ann. §152.15* subdivision 2.

112 *Minn. Stat. Ann. §152.15* subdivision 2(5).

113 *Minn. Stat. Ann. §152.15* subdivision 1.

114 *Id.*

115 *Minn. Stat. Ann. §152.15* subdivision 5.

The possession of one ounce or less of marijuana is not a criminal act, but is instead a violation enforceable by summons. The penalty for a first offense is a fine of from \$100 - \$250. Upon a second "conviction," however, the penalty becomes a \$250 fine, incarceration of from five to 60 days, and mandatory participation in a drug program. Third and subsequent offenses are punishable by a fine ranging from \$250 - \$500, as well as by incarceration in the county jail for a term of five days to six months. Two years after each "conviction," however, all records are expunged.¹¹⁶

Notwithstanding this lenient treatment, all other marijuana offenses are relatively harshly punished. Possession of more than one ounce but less than one kilogram¹¹⁷ is punishable by as much as three years' imprisonment and a fine of as much as \$3000.¹¹⁸ When the amount possessed exceeds one kilogram, the three years are mandatory and the fine may reach \$10,000.¹¹⁹

Distribution is, by New Jersey standards, especially harshly punished. If the amount is less than one kilogram, the actor faces a maximal, 20-year, jail term and a maximal fine of \$30,000.¹²⁰ For greater amounts, the fine does not change, but the sentence is from three to 20 years. Moreover, there can be no reduction of sentence during the first three years.¹²¹

New York

Possession in the State of New York is also treated somewhat leniently, so long as the quantity involved is small. Possession of fewer than 25 grams is punishable by a maximal, \$100 fine,¹²² unless a subsequent offense occurs within three years. Under those circumstances, a second offense is punishable by a maximal fine of \$200, while a third offense may bring as many as fifteen days in jail, and a \$250 fine.¹²³

Possession of marijuana in a public place, however, is treated differently. If the amount is two ounces or fewer, then the offense is termed fifth degree possession.¹²⁴ Fourth degree possession is established by possession of any amount over two ounces but not in excess of eight ounces.¹²⁵ The next higher offense is committed if the individual possesses more than eight ounces but not more than one pound.¹²⁶ Possession of more than one but not more than ten pounds establishes the penultimate degree of possession,¹²⁷ while possession of greater than ten pounds constitutes first degree possession.¹²⁸

116 *Miss. Code Ann.* §49-29-139 (d)(2)(A).

117 Two and two-tenths pounds.

118 *Miss. Code Ann.* §41-29-139(d)(2)(C).

119 *Miss. Code Ann.* §41-29-139(d)(2)(D).

120 *Miss. Code Ann.* §41-29-139(c)(2)(B).

121 *Miss. Code Ann.* §41-29-139(c)(2)(A).

122 *N. Y. Penal Code* (McKinney) §221.05.

123 *Id.*

124 *N. Y. Penal Code* (McKinney) §221.10. This offense is punishable by as much as three months in jail and as much as a \$500 fine.

125 *N. Y. Penal Code* (McKinney) §221.15. This offense is punishable by as much as one year's incarceration and by a fine not to exceed \$1,000.

126 *N. Y. Penal Code* (McKinney) §221.20. This offense is punishable by a prison term of up to four years. The fine may not exceed \$5,000.

127 *N. Y. Penal Code* (McKinney) §221.25. This offense is punishable by a maximal, seven-year, prison term and a maximal, \$5,000 fine.

128 *N. Y. Penal Code* (McKinney) §221.30. This offense is punishable by as much as fifteen years' incarceration and as much as a \$5,000 fine.

Distribution of the drug is similarly treated, the penalty gradations corresponding to the quantity of the drug transferred. Thus, the lowest degree offense is committed by the transfer - - without consideration - - of two or fewer grams of marijuana or one marijuana cigarette.¹²⁹ Progressively more serious crimes are committed if the transfer is made for consideration or if the quantity is increased. Thus, one section of the applicable statute¹³⁰ proscribes the transfer of twenty-five or fewer grams for consideration. Another section¹³¹ encompasses transfers of more than twenty-five grams but fewer than four ounces. Yet another section¹³² bans transfers of more than four ounces but not more than one pound. Finally, the transfer of more than one pound is governed by another section of New York's Penal Code.¹³³

Ohio

Possession of as much as one hundred grams of marijuana (or five grams of hashish, or one gram of hash oil) is termed a minor misdemeanor. The only penalty for these possessory offenses is a one hundred dollar fine, no matter how often a given individual commits the offense.¹³⁴ In all other respects, the criminal justice system is not implicated.

The penalties increase with the quantity of drug, however. Thus, possession of 101 - 200 grams of marijuana (or six to ten grams of hashish, or one to two grams of hash oil) exposes an individual to as many as thirty days in jail and to as much as a \$250 fine.¹³⁵ The next increment (201 - 600 grams of marijuana, 11 - 30 grams of hashish, two to six grams of hash oil) brings significantly harsher penalties: one to ten years in jail, as much as a \$5,000 fine.¹³⁶ Second and subsequent convictions can expose the actor to a two-to-fifteen year, prison term, and the fine can be as high as \$7,500.¹³⁷

Distribution (termed "trafficking" by the Ohio statutes), however, remains a criminal offense. Depending upon both the quantity of the drug, and the number of times the offense has been committed by the particular actor, the term of incarceration can range from three months to fifteen years.¹³⁸ Moreover, if the drug is distributed to a juvenile, the actor must spend at least three months in jail, even if only a relatively small quantity of the drug is transferred.¹³⁹ On the other hand, a gift of twenty grams or less is very leniently punished.¹⁴⁰

129 *N. Y. Penal Code* (McKinney) §221.35. The penalty for violating this section is as much as three months' imprisonment and as much as a \$500 fine.

130 *N. Y. Penal Code* (McKinney) §221.40. A violation is punishable by a jail term of up to one year, and a fine as high as \$1,000.

131 *N. Y. Penal Code* (McKinney) §221.45. The sanctions for violation range from no years to four years in jail. The fine (which may be imposed for all distributional offenses) may be the greater of \$5,000 or twice the pecuniary gain from the crime.

132 *N. Y. Penal Code* (McKinney) §221.50. This section also proscribes any transfer to a person under the age of eighteen. A violation of either provision is punishable by as much as seven years' imprisonment. For the fine, see n.130, *supra*.

133 *N. Y. Penal Code* §221.55. Conviction could bring 15 years in jail. For the fine, see n.130, *supra*.

134 *Ohio Rev. Code Ann.* §2925.11.

135 *Ohio Rev. Code Ann.* §2925.03. Possession of certain, large amounts is punished in accordance with the provisions of the distribution statute.

136 *Id.*

137 *Id.*

138 *Id.* In addition, a maximal, \$7,500 fine can be imposed.

139 *Ohio Rev. Code Ann.* §2925.02(c)(3).

140 *Ohio Rev. Code Ann.* §2925.03(F). A first offense brings only a \$100 fine. Subsequent offenses bring only a maximal, sixty-day jail term and a fine not in excess of \$500.

Oregon

Oregon decriminalized the possession of small amounts of marijuana in 1973.¹⁴¹ As in Alaska, the proceedings are non-criminal - - so long as the quantity does not exceed one ounce - - and are initiated by citation.¹⁴² The penalty (a maximal fine of \$100)¹⁴³ is the only indication that the offense was committed, because no arrest records are kept.¹⁴⁴

On the other hand, it remains an indictable offense to possess¹⁴⁵ or distribute¹⁴⁶ more than one ounce of marijuana. Moreover, it remains a criminal offense to distribute any amount of marijuana to a juvenile.¹⁴⁷

IV. STATUTORY MODELS FOR NEW JERSEY

A. Current Law in New Jersey

In New Jersey, marijuana and hashish are considered drugs with high potential for abuse having no accepted medical use.¹⁴⁸ Both drugs are statutorily defined in terms of their derivation from the marijuana plant *Cannabis sativa* L.¹⁴⁹

Distributional offenses are governed by *N.J.S.A.* 24:21-19(a),¹⁵⁰ which essentially makes all unauthorized distribution or manufacture criminal. Penalties, which are governed by *N.J.S.A.* 24:21-19(b),¹⁵¹ are dichotomous: the maximal period of incarceration (five years) is not particularly harsh, while the maximal fine is relatively high at \$15,000.

Possessory offenses are currently governed by *N.J.S.A.* 24:21-20(a)(1),¹⁵² which penalizes the possession of any amount in excess of twenty-five grams of marijuana by

141 *Or. Rev. Stat.* § 167.207 This statute was repealed effective July 1, 1978, and replaced by others effectuating the same goals. We did not have them as we went to print.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

148 *N.J.S.A.* 24:21-5(e). Marijuana and hashish appear only in the form of their active chemical ingredient, tetrahydrocannabinols.

149 *N.J.S.A.* 24:21-1 establishes the following definitions: "Hashish" means the resin extracted from any part of the plant *Cannabis sativa* L. "Marijuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt derivative, mixture, or preparation of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

150 *N.J.S.A.* 24:21-19(a): Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally: (1) to manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance; or (2) to create, distribute, or possess or have under his control with intent to distribute, a counterfeit controlled dangerous substance.

151 *N.J.S.A.* 24:21-19(b): Any person who violates subsection (a) with respect to: (3) [sic] any other controlled dangerous substance classified in Schedules I, II, III or IV is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than \$15,000 or both.

152 *N.J.S.A.* 24:21-20(a)(1):lawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to: *** possession of more than 25 grams of marijuana, including any adulterants or dilutants, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than \$15,000, or both; provided, however, that any person who violates this section with respect to 25 grams or less of marijuana, including any adulterants or dilutants, or 5 grams or less of hashish is a disorderly person.

as much as five years in jail or a \$15,000 fine. Possession of fewer than twenty-five grams (or fewer than five grams of hashish) is made merely a disorderly persons offense, punishable by incarceration for no more than six months and by a fine of no more than \$500.¹⁵³ Although New Jersey does have a sentence-enhancing, subsequent-offender statute,¹⁵⁴ its failure to exclude the disorderly persons offense appears to be inadvertent.¹⁵⁵

Using or being under the influence of any controlled, dangerous substance is made a disorderly persons offense by *N.J.S.A. 24:21-20(b)*.¹⁵⁶ It should be noted, moreover, that a disorderly persons conviction under *N.J.S.A. 24:21-20(a)(4)* or *N.J.S.A. 24:21-20(b)* carries with it more than penal sanctions: another subsection of the statute¹⁵⁷ gives sentencing judges discretion to revoke the defendant's driving privilege for not more than two years.

One further offense warrants mention here. By *N.J.S.A. 24:21-20(b)*,¹⁵⁸ distribution of marijuana or hashish by a person over the age of eighteen to a person under the age of seventeen (who is at least three years younger than the distributor) is severely punished. New Jersey has thus taken the same position as many other states that have liberalized the prohibitions against marijuana: distribution of any amount to a juvenile is yet severely punished, although simple possession of small amounts is treated leniently.

We make one final observation before moving to proposed changes in our law. New Jersey does, in fact, treat most first offense possessions very leniently. Under one section of the drug laws,¹⁵⁹ a first-time, possessory offender can have the criminal proceedings against him suspended under most circumstances. In exchange, the defendant can be placed on what is essentially probation for a period of time not to exceed three years, and he may be referred to a residential, treatment facility.¹⁶⁰ His stay in such a facility, however, cannot exceed the maximal period of confinement prescribed by law for the offense with which he was charged (or three years).¹⁶¹

153 *N.J.S.A. 2A:169-4* sets the general penalty for disorderly persons offenses.

154 *N.J.S.A. 24:21-29*.

155 Originally, subsection (4) of *N.J.S.A. 24:21-20(a)* was subsection (3), the renumbering occurring in 1975. *L. 1975, c. 31, §2*. Subsection (3), was (and still is) specifically excluded from the coverage of the enhancement statute, *N.J.S.A. 24:21-29*. The failure of that statute to currently exclude subsection (4) is apparently due to a legislative oversight: *N.J.S.A. 24:21-29* was not amended to conform with the effect of *L. 1975, c. 31, §2*.

156 *N.J.S.A. 24:21-20(b)*: Any person who uses or who is under the influence of any controlled dangerous substance, as defined in this act, for a purpose other than the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat sick and injured human beings, is a disorderly person. In a prosecution under this subsection, it shall not be necessary for the State to prove that the accused did use or was under the influence of any specific narcotic drug or drugs, but it shall be sufficient for a conviction under this subsection for the State to prove that the accused did use or was under the influence of some controlled dangerous substance or counterfeit controlled dangerous substance as defined in this act, by providing that the accused did manifest physical and physiological symptoms or reactions caused by the use of any controlled dangerous substance.

157 *N.J.S.A. 24:21-20(c)*.

158 *N.J.S.A. 24:21-20(b)*: Any person who is at least 18 years of age who violates subsection 19(a)(1) by distributing any other controlled dangerous substance listed in Schedules I, II, III, IV or V to a person 17 years of age or younger who is at least 3 years his junior is punishable by a term of imprisonment up to twice that authorized by subsections 19(b)(2) or (3), or by the fine authorized by subsections 19(b)(2) or (3) or both.

159 *N.J.S.A. 24:21-27*.

160 *N.J.S.A. 24:21-27(b)*.

161 *Id.*

The benefits to the defendant include no determination of guilt and no adjudicated conviction barring his application for licenses or similar privileges in the future.¹⁶² In addition, if the defendant was under 21 years of age when he committed the offense, he is eligible after six months (from the date of the commencement of a period of probation) to have all reference to the offense expunged.¹⁶³

B. Conforming New Jersey Law to the Shafer Commission Model.

The Shafer Commission established a framework for decriminalizing marijuana that may properly be termed partial prohibition. We use that label because, under the proposal, certain marijuana-related activity would become legal.

Specifically, private possession for personal use, and private distribution of small amounts for no personal gain would no longer be criminal offenses.¹⁶⁴ Moreover, public possession of an ounce or less would trigger only forfeiture, while public use of the same amount would be a criminal offense punishable by a fine of no more than \$100.¹⁶⁵ This latter treatment would apply as well to the public distribution of small amounts of marijuana for no personal gain,¹⁶⁶ and to the public possession of more than one ounce of the drug.¹⁶⁷

It would be relatively simple to amend our Controlled Dangerous Substances Act to reflect the law as envisioned by the Shafer Commission. Thus, a new statute¹⁶⁸ could be enacted specifically excluding from the reach of *N.J.S.A. 24:21-19* and *N.J.S.A. 24:21-20* certain acts, which would then be legal. A second subsection¹⁶⁹ of the new statute could define the minor offenses discussed in the previous paragraph as disorderly persons offenses and establish a separate penalty for them. To insure clarity, a third subsection¹⁷⁰ of the new statute could explain that all offenses not encompassed by the first two subsections are, as before, indictable offenses to be treated in accordance with *N.J.S.A. 24:21-19* and *N.J.S.A. 24:21-20*.

The Shafer Commission explained that its recommendations were consistent with both federal, and state, enforcement policies of keeping marijuana use contained and in private. The Commission's plan for partial prohibition depends upon a continued conclusion by society that marijuana remain contraband and thus subject to seizure. Notwithstanding such a societal declaration, however, certain problems inhere in the Commission's scheme.

Specifically, possessory offenses would be detectable only in public, or in private only by accident. This result ensues because the Commission's plan excludes the issue of warrants to search private dwellings for mere possessory offenses, preferring instead to rely upon fines.¹⁷¹

162 *Id.*

163 *N.J.S.A. 24:21-28*. Note, however, that the defendant's name is entered upon the Register of Controlled Dangerous Substances offenders, that, should there be a second conviction, the hearing court will be aware that the defendant does not qualify for the benefits accorded by *N.J.S.A. 24:21-27* and *N.J.S.A. 24:21-28*.

164 *Signal, supra* n.14 at note 9.

165 *Id.*

166 *Id.*

167 *Id.*

168 *N.J.S.A. 24:21-20.1(a)*.

169 *N.J.S.A. 24:21-20.1(b)*.

170 *N.J.S.A. 24:21-20.1(c)*.

171 *Signal, note 9, supra* at 151. See note 41, *supra*, and accompanying text.

In addition, the very reliance on the fine as a means of control poses a problem: the potential for nonpayment. Unlike nonpayment of, for example, a motor vehicle violation fine (which might result in loss of driving privilege), no privilege can be revoked simply because the violator fails to pay his fine. Enforcement, therefore, may necessitate court involvement.¹⁷²

Partial prohibition discourages use in three main ways. It continues as a crime the business of selling the drug. It confines marijuana use to the home: if the drug is used in public, an offense is committed, and if it is merely possessed in public it may be seized. Finally, the former law remains as an aid to those non-legal efforts to discourage the use of marijuana.

The Shafer Commission made no potency distinctions regarding marijuana and hashish. On the other hand, the Commission followed the approach taken by the Comprehensive Drug Abuse Prevention and Control Act of 1970¹⁷³ and distinguished the Cannabis plant and the synthetic tetrahydro-cannabinols. The distinctions were predicated upon considerations of usage patterns in this county.¹⁷⁴

The highest risk in Cannabis use arises from very heavy and long-term use of hashish. That pattern of use, however, is unknown in the United States today, where use tends to the experimental or intermittent consumption of less potent preparations. Even when more potent formulations are available, users tend to smoke only the amount necessary to achieve the desired effect.¹⁷⁵ The Commission's judgment not to distinguish hashish and marijuana was reinforced by what it termed the "procedural and practical problems" attending any attempt to do so.¹⁷⁶

C. The New Jersey Drug Study Commission's¹⁷⁷ Model

The formula devised by the New Jersey Drug Study Commission follows the Oregon example in that it proposes civil fines for any possession or use of marijuana or hashish. Possession of increasing quantities of the drugs brings harsher penalties: up to three years' imprisonment. Implementation of the Drug Study Commission's ideas would require amending portions of our current Controlled Dangerous Substances Act.

Instead of the disorderly persons offense now existing (possession of fewer than 25 grams of marijuana or five grams of hashish), a "nuisance offense" would be established. Possession of one ounce or less of marijuana or up to six grams of hashish would be punished by confiscation of the drug and a fifty dollar fine, imposed as is a traffic citation.¹⁷⁸ Possession of as much as twice those amounts would constitute a normal, disorderly persons offense.¹⁷⁹ Possession of still greater quantities would be a misdemeanor.¹⁸⁰

172 *Id.*

173 84 Stat. 1236 (October 27, 1970).

174 *Signal*, note 9, *supra* at 166.

175 *Id.*

176 *Id.* at 166-170.

177 See note 51, *supra*.

178 *Final Report*, note 46 *supra* at 68.

179 *Id.*

180 *Id.* at 68-69.

The Commission would also amend *N.J.S.A. 24:21-20(b)* to exclude use or being under the influence of marijuana or hashish from the category of a disorderly persons offense.¹⁸¹ This amendment would have the incidental effect of removing use of these drugs from *N.J.S.A. 24:21-20(c)*, which allows the sentencing court to suspend the driver's license of one convicted of using or being under the influence of Cannabis.

The Drug Study Commission's recommendations thus use quantity to distinguish criminal offenses from non-criminal acts. The advantages of clarity and certainty are achieved, however, with some compromise of the principle that possession for personal use only is not a serious threat. Thus, implicit in the quantified cut-offs is an expression that, if an individual possesses more than two ounces of marijuana, it is not for his own use. This artificial device may facilitate criminal conviction of those possessing greater quantities of the substances, but it only roughly approximates the real intent of the possessor. It would thus provide an arbitrary basis for discrimination among those persons found in possession. Proposals free of such arbitrary devices maximize the opportunity for police, prosecutors and juries to exercise discretion based on all the circumstances attending the possession.

The Commission would further amend *N.J.S.A. 24:21-19* to provide that the manufacture, distribution, or possession (with intent to distribute) of one ounce or less of marijuana and six grams or less of hashish would be a misdemeanor. The fine for this misdemeanor, however, would be inordinately low: \$1000.¹⁸² A violation involving greater amounts of either drug would be a high misdemeanor, carrying a potential incarceration of five years. Again, however, the fine would be relatively small: \$1,500.¹⁸³

This amendment recognizes by a reduced criminal penalty the reality of accommodation-distribution, and again uses an arbitrary cut-off to distinguish such acts from more serious, commercial distribution. The quantity limitations, however, in the proposed recommendations would not in fact have the desired effect. Since the nature of any particular distribution may depend on a great number of variables, it appears wisest to allow the sentencing court the discretion to severely punish the profiteer while extending judicial mercy to the technical or less culpable violator. Indeed, it is already the policy of our courts in sentencing marijuana offenders to carefully consider the circumstances surrounding the offense, even where a sale or distribution is involved.¹⁸⁴

Moreover, the proposed recommendations would drastically reduce the monetary penalties that could be imposed. We believe that a substantial fine is an indispensable sanction against people seeking to profit from their drug dealings.

The cultivation of any amount of marijuana, according to the Commission's recommendations, would remain a disorderly persons offense.¹⁸⁵ In our view, the discrepancy between this penalty and the small fine for simple possession is unjustified. The cultivation statute should instead reflect a lesser penalty.

Another recommendation was that the definition of marijuana be both broadened and changed. It would be broadened by defining the source of the drug as *Genus Cannabis L.*, reflecting recent findings that more than one species of the plant exist.¹⁸⁶

181 *Id.* at 69.

182 *Id.*

183 *Id.*

184 See e.g., *State v. Ward*, 57 N. J. 75 270 A2d 1 (1970).

185 *Final Report*, note 46. *supra* at 69

186 *Id.* at 69-70.

It would be changed by deleting the phrase, "the resin extracted from any part of such plant,"¹⁸⁷ inasmuch as that phrase defines hashish.

Finally, the Drug Study Commission recommended that the penalties be reviewed within the three years of decriminalization.¹⁸⁸ This advice was predicated upon the developing nature of scientific evidence, criminal justice studies, and community expectations.

D. The Stamler Model

In December 1974, Union County Assistant Prosecutor (now Union County Prosecutor) John H. Stamler released his personal conclusions concerning the treatment of small quantities of marijuana.¹⁸⁹ Stamler addressed himself only to possession, although his report appears to reflect a concern that the penalty for distributing even small quantities of marijuana are so harsh.¹⁹⁰

Specifically, Stamler decided to characterize the possession of ten or fewer grams of marijuana (or one gram or less of hashish) as a nuisance,¹⁹¹ punishable by no more than a \$100 fine. Proceedings were to be initiated by summons and the drug could be seized.¹⁹² Quantities of the drugs greater than these amounts, but not in excess of the amounts currently constituting disorderly persons offenses would be, under the Stamler scheme, disorderly persons offenses.¹⁹³ Possession of still greater amounts would remain a high misdemeanor.¹⁹⁴

As with the recommendations of the Drug Study Commission, the quantitative cut-offs pose some problems.¹⁹⁵ In our view, an advantage accrues to both the prosecution and the accused when no cut-offs are established to delimit the criminal penalties. An individual who possesses modest amounts of the drug need not fear the higher, automatic penalties. On the other hand, the state may prove possession with intent to distribute when circumstances warrant, without the extra burden of overcoming a presumption where the amount is small.

E. Division of Criminal Justice Model

The Division of Criminal Justice proposed its own decriminalization model in 1973. Further study occurring after the Legislature's Drug Study Commission acted led the Division to modify some aspects of its model, while reaffirming most details of the plan and its broad purpose. Drawing on its own studies as well as others, the Division

187 *Id.* at 70.

188 *Id.* at 71.

189 "Marijuana and Hashish: Law Enforcement's Biggest Enforcement Problem," December 2, 1974. Stamler, ironically, is counsel to the New Jersey Narcotic Enforcement Officers Association, which in October 1974, in a position paper by the same title as Stamler's own, adopted a resolution opposing all decriminalization.

190 See p. 6: "I have further found, in the course of presenting cases to Grand Juries of Union County, a reluctance by those Grand Jurors to vote an indictment for an individual charged with sale of an ounce or less of marijuana to an undercover agent. The Grand Jurors know that it is a disorderly persons offense to possess less than 25 grams; they find it hard to reconcile the fact that it is a high misdemeanor, punishable by up to five (5) years in prison and a \$15,000 fine, to sell an amount less than 25 grams."

191 By *N.J.S.A. 2A:130-1 et seq.*, nuisances in New Jersey are misdemeanors. We are confident that Stamler did not intend that his characterization "nuisance" be given this technical meaning.

192 Stamler proposal, *supra* note 182, at 6-7.

193 *Id.* at 7.

194 *Id.*

195 See *supra* at 117.

recommends amendments somewhat similar to those of the Drug Study Commission.

In its proposals, the Division recommends the continued imposition of criminal penalties for distribution. The penalties for personal possession of marijuana, however, should be radically altered to the form of a civil violation not to exceed \$200, the proceedings to be initiated by summons. No enhancement should result from the commission of subsequent acts, and the same penalty would apply to cultivation of the plant. Lastly, the Division recommends that no distinctions be drawn predicated upon the drug's potency.

Obviously, sections of the *Controlled Dangerous Substances Act* would need amending. Such amendments would reflect simple ideas (for example, the deletion of a separate definition of hashish because it is subsumed in the definition of marijuana)¹⁹⁶ and more complicated ideas (*N.J.S.A.* 24:21-20 [a][4] would require rewriting to insure that using or being under the influence of marijuana is treated differently from using or being under the influence of drugs not affected by statutory change.).

Each of the proposals has a valid premise. The establishment of a steep fine, for example, gives the courts the flexibility to impose higher fines when the circumstances warrant. Not distinguishing subsequent offenses permits speedier disposition of the infraction than would be possible if records had to be kept and examined to determine whether the defendant was a multiple offender and thereby subject to a higher maximum. Obviously the proposed procedure is less cumbersome and expensive to enforce.

Moreover, the Division recommends that a court finding that an individual possessed or used marijuana should not give the hearing judge discretion to revoke the individual's driving privileges. Inasmuch as there is now no evidence that users may become physically addicted to marijuana and thus become likely to violate the traffic code, the Division recommends that this power to suspend license be removed from the judge in these cases. When a defendant uses intoxicants while driving, he may still be prosecuted under the appropriate statutes barring those activities.

Two final recommendations must be mentioned. The Division believes that the reforms, when enacted, should be effective immediately. Furthermore, as does the Drug Study Commission,¹⁹⁷ the Division proposes that the penalties be reviewed within three years after their adoption.

The Division's recommendations are not the final solution to the marijuana problem. Rather, they are part of the continuing process of reevaluation that is compelled by our increased knowledge. We recognize that a choice is not always clear. Close decisions were made in two areas where another option may have been well defended.

The first issue is raised by the Division's choice to criminally condemn all transfers of marijuana and to reject the Shafer Commission's and other jurisdictions' examples of decriminalizing certain kinds of distribution. The Shafer Commission suggested that distribution be legalized if transfer were in private and "for no remuneration or insignificant remuneration."¹⁹⁸ The "insignificant remuneration" phrase seems utterly unworkable and should be abandoned. Some jurisdictions, of course, pursued this path.¹⁹⁹

¹⁹⁶ Compare the response of the Drug Study Commission. See *supra* at 117-118.

¹⁹⁷ See *supra* at 118.

¹⁹⁸ *Signal*, note 9 *supra* at 152.

¹⁹⁹ See, e.g., note 114, *supra* and accompanying text.

The recognition of accommodation-distribution is based on the fact that distinctions between possessors and casual distributors are essentially artificial. Most studies demonstrate that these people are one and the same and not otherwise involved with criminal activity. Thus, it is felt that retaining casual transfers as crimes means that the same number of people are denominated criminals as prior to decriminalization. The benefits of reform are reduced and the cost of imposing the criminal justice system on these people remains high.

Nevertheless, Oregon's experience dictates against legitimizing transfers. In that State, where all distribution is banned, marijuana use had stabilized by 1975 and by the end of that year most residents continued to support decriminalization.²⁰⁰ The benefits of decriminalization are thus seen as realizable without the added, symbolic costs that would be generated by permitting more, previously illegal, activity.

A second area where a close question is involved concerns the question of issuing search warrants for marijuana "violations." The Division's model does not bar such searches. The Shafer Commission was cognizant, when it endorsed the notion of private, legal possession and distribution, that the activity thus labeled was thereby freed from the burden of government intrusion. When the two Commissioners proposed the civil fine technique²⁰¹ they also stated that no warrant would issue for search of a private residence unless there were probable cause to believe a criminal offense was being committed, although a policeman legitimately present for other reasons could issue a civil summons for violating the "possession" proscription.²⁰²

Other Commissioners were concerned with the problem of searches even under the legalization scheme. Senators Hughes and Javits, both Commissioners, preferred to eliminate entirely the contraband provision from the Commission's model. First, they complained that its legal implications are unclear even to lawyers. Secondly, possession of material designated as contraband made the possession, if not criminal, at least unlawful and thus subject to government search and seizure when outside the home. Both Hughes and Javits felt "that the preservation of the right of privacy is of paramount importance and cannot be casually jeopardized in the pursuit of some vague public or law enforcement interest"²⁰³

The Shafer Commission expressed its concern thus:

Since one of the principal reasons supporting decriminalization of mere possession and use is the protection of personal privacy, a law which permitted searches of private dwellings, or private vehicles, or of persons for contraband marijuana, in cases where there was no probable cause to believe the substance was held for illegal purposes, would seriously frustrate the general reform of the marijuana control laws. In effect, such legislation would continue to authorize substantial invasions of privacy in order to suppress the use of marijuana.

Moreover, a law permitting searches for marijuana wherever found would prove as expensive to enforce as the present prohibition on use, and would provide too facile a means of harassment of persons who were otherwise

200 *The Newark Star-Ledger*, November 30, 1975, p.21.

201 *Signal*, note 9, *supra* at 151.

202 See note 51, *supra*. See also *Signal*, *supra*, at 151, note 9.

203 *Signal*, note 9 *supra* at 154

complying with the control laws. For these reasons, it would appear that searches for the drug should at least be limited to those cases where the police have probable cause to believe that a crime has been committed.²⁰⁴

Nevertheless, the Division's amendments probably preserve for police the power to search for and seize marijuana being maintained for personal use.²⁰⁵ The question is: are the reforms then thwarted?

We suggest not. Decriminalization will reorient police enforcement activity in several ways that will actually expand the zone of privacy shielding citizens from police intrusions. Notably, there will be less incentive for individual policemen to search people's homes when the only probable result is the imposition of a fine. Furthermore, there will undoubtedly be a policy change: The law enforcement community will determine that the most fruitful expenditure of limited resources does not justify (*i.e.*, allow) the searching of private homes for mere possessory offenses. Inasmuch as curtailing police intrusions is achievable simply by possessory decriminalization and derivative law enforcement policies, it does not appear that the cost of increased discouragement is overcome by the benefit -- marginal, if any -- of reduced intrusions.²⁰⁶

V. CONCLUSIONS

In 1972, the Shafer Commission published an analysis of the spectrum of social policies that might conceivably be pursued depending on one's general assessment of the impact of marijuana use on the public safety, on the public health and on the dominant social order. The policy options were: elimination of use, discouragement of use, neutrality toward use, and approval of use.²⁰⁷ The Commission elected discouragement.²⁰⁸

Subsequently, newer studies and other developments have compelled us in 1979 to narrow our choices. Specifically, we have seen that in this country, society does not wish to promote the use of psychoactive drugs. No major public study in this country has adopted a policy of encouraging or even approving marijuana use.

On the other hand, the goals pursued by current statutory schemes (*i.e.*, elimination and discouragement of use) have either failed or been only partly successful. Moreover, the limited success attained is constantly being undermined by a lack of consensus in the community that the use of marijuana warrants criminal penalties. Finally, it is clear that the goals are pursued only at great cost to the enforcement community and the judiciary. These costs are loss of respect for the law, alienation of the young, and damage to defendants who are stigmatized permanently by their convictions or arrests. Other methods of pursuing the same goals exist; they should be used.

204 *Id.* at 1176 app., n. omitted.

205 Certain acts, even under the Division's proposals, would remain acts subject to the penalty of a fine pursuant to *N.J.S.A. 2A:51-1 et seq.*, and the drug itself remains contraband. Pursuant to *R. 3:5-2*, search warrants can issue for violations of the State's "penal laws." "Penal" is a much broader term than "criminal." It encompasses any punishment or penalty and acts that are not necessarily designated criminal. *Marter v. Repp*, 80 *N.J.L.* 530, 77 *A.* 1030 (Sup.Ct. 1910), *aff'd* 82 *N.J.L.* 531, 81 *A.* 1134 (E. & A. 1911).

206 We note that a legislative curtailment of police activity in this context might significantly alter society's perception of the moral force behind the goal of discouragement.

207 *Signal*, *supra* note 9 at 1146-1147 app.

208 *Id.* at 167.

The Shafer Commission observed:

After a preferred policy is tentatively formulated regarding marijuana use, impulsiveness as to the choice of legal implementation should be resisted. Other aspects of the social fabric must be considered which impact both on the propriety of the policy objective and on the choice of legal means The fact is that any means adopted will have a number of side effects which will impinge on other important goals and values.²⁰⁹

For example, how does the enforcement community wish to treat the balance of cultural homogeneity and cultural pluralism? If there is a new ethos associated with marijuana use, does it benefit or degrade the existing social order? Or does the widespread use of the drug by the American middle classes already suggest that the issue of cultural clash is not so great as was once anticipated?

Restriction of drug use by governmental authority also raises the issue of the role of the State in private morality. Traditionally, American governments have tried to recognize an area of private, moral decisions. Statutes invading this area are justified only in terms of indirect harm to society at large by aggregates of similar behavior. On this ground the right of the State to control private behavior has often been upheld.

The uproar caused by criminal prosecution (or threatened cessation of it) of marijuana emphasizes the alienation so often described. "When a public issue involves a clash of values, there is a possibility that one side will be alienated from social authority, when it acts on the basis of values held by the other side."²¹⁰ Today it is the user who is alienated while those opposing use see the laws as necessary to meet a danger. "The possibility for alienation exists, then, on both sides of the marijuana problem, and a concern for balancing these effects may well act as a critical determinant in the choice of controls."²¹¹ For this reason alone, legal change must be cautious and attuned to developing public opinion as the public is educated by the continuing flow of scientific evidence and the empirical evidence of harmlessness supplied by jurisdictions that have decriminalized.

The symbolism of marijuana use, as noted above, acts to exacerbate the other problems affecting social policy. Use of the criminal law provides a sharp edge or focal point for polarization and burdens useful public dialogue over the real issues.

Policy statements regarding marijuana inevitably raise questions both with regard to society's tolerated and approved drugs and to those more severely condemned. While courts may repeatedly affirm that no denial of equal protection occurs when legislatures do not punish all evils equally, the policy maker cannot find much refuge in such a formula. In this connection it should be noted both that marijuana has not been shown to be harmless and that, unlike other approved drugs, it has use only as an intoxicant.²¹² At the same time, most students agree that the demonstrable risk in marijuana use does not approach that for drugs criminally condemned.

Not the least of the other considerations is the use of enforcement resources. When the forces to be employed in crime prevention and detection are limited, as they

209 *Id.* at 1147 app.

210 *Id.* at 1148 app.

211 *Id.*

212 *But see* note 18, *supra*.

are in the real world, does the harm of marijuana usage justify the present employment of the criminal justice system? The variety of available alternative procedures to effect the same goals strongly suggests that we are misallocating our resources.

Any policy of legal control must be made with an awareness of the relevant non-legal controls. A non-criminal as well as a criminal system of discouragement interacts with other forces in the community to control individual behavior. In the current situation, however, where there is no broad support for the criminal laws, the non-legal institutions are made allies of a coercive apparatus they do not support or defend. A counterproductive element thus intrudes upon what should be a mutually supporting system.

In light of the current state of scientific knowledge, the experiences of jurisdictions not employing the criminal sanction, the widespread use of the drug, the great costs involved in using the criminal justice system, and the available alternatives to express society's disapproval of marijuana use, the Division of Criminal Justice concludes that the alternatives to a criminal sanction should now be employed. The policy of discouragement of users should be pursued by other means while the goal of elimination sought through criminal penalties is restricted to commercial traffickers. No fundamental shift in policy is adopted. No change is made in the goals we seek. Rather, we have simply clarified them and tried to implement more efficient ways to attain them.



END