Marihuana, the Law and the Courts

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I. THE PROBLEM

"Found my way upstairs and had a smoke
Somebody spoke and I went into a dream. . .
I'd love to turn you on."

A Day In The Life,
The Beatles.

"But something is happening
And you don't know what it is,
Do you, Mr. Jones?"

Ballad of a Thin Man,
Bob Dylan.

Mr. Jones is still probably asking why. He is part of a society that is increasingly turning on. A recent Administrative Task Force conservatively estimated that at least 5,000,000 Americans have used marihuana at least once.¹

Dr. Stanley Yolles, director of the National Institute of Mental Health, puts the total far higher: at least 12 million and perhaps even 20 million.²

Marihuana is mostly used by the young, although Mr. Jones is also experimenting with it. TIME estimates that between 25% to 40% of all American students have tried it at least once. Canadian studies show an average of 15% to 20% of Canadian college students have had at least one experience with marihuana.³

In 1964, 93 persons were arrested in Metro Toronto on charges involving marihuana and the related drug hashish. By contrast, R.C.M.P. figures in October show 832 arrests on such charges in Metro so far this year.⁴

But Mr. Jones is still asking why.

Some attribute it to an alienated youth lost and frustrated in a complex and alien society. Others say it is only a resulting manifestation of young

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¹Time, September 26, 1969.
²Ibid p. 63.
people raised in a society that is so dependent on drugs. Young people say it is an indication of an emerging way of life. The marihuana laws symbolize society's unwillingness to recognize the individual's right to enjoy himself in this world. Whatever it is, Mr. Jones will have to look elsewhere to solve his 'problem'. This note will not attempt to do so.

This paper will attempt to do three things. First, it will review what evidence we have on marihuana. What is it? What are its effects? What does it lead to? It is important to remember that this paper is concerned with marihuana alone. Secondly, this paper will consider whether the criminal law is the proper societal tool to control the use of marihuana. Finally, this paper will review the treatment of marihuana offenders in our courts. What kinds of sentences are they imposing? What are the courts trying to do? Have the courts rationally approached this problem? At the end, some conclusions will be made about judicial action in this area.

II. MARIHUANA

A. Physical and Psychological Effects

It would be foolish to attempt to describe a 'high'. Marihuana has unique effects on its users. However, there are a few general statements which can be made. The Medical Society of the County of New York has classified marihuana as a mild hallucinogen. It can impair judgment and memory; it can cause psychotic episodes in predisposed people. Most important, it usually makes the user feel good. It may relax him. It may enhance his sensory perceptions. It may induce uncontrollable laughter. Generally, the experience under the influence of marihuana is a pleasing one. This euphoric experience usually lasts about three or four hours. Fortunately there are no 'hangover' effects from marihuana.

I would now like to discuss whether the use of the drug is physically harmful. For many years it was believed that marihuana was addictive, that is, that it induced physical dependence. By this I mean a state that manifests itself by intense physical disturbances when the administration of the drug is suspended. This theory was attacked by the famous La Guardia Report in 1944. The report stated that the use of marihuana did not lead to physical degeneration and that permanent deleterious effects were not observable. However, this report did not go unchallenged. In an editorial in the Journal of the American Medical Association it was advised that "public officials will do well to disregard this unscientific, uncritical study and to regard marihuana as a menace wherever it is purveyed." But the A.M.A. did relent, although

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6 Mayor's Commission on Marihuana, The Marihuana Problem in the City of New York (1944).
7 April 28, 1945. 
twenty years later, when in 1967 it said that no physical dependence on marihuana has yet been demonstrated and that it has not been shown that marihuana causes addiction or leads to any lasting mental or physical changes.

Margaret Mead, the noted anthropologist, recently told a Congressional committee that marihuana is less harmful than cigarettes and alcohol. A similar conclusion was reached by the well-respected British Advisory Committee on Drug Dependence. Evaluating the possibility of long term harm, the Committee concluded that "having regard to all the material available to us we find ourselves in agreement . . . that the long term consumption of cannabis in moderate doses has no harmful effects" and "that in terms of physical harmfulness, cannabis is very much less dangerous than the opiates, amphetamines and barbiturates and also less dangerous than alcohol."

The President's Commission concluded that marihuana does not induce physical dependence. So it can be said that the authorities generally agree that marihuana is not physically addictive and that it is not likely to cause physically harmful effects.

Whether marihuana induces psychological dependence is another question. The President's Commission concluded that it does. Most writers would agree with this. However, alcohol or chocolate ice cream may induce psychological dependence. So this is not reason enough to ban the drug. We must then ask whether it causes any mental ill effects. As is so often the case in this area experts give conflicting evidence on this question. Schwartz wrote that "... depending on the complex interaction of a number of variables of which the drug is only one, hashish and, to a lesser extent, marihuana can be associated with personality deterioration ..." Eddy et al, however, said that, for cannabis, there is 'no unequivocal evidence . . . that lasting mental changes are produced.' Kalant concluded that "it would appear that no valid conclusion to the effect that the chronic use of cannabis is harmful or that it is not harmful can be drawn at present."

This is the approach that was recently taken by the Canadian Medical Association in its brief to the federal commission on non-medical drug use:

"In our opinion the effects of long-term use of cannabis (marihuana) are unknown. We are singularly unimpressed with the inadequate scientific evidence used to substantiate the extreme range of opinions—from marihuana is totally harmless at one end, to the use of marihuana leads to the use of hard drugs and the resulting effects at the other . . . The catastrophic results of allowing the use of substances without full knowledge of the results, such as tobacco and thalidomide must be avoided." (16)

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8 Newsweek, November 19, 1969.
10 Supra, n.5, at p. 13.
11 Ibid. at pp. 13 and 122.
15 November 6, 1969.
This does not mean that the C.M.A. was happy with the present legal situation. It recommended a re-thinking of our drug laws. This has also been recommended by Family Court Judge William Little and Ontario Supervising Coroner Dr. H. B. Cotnam to the extent of legalizing marihuana. The reasons for these positions will be thoroughly discussed in the following sections.

In closing I would like to present the most recent statement (at the time of writing this paper) on this particular problem. It is a draft of a preliminary brief to the Commission of Inquiry into the Non-Medical Use of Drugs.\textsuperscript{16} The report was written by Dr. Kenneth Keith Yonge, President of the Canadian Psychiatric Association.

The conclusion drawn is that marihuana is harmful to health:

“All the psychotropic drugs at present being used non-medically on a wide scale in Canada, particularly by youth, are definitely harmful — marihuana certainly included. They are all detrimental to health (health as defined by the World Health Organization as a “state of complete physical, mental and social well-being”). On this we can be firm and definite in the face of opinions of others to the contrary who argue that there is no reliable evidence that these drugs cause damage to the brain structure.”

More specifically “the use of these drugs does indeed induce lasting changes in personality functioning, changes which are pathological in so much as they impair the mental and social well being”.

Furthermore, “the argument that marihuana is no more harmful than alcohol is specious”. The primary action of alcohol, he writes, is that of a relaxant with mental impairment occurring only when intoxicating quantities are consumed. Marihuana, on the other hand, acts solely as an intoxicant, its effect being primarily the distortion of perception and reasoning.

As to whether marihuana is addictive, Dr. Yonge said the user becomes psychologically dependent. “There is ample evidence that people who use the psychotropic drugs, including marihuana, tend to do so habitually”.

Finally, he writes of a regression:

“the trend toward instant self-gratification and artificial self-exploration (by the use of psychotropic drugs) is distinctly regressive—a reversion to the immature, the primitive”.

He concludes that the laws prohibiting the supply and use of psychotropic drugs (including marihuana) should not be made any more permissive. However, the penalties under the law should be drastically changed to render them more appropriate and remedial.

It would be remiss of me if I did not point out that this paper touched off a row in Canadian psychiatric circles. Dr. Aldwyn Stokes, President-elect of the C.P.A., said that this paper only represented the personal views of Dr. Yonge and not the views of the Association.\textsuperscript{17} He referred to the paper as “a paper that comes down on the side of discipline”. He said that since Dr. Yonge’s paper was distributed, the Association has set up a formal committee to formulate a consensus within the profession that will lead to the presentation of a brief to the Le Dain Commission.

\textsuperscript{17} \textit{The Globe and Mail}, November 21, 1969, p. 4.
B. A Prelude to Harder Drugs

One of the main contentions of those who oppose liberalizing the marihuana laws is that marihuana inevitably leads to heroin or other more dangerous drugs. This conclusion has been drawn because most heroin users at one time or another used marihuana. However, this stepping-stone theory of addiction is based on illogical reasoning. Judge Charles Wyzanski aptly described that reasoning in the following terms:

It is, of course, absurd to argue that because most users of heroin first used marihuana, marihuana is proved to be a preliminary step to heroin addiction. One might as well say that because most users of heroin once imbibed milk, milk leads to heroin addiction.  

The President's Commission came to a similar conclusion because "(T)here are too many marihuana users who do not graduate to heroin, and too many heroin addicts with no prior marihuana use, to support such a theory. Moreover, there is no scientific basis for such a theory."\textsuperscript{19}

Whether one progresses to harder drugs likely depends on his environment. Howard S. Becker has stated that the use of marihuana depends upon the availability of the drug.\textsuperscript{20} This would also seem to be true of the harder drugs. So if a marihuana user lives in the suburbs he is not likely to graduate to the harder drugs because he will not come into contact with them. This seems to be borne out by the findings of The President's Commission:

“The evidence from our college students and utopiate and news articles is clear that many persons not in heroin-risk neighbourhoods who experiment with marihuana do not progress to hard drugs.”\textsuperscript{21}

Margaret Mead has suggested a counter theory to this. She reasoned that youngsters progress from marihuana to the so-called hard drugs, because possession of either, being a felonious offence, they may as well be hanged for sheep as for lambs.\textsuperscript{22} However, this is unlikely to be the case because most young people stay with marihuana because they believe it is not harmful to them. Criminality or the amount of punishment is unlikely to be a consideration in their choice of drugs. My reasons for this proposition will be discussed in a later section.

The only evidence which I could find that substantiated the theory was that of the now defunct American Bureau of Narcotics. In one of their pamphlets, “Living Death”, 1965, it warned that “it cannot be too strongly emphasized that the smoking of the marihuana cigarette is a dangerous first step on the road which usually leads to enslavement by heroin”. In a well thought article, “Marihuana and Legal Controls”, D. E. Miller, former Chief Counsel of the Bureau, stated that marihuana leads to the stronger addictive opiates.\textsuperscript{23} However, it is likely that this is just an instance of a bureaucratic organization protecting the status quo in order to preserve one of its

\textsuperscript{18} A. Geller and M. Boas, The Drug Beat, N.Y. 1969 Cowles Book Co. Inc.
\textsuperscript{19} Supra, n.5 at p. 14.
\textsuperscript{21} Supra, n. 5 at p. 24.
\textsuperscript{22} Newsweek, November 10, 1969, p. 45.
\textsuperscript{23} In E. Goode, Supra n. 20 at p. 167.
functions. The last Commissioner of the Bureau, H. I. Giordano, in discussing the legalization of marihuana, stated:

"I am afraid this is just another effort to break down our whole American system." 

The empirical relationship between marihuana and the harder drugs has not been adequately tested. However, there is no possible scientific basis for using the theory presented in this section as a reason for not liberalizing the marihuana laws.

C. A Prelude to Crime and Violence

Another contention of the opponents to the relaxation of the marihuana laws is that the drug leads to crime and violence. If this is true, then this contention is the most persuasive in criminalizing marihuana use because now the user is affecting the interests of other people and not merely his own.

Probably the first study which substantiated this theory was a report by the district attorney of New Orleans submitted to the Hearings on Taxation ofMarihuana Before the House Ways and Means Committee, 1937. It found that 125 of 450 convicted of major crimes in 1930 were regular marihuana users. Approximately one-half the murderers and a fifth of those tried for larcency, robbery and assault were regular users. However, the efficacy of these results has been questioned. Perhaps we should be wary of reports from district attorneys from New Orleans because of the recent experience we have had with the present one.

Similarly the Narcotic Addiction Foundation of British Columbia, in a recent policy statement outlining "what we know about the drug", found "indisputable evidence that the stronger forms of the drug . . . are directly connected with crimes of violence and anti-social behavior".

Finally, as was expected, the Chief Counsel of the Federal Bureau of Narcotics, D. E. Miller, agrees with this position. He states

"In the final analysis it is clear that marihuana may be causally associated with the commission of crimes in a number of ways, depending upon the variability of the strength of the dose and the underlying personality of the user." But surely Mr. Miller could just as easily have been discussing alcohol.

The authorities holding the opposite position are just as formidable, if not more so. The Medical Society of the County of New York has stated flatly that there is no evidence that marihuana use is associated with crimes of violence. The 1962 report of the President's Ad Hoc Panel on Drug

25 E. Goode, supra n. 20 at p. 154.
26 See President's Commision, supra, n. 5, p. 13.
27 Comment, Marihuana, Canadian Mental Health, 16:28, September-October 1968.
28 E. Goode, Supra n. 20 at p. 166.
29 Of course the fact that marihuana is less harmful than alcohol or tobacco does not alone justify its legalization. There must be other justifying reasons which will be developed later in this article.
30 Medicine, May 5, 1966, p. 3.
Abuse found the evidence inadequate to substantiate the reputation of marihuana for inciting people to anti-social acts.\footnote{Proceedings 286: Report of Ad Hoc Panel on Drug Abuse.} The famous La Guardia Report (\textit{supra}) did not observe any aggression in subjects to whom marihuana was given. In "The Cannabis Habit: A Review of Recent Psychiatric Literature", Professor H. B. Murphy of McGill University states that although aggressive or antisocial behaviour can occur, it "is agreed to be less common with cannabis than with alcohol" and that "most serious observers agree that cannabis does not \textit{per se} induce aggressive or criminal activities, and that the reduction of work-drive leads to a negative correlation with criminality rather than a positive one".\footnote{Bull., Narcotics, 15:15 January-March, 1963.} \footnote{Kalant, \textit{Supra} n. 14.}

Finally, Kalant, in one of the most recent critical reviews available, concludes that "there appears to be no evidence that the use of the drug in itself causes crimes of violence, sexual arousal or anti-social behaviour."\footnote{See Debates, Sess. 1910-11, Vol I, p. 468.}

Where does all this conflicting scientific evidence leave the legislator? He is the one who must make the decision. I think he can safely assume that the effects of marihuana depend more on the individual than on the drug itself. But is this reason enough to relax the marihuana laws? It clearly is not. He now requires direction in other areas. Therefore we must give the legislator guidance in our own area of competence. Hence, with this scientific evidence in mind we must now question whether the criminal law is the proper tool to control the use of marihuana.

III. LEGISLATIVE POLICY OF MARIHUANA LAWS

In this section I will attempt to describe legislative policy on marihuana. In essence, it will be a brief discussion of present narcotic legislation. This is because marihuana and other narcotic drugs have been inextricably bound together by Parliament. There has been no distinction at all between marihuana and other drugs although one is clearly called for. The question that has been asked throughout this section is:

"What is Parliament trying to do?"

The first piece of legislation regulating the use of narcotic drugs in Canada was enacted in 1908. The only prescribed narcotic drug was opium. Cannabis (marihuana) was not added to the schedule of forbidden narcotic drugs until 1923. At this time there was no legislative discussion as to its inclusion. However in reading the Debates one can observe three factors which appear to underlie the policy of narcotic legislation in the earlier periods.

Initially Parliament looked upon the problem of narcotics as an Oriental one.\footnote{Proceedings 286: Report of Ad Hoc Panel on Drug Abuse.} Secondly, in implementing this legislation Canada was ful-
filling one of her international obligations. Thirdly, the protection of the young was a major interest considered in the enactment of their legislation.

Between 1908 and 1961 there were piecemeal amendments in narcotic legislation. However, in 1954 there was a major overhaul of the legislation. In this year there was an important change in the legislative framework. But for our purposes it is sufficient to say that there was no real change in policy although the protection of the young became less important as an interest in the legislation.

In 1961, the Narcotic Control Act completely revamped the law and policy in this area. It eliminated many of the old offences like possession of an opium pipe. Also it more systematically laid out the offences with which the Parliament was concerned.

In Part I of the Act Parliament has set out four offences. Section 3 prohibits the possession (as defined in the Code) of a narcotic (a substance listed in the schedule). The offender is guilty of an indictable offence and is liable to imprisonment for 7 years. Notice that Parliament has removed the required minimum for this offence.

Section 4 prohibits the trafficking of a narcotic or the possession of any narcotic for the purpose of trafficking. The offender is guilty of an indictable offence and is liable to imprisonment for life. This is a significant increase in the severity of the sentence, especially for the first offender. The purpose of this legislative provision is obvious.

Mr. W. Monteith, the then Minister of National Health and Welfare, described it in the following words:

"In this way Parliament will have indicated clearly the seriousness with which it regards trafficking offences and the courts can, therefore, take cognizance of this in fixing appropriate penalties."  

Later in the debates, Mr. Fulton more specifically described the purposes of the trafficking provision:

"It would seem that appropriate federal legislation against illegal drug trafficking should be designed:
(a) to deter the would-be trafficker;
(b) to teach a salutary lesson to the peddler who may deal in small transactions and also to the major distributor who may deal in only a few large ones;
(c) to attempt to assist the convicted trafficker to live in society upon his release without engaging in this form of activity;
(d) to remove from society for substantial periods, those persons who have demonstrated by their previous conduct that they are not likely to refrain from this type of conduct in the future."

Thus Mr. Fulton has described general deterrence, rehabilitation and incapacitation as the justifications for the punishment of traffickers.

Section 5 prohibits the import into Canada or export from Canada of any narcotic. The offender is guilty of an indictable offence and is liable to

35 Ibid., at 2521.
39 Ibid., 5987.
imprisonment for life but not less than seven years. The purpose of this provision was simply described by Mr. Monteith:  

"If it were not for the illicit importation of narcotics, there would be no trafficking problem and, correspondingly, no problem of narcotic addiction."

Of course, exporting is prohibited so that Canada could fulfil her international obligations.

Section 6 prohibits the cultivation of opium or marihuana except under federal authority. The violator is guilty of an indictable offence and is liable to imprisonment for seven years. When discussing this provision Mr. Monteith defended the prohibition of marihuana growing but he also underestimated its use in Canada at the time:

"The use of marihuana as a drug of addiction in Canada is fortunately not widespread. It, however, may well provide a stepping stone to addiction to heroin and here again marihuana is prohibited except under licence."  

Part II of the Act is where Parliament clearly shows a departure from its former approach to the drug problem. The reason for this was the failure of the former approach:

"... the programme embraced in that legislation (i.e., past), had not been effective to solve the problems of narcotic addiction and narcotic trafficking. A new approach is therefore necessary."

Mr. Fulton generally described the purposes of the new approach as follows:

"First, to reduce so far as possible the supply of drugs brought in and distributed for illegal purposes; second, but simultaneously, to reduce the demand for illegal drugs by providing effective treatment for existing addicts, and third, to prevent the creation of additional demand by preventing, so far as possible, the creation of new addicts."

Section 15 of Part II calls for the preventive detention for an indeterminate period of a person convicted of an offence under section 4 or 5 (trafficking and import or export) if that person

(a) has been previously convicted under these sections on a separate occasion, or

(b) has been previously sentenced to preventive detention under this section.

Section 16 permits the court to remand a person charged under 3, 4 or 5, for observation and examination for a period not exceeding 7 days. Section 17 provides that where a person who has been remanded under s. 16 is convicted, then the court, in sentencing, must consider the evidence of the examination. Where the court is satisfied that the person is a narcotic addict, then it shall, notwithstanding anything in section 15, sentence him to custody for treatment for an indeterminate period.

Effective treatment was called for, Mr. Fulton suggested because of:

"the heartbreaking fact that under the present system the criminal addict is going through our penal institutions in a never ending cycle; crime, arrest, conviction,

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40 Ibid., 5981.
41 Ibid., p. 5981.
42 Ibid., Fulton, p. 5982.
43 Ibid., 5982.
He then proceeded to describe the expanded purposes of criminal punishment in this area:

The consideration of this situation has led to the conclusion that what is needed is a concentrated effort to reform and rehabilitate rather than simply to incarcerate. Mr. Fulton then went on to describe the purpose and hopeful effect of the proposed treatment:

"(The Act) ... is to provide the appropriate institutional treatment to remedy the fundamental delinquency of the addict to abstain from using drugs during substantial periods of his life in the community." Part II of the Act was never in effect as it did not receive Royal proclamation. It seems that Parliament recognized the weakness of this approach and hence it was never put in use.

Finally Mr. Fulton commented on the fact that the sentence for trafficking did not require a minimum. He stated that:

"the provisions of this bill will give almost complete discretion to the courts to adopt the course that is indicated as most appropriate in the individual cases, ..." Hence, first offenders could be treated more leniently.

In the last few months the legislature has amended the "possession" section. This amendment is found in section 12 of An Act to Amend the Food and Drug Act and The Narcotic Control Act and to make consequential amendments to the Criminal Code. The important difference is that there is an option now. Anyone convicted of possession of marihuana on summary conviction is liable to a fine of $1000 and/or imprisonment for six months for the first offence. For each subsequent offence he is liable to a fine of $2000 and/or imprisonment for one year. If the offender is convicted on indictment, he is liable to imprisonment for 7 years.

This is the present status of marihuana legislation in Canada. Is the policy of this legislation realistic? Are its purposes being effected? Are there alternatives to the present approach to the problem of drugs? These are some of the questions to which we will now turn in the next section.

IV. CONSIDERATIONS IN USING THE CRIMINAL LAW AS AN INSTRUMENT CONTROLLING IMMORAL BEHAVIOUR

A. Law and Morals

This section is intended to present the different contemporary positions on the issue of morality and the criminal law. We are concerned with two
questions here. First, should the State use its power to legislate morals? Secondly, if this is a legitimate use of power, then in what circumstances should it criminally prohibit the conduct believed to be immoral?

The first position that I will present is that of Sir James Fitzjames Stephen which has recently been reiterated by Lord Devlin. They believe that it is the true province of the criminal law to restrict or prohibit immoral conduct. Historically the criminal law of England has concerned itself with moral principles. The common law is steeped in the Christian tradition so that it is foolish to deny entry of the criminal law into the area of morality. Crime and sin are inextricably bound and a denial of this proposition would be disastrous to the criminal law or morality.

Lord Devlin believes that a common morality pervades our society. "There are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole." It is this danger to society which is the chief concern of Lord Devlin.

His theory has been called the "disintegration thesis". Society is bound together by invisible bonds of common thought (be they social, economic, political or moral). The members of society would drift apart if these bonds were relaxed. A common morality is part of their bondage as is a common political philosophy. Any conduct which threatens any of these bonds must be prohibited. Hence, we have made an act of treason punishable by the criminal law because it endangers our political way of life. Likewise we should prohibit any conduct which breaches the common morality because that, too, is a danger to our social existence.

This position has also been accepted by the sociologist Durkheim. However, Durkheim sees another purpose of the law in regulating immoral behaviour. He agrees that it protects the common morality. But he also sees the law as "giving satisfactory vent to a sense of outrage because if the vent is closed the common conscience would lose its energy and the cohesive morality would weaken." So the criminal trial then becomes a symbolic reinforcement of what people believe to be morally bad.

This clearly answers the first question presented at the outset. However, now we must decide when we will implement the criminal law in regulating such behaviour. Of course, the problem now becomes one of checking the legitimate use of power. Lord Devlin recognized this as he realized the dangers of a paternalistic society. He knew that the law should also be concerned with the rights of the individual. He believes in the liberal principle of tolerance. However, society cannot withstand unlimited tolerance. "There must be toleration of the maximum individual freedom that is consistent with the integrity of society." Therefore the use of the law in this area is

49 Liberty, Equality, and Fraternity.
50 The Enforcement of Morals.
51 Ibid.
52 Professional Ethics and Civic Morals, 1958.
54 Devlin, op. cit. 16.
dependent on a balancing process analogous to the approach used by Justice Frankfurter in the United States Supreme Court. This necessarily entails a deliberate judgment by the power structure as to when certain conduct is injurious to society and the individual. But what are the standards of decision-making?

Lord Devlin supplies a simple answer. The moral judgment of society is to be determined by the ubiquitous reasonable man. Immorality then becomes what the right minded person believes to be such. The problems with this are innumerable. Who is the right minded person? Surely the beliefs of a right minded person differ between Toronto and Barrie, or even between Yorkville and East York. Immorality, then, becomes a function of geographical location. Furthermore, there are times when it is unwise to push democratic principles too far. Sometimes the right minded person is 'wrong'. It is then the responsibility of the power structure to lead public opinion rather than follow it. This is particularly true in such nebulous areas as morality or such complex matters as the relationship between the law and morality.

I hope that I have objectively presented the case of Lord Devlin. This is not the place to affirm or reject his approach. However, I would suggest that this position has been accepted by the judiciary as is demonstrated by the following statements of Viscount Simonds, in Shaw v. D.P.P.:55

“There remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State.”

The other side of the argument was presented by John Stuart Mill in his great essay On Liberty. Mill believed that “the only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others.” This position has been recently rearticulated by H. L. A. Hart in Law, Liberty and Morality (1963). The new Utilitarians realize the inadequacies of Mill's simple formula but they also see it as a basis of a new approach which takes into account relevant considerations which have been disregarded by the legal moralists.

Immorality should not be viewed as the principal or sufficient reason for calling conduct criminal. This is so, for the following reasons. First, the new Utilitarians deny the existence of a common morality or a bondage of common thought. This is especially true in a pluralistic society like Canada where the diverse backgrounds of its citizens provide a very heterogeneous society. Lord Devlin's approach may have relevance to a homogeneous society such as England but its application to North America must be seriously questioned. Canada is a 'mosaic' or 'melting pot' of different philosophies. Its moral norms are diverse as are its social, economic or political norms. “In a society that neither has nor wants a unitary set of moral norms, the enforcement of morals carries a heavy cost in repression.”56 Therefore the criminal sanction should only be used in this area where there is a social consensus as to the immorality of the conduct. But does this not suggest that there is a common morality?

56 Packer, The Limits of the Criminal Sanction, p. 265.
Most Canadians feel that murder, rape, or robbery are immoral. No one would argue that these immoral acts should not be criminally proscribed. Does this lead one to the conclusion that crime and sin are inextricably bound? The contemporary Utilitarians would suggest not. H. L. A. Hart calls this the ‘interaction of crime and sin’. A. W. Mewett calls this connection entirely fortuitous. “If the moral law and the criminal law coincide, it is not purely because the immoral act has a criminal sanction attached but because some other element is present which renders that act a fit subject for the criminal law.”

This leads us to our next consideration.

Contemporary Utilitarians generally agree that before conduct is criminally proscribed, it must cause physical harm to the person or property of someone. This standard of proscription provides us with a concrete rule that is not dependent on nebulous concepts such as immorality. It also gives us a definite purpose so that in proscribing conduct we should be aware of what we are attempting to do. Unfortunately in legislating morals we lose sight of what we are trying to do with the criminal law. But is this Utilitarian approach adequate? I would suggest not. The problem at hand requires a more sophisticated approach than is provided by the ‘physical harm’ test. Today there are many criminal laws proscribing conduct which does not cause physical harm. In such cases the state is legitimately using its power to enforce a positive morality in order to protect its citizens.

I would suggest that the legitimacy of state action should not be dependent upon an either-or approach as is provided for by the physical harm test but by a workable balancing process to be developed in the next few sections.

B. The Suggested Approach

(a) Priorities of State Intervention

The overriding issue is the legitimate extent of state intervention with individual liberty through the criminal law. Stated another way: What activity should the criminal law proscribe or alternatively what conduct should it prescribe?

For clarity's sake, this issue must be examined from four levels of priority abstractions vis-a-vis state intervention. These levels are:
1. conduct which causes actual harm to other people (society),
2. conduct which causes actual harm to the individual,
3. conduct involving risk of harm to other people (society) and
4. conduct involving risk of harm to the individual.

At each level the activity should be viewed in relation to the character of the harm it causes or may cause balanced against the right of the individual to remain unimpeded by the state (freedom of the individual, freedom of choice,

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68 This model was developed by G. Adams, B.A., LL.B., in an unpublished paper presented to Prof. P. C. Weiler in a research seminar.
sanctity of the individual). It is suggested that the levels ascend in order of their diminishing priority vis-a-vis legitimate state concern.

The first level of abstraction, *actual harm to others*, is patently the most compelling in terms of legitimate state intervention. The community we live in, by virtue of its name, demands physical and proprietary security. Just as it establishes rules and regulations for its administration called government, so too, standards of required conduct are legislatively enacted and enforced. It is totally unacceptable that individuals may resort to physical abuse, whatever the cause, or that they take what “rightfully” belongs to another. All disputes are to be settled through legitimized channels of appeal and discourse, leading to peaceful and binding solution. Society in turn is benefitted by the continuity of peaceful co-existence and orderly exchange of ideas, articles of trade and social interaction. So too, the individual benefits, allowing him to maximize his own potential without fear of an attack by a fellow denizen. By sacrificing some individual liberty, the individual is allowed to maximize the residual (which is considerable). J. S. Mill has suggested that this is the only legitimate form of state intervention — the proscription of conduct which causes actual harm to others.5

The second level of conduct, *that which causes actual harm to the individual*, does not possess the same compelling characteristics in favour of state concern. Witness John Stewart Mill. This is one of the levels at which the volatilé debate involving law and morals rages. I might add that many philosopher-participants try to finesse this level by resorting to justification at some level distinct from this one, thereby evading any discussion of paternalism. This ploy clouds the “true” issue and is unacceptable. The query at bar, is not to have regard to any concomitant benefit or harm, actual or possible, that may accrue to society through the proscription or neglect of the specific conduct by the criminal law. The fact that an individual by harming himself so, too, indirectly harms society by his lack of productivity, ambition or even existence, causing a possible threat to the very existence of society as we know it, must be dealt with at another level, (which has even less priority as we are then examining risk of harm and not actual harm).

In this second instance then, we are discussing the merits of a form of state paternalism. But because actual harm to the individual is at stake, it is a form most easily recognized as legitimate. The justification appears to be two-fold. First, society feels the individual will be happier and better off if he refrains from pursuing this specific course of action. The collective “we” has looked “rationally” at different forms of behaviour, deciding which form is best or inversely, what the individual should not do. Conduct which is individually harmful prevents a member of society from maximizing his happiness. This line of reasoning leads imperceptively into the second justification which depends on individual freedom as a corner-stone. If the individual follows this particular course of action he will lose all freedom he now possesses. The drug user, if allowed to purchase drugs

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freely, will become so dependent upon them, that any freedom heretofore possessed will vanish. Similarly, the potential suicide, if allowed to act freely in his depressed state, so extinguishes irrevocably the entity that once had freedom of choice (obvious problem here in terms of effectiveness, and a reliance on the notion of lack of capacity). Such activities that are harmful to the individual can, therefore, take away the very freedom that the actor suggests the state is impinging upon. This impingement then preserves all the other areas of liberty where individual rights can be exercised. Are not such laws quite consistent with individual liberty?

A derivative observation, which will hold throughout the discussion is the fact that individual freedom is not an absolute value. Accommodation and compromise with other values and objectives runs throughout the area of legislative enactment.

The third level of analysis, conduct involving risk of harm to society, is the level at which Lord Devlin fences. Obviously he never answers Mill in terms of a justification at the second level of legitimate state intervention and this is why I said that some participants tended to finesse the true issues.

Justification at this abstraction buttresses itself with the thesis that if this particular conduct is allowed to flourish (which may or may not require one to argue in the “logical extreme”), society as we now know it (and presumably cherish it) will “disintegrate”.60 Said in another way: There is a risk that this conduct may eventually break our society down, even though its immediate harm to others is virtually non-existent. This is not paternalism and it is readily apparent that a number of assumptions have to be made which are not self-evident or certain. In attacking these assumptions, Devlin’s opponents, the pragmatic moral pluralist’s, demand empirical evidence of this “disintegration thesis”.61 “History”, is his retort, reaffirming the moralist belief that the community is dependent on its essential moral structure.62

The issue is: when is the risk of harm to society sufficiently remote or nebulous as not to outweigh the interest of the individual’s liberty?

The level least compelling, conduct involving risk of harm to the individual, is the contingency of the second level. The justification is the same, however all arguments must be premised with the word “may” as we are not dealing with actual harm. This form of paternalism is the least legitimate and the most offensive to individual freedom. This is the level at which the laws against use of marihuana should be discussed (with some altering considerations like a pre-existing law) but it is continually finessed into the other levels possessing a more compelling justification.

(b) Costs of Implementing the Criminal Law

As I stated earlier, as one moves up our suggested list of priorities the legitimacy of state action increases. Hence less justification is required for

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60 Lord Devlin, The Enforcement of Morals (1959) p. 15; See also J. F. Stephens, Liberty, Equality and Fraternity (1873).
62 Devlin, op. cit., p. 23.
state intervention. In relating this to our balancing process it means that since proscription of conduct causing actual harm to others (society) is a compelling factor, it will require more in the way of costs to deter the implementation of the criminal sanction. Likewise proscription of conduct involving risk of harm to the individual (which is the level we shall discuss marihuana) will need less in the way of costs to deter the implementation of the sanction.

Of course, the most important cost of criminally proscribing the use of marihuana is the deprivation of the liberty of the user. In a democratic society this is the most serious form of state intervention, so that such action must be clearly justified. Everyone would agree that the state is justified in removing the murderer from society. The offender has caused harm to another person. There may be costs involved in depriving him of his liberty but these are insufficient to prevent the implementation of the criminal sanction. Does the same reasoning hold true for the marihuana offender? He has participated in conduct involving a risk of harm to himself. Therefore fewer costs of using the criminal law should deter us from using it in controlling such behaviour. At this point I would like to turn away from the costs in terms of the individual to the deleterious effects of the marihuana laws on the criminal process.

I believe that the most important effect of the marihuana laws is that the criminal law tends to lose its authoritative character. As we have seen, the criminal law has not been an effective tool in deterring marihuana use. This has been recognized by government officials. In a speech to the Canadian Pharmaceutical Association, the Minister of National Health and Welfare, the Hon. John Munro, stated:

"the possession of marihuana being an indictable offence under the Narcotic Control Act . . . does not seem to have been a very effective deterrent. Nor does it seem to me that giving criminal records to several thousand curious kids a year serves any worth-while social purpose."

As the criminal law loses its authoritative character, citizens also lose respect for the law in general. Needless to say, this is a grave social problem today. The marihuana laws only aggravate this problem. Young people have no respect for a law which they believe to be unreasonable. As I have stressed in this paper, a law can have little effect if it has no rational basis.

Citizens also lose respect for the law when they see it is unenforceable as is the case of the marihuana laws. One of the reasons why these laws are unenforceable is that we have given the criminal law a function that is beyond its competence. Sanford Kadish has called this "The Crisis of Over-criminalization". We have too many criminal laws today because we have lost sight of its true purpose. Of course, this leads to problems of enforcement. As a spokesman for the Federal Bureau of Investigation recently stated the issue:

"The criminal code of any jurisdiction tends to make a crime of everything that people are against, without regard to enforceability. changing social concepts,
etc. . . . The result is that the criminal code becomes society's trash bin. The police have to rummage around in this material and are expected to prevent everything that is unlawful. They cannot do so because many of the things prohibited are simply beyond enforcement, both because of human inability to enforce the law and because, as in the case of prohibition, society acts one way and legislates in another. If we would restrict our definition of criminal offenses in many areas, we would get the criminal codes back to the point where they prohibit specific, carefully defined and serious conduct, and the police could then concentrate on enforcing the law in that context and would not waste its officers by trying to enforce the unenforceable, as is now done. 66

This situation has led one recent empirical study to conclude that "(T)he typical marihuana arrest occurs by chance." 66 With such success it is little wonder that these laws exacerbate an already intolerable problem. Laws like those prohibiting the use of marihuana also lead to unequal enforcement. Of course this only increases disrespect for the law. Police enforcement tends to concentrate where police think 'the action is'. In Toronto this means that police efforts are concentrated in Yorkville. This increases the alienation and fear of an already alienated and paranoid subculture. This is because police may be over-zealous in their efforts, and because the "hippies" realize that marihuana is extensively used in the suburbs where users go relatively unhindered. Unfortunately this discrimination may also have been carried to the courts. Alfred Lindesmith reports on differential enforcement of narcotic law according to social class as follows:

"Where the addict is a well-to-do-professional man such as a physician or lawyer, and is well-spoken and well-educated, prosecutors, policemen and judges alike are especially strongly inclined to regard him as an 'unfortunate' or as a 'victim' of something like a disease. The harsh penalties of the law, it is felt, were surely not intended for a person like this, and by an unspoken agreement, arrangements are quietly made to exempt him from such penalties." 67

Marihuana use is a 'crime without a victim'. There is therefore no complainant. Hence police must find new ways of apprehending these offenders since no citizen will be complaining of the proscribed conduct. This has forced police to use such tactics as agents provocateurs, harassment, and entrapment. Some of the uses of these techniques are contrary to our sense of justice. To allow a policeman to entice a citizen into crime is not only unjust but also signifies the illegitimate use of power. Unfortunately, this situation has arisen for reasons previously discussed. These police practices can only increase disrespect for the law while in no way effectively controlling the use of marihuana.

The problems of enforcement do not stop here. Crimes of vice, like marihuana use, encourage the public to make moral judgments as to enforcement. 68 This leads to great arbitrariness in arrest. 69 The ramifications of this are obvious.

The application of marihuana laws also leads to economic problems. The costs of enforcement and adjudication are increasing in a system in.

68 Skolnick, op. cit., p. 632.
69 See U.C.L.A. study, supra n. 67.
which the police and the criminal courts are already overworked. The U.C.L.A. study described the situation as follows:

"Financially, the enforcement of the marihuana laws is very expensive. Thousands of hours of police time are consumed in apprehending marihuana offenders; many more hours are spent by the police in court; and our criminal courts are already plagued by oppressive caseloads, are ill-equipped to handle the staggering increase in marihuana trials."\(^{70}\)

R. H. Blum, an American expert on the drug problem, also recognized this grave situation:

"... it is evident that if arrests increase still further both the courts and the correctional facilities will be taxed beyond their capacities. Police narcotic squads are already in this position although they are in a better position to control their work loads."\(^{71}\)

Marihuana laws also have a bad effect on the criminal process in that the position of organized crime is enhanced. The syndicate which supplies marihuana is selling it at an inflated price because 'pot' is illegal. Business is good and the risk of being apprehended is slight. This thesis has not gone unchallenged. Erich Goode has written that the syndicate does not deal in marihuana "because it is so easily grown and distributed by so many diverse sources that it would be impossible to capture and control a steady market."\(^{72}\)

Be that as it may, some criminal traffickers are aided by the illegality of marihuana. Furthermore, because of police methods already described, police officers must use informers and other members of the criminal element. This increases contact with criminals and may unfortunately lead to co-operation with criminals for illegal purposes.\(^{73}\)

Finally, criminalizing marihuana use may have long term bad effects in the criminal process. First, because it is illegal, young people must associate with the criminal element in order to acquire marihuana. Secondly, if a young person is convicted and given a criminal record his economic and social potential are seriously restricted because of this record. This may lead to more criminal activity. Thirdly, if he is sent to jail, the contacts and associations that he will meet there may unfortunately affect his life. Fourthly, the fact that marihuana is illegal may entice many young people to use it and therefore aggravate the problems for the police. This is not a frivolous relationship as was indicated by the recent eradication of obscenity laws in Denmark. Finally, in giving a young marihuana user a criminal record, we may be causing effects that are not readily foreseeable. E. M. Schur in his book, *Crimes Without Victims*, described these effects as follows:

"Just as the mere knowledge that he has become a 'criminal' may alter the individual's self-image, so too may legal proscription drive him into various behavior patterns that reinforce this image and that create new problems for himself and for society at large."\(^{74}\)

The deleterious effects on the criminal process of proscribing marihuana use are grave. These must be considered in light of the fact that police

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\(^{70}\) Ibid., 1513.

\(^{71}\) Students and Drugs (1969) p. 364.


\(^{73}\) See Skolnick, *op. cit.* pp. 630-34.

enforcement of these laws has been very unsuccessful in controlling its use. Now we should consider costs to the individual and society after the offender is apprehended and placed within the judicial process. In effect we shall discuss whether the judicial application of marihuana laws will be effective in controlling its use.

C. Principles of Sentencing

Because I have adopted a purposive approach, I have assumed that the criminal law will only be used when its use is consistent with the purposes of criminal punishment. In this section I shall apply this general theory to a practical problem. Hopefully this will answer whether legislation proscribing the use of marihuana is consistent with sentencing principles.

(a) Retribution

The first theory of punishment which I will discuss is the retribution or the expiation theory. This is the revenge theory of an "eye for an eye and a tooth for a tooth". Today it does not hold many adherents. For instance, the Ouimet Report rejected it. "The cost to the community of incarceration and the damage to and the subsequent danger from an individual punished for vengeance make the execution of vengeance totally unacceptable to any rationally motivated community." These are strong and sensible words but this theory should not be quickly dismissed. Such formidable legal philosophers as Professor Fuller have defended this theory. His three reasons for its legitimacy are: First, if criminal acts are not punished, then they may become the object of private revenge. If you kill my brother, then, as my brother's keeper, I may come and kill you if you go unpunished. I hope that this reason is untrue today; however, even if it does have validity, it has no application to marihuana smoking. This is a victimless crime so that there is no victim to take revenge. Secondly, the criminal trial provides a "symbolic function of reinforcing the public sense that there are certain acts that are fundamentally wrong, that must not be done." Furthermore, only through suffering punishment can the criminal expiate his sin. I reject this justification because I believe that such symbolic functions are the province of the moral law and not the criminal law. However, even if my thesis is rejected, this symbolic function that Fuller suggests has no relevance to the use of marihuana. Before this purpose is served, the conduct must be accepted as fundamentally wrong. If there is a substantial segment of the population which does not accept this, then no amount of criminal prosecutions will convince them of the wrongfulness of the conduct. This is the situation with marihuana. The criminal sanction here rather than providing respect for the law, only increases disrespect for the law in a society which no longer can afford such disrespect. Finally, Professor Fuller suggests that punishment also exists for the benefit of the law abiding citizen. If a person

76 See at p. 188.
76 See L. Fuller, Anatomy of the Law, pp. 27-30.
77 Ibid., 28.
disobeys the law then he should be penalized and if he observes the law then he should be rewarded (i.e., by going unpunished). This may be true but again I suggest that it has no relevance to the use of marihuana. This justification is valid only as long as there is effective enforcement of the law. The honest man is induced to remain honest because he sees the dishonest man being penalized for his actions. However, as we have seen, only a minimal number of marihuana users are ever penalized by the law. The honest man realizes this and hence his “reward” becomes illusory.

(b) Rehabilitation

This of course is the most humane theory of punishment. As we saw earlier in the section on legislative history, Parliament supposedly made this purpose paramount in offences under The Narcotic Control Act. But how reasonable is this approach? I would suggest that this approach is not viable today. Herbert Packer, in his already classical study, *The Limits of the Criminal Sanction*, has written that rehabilitation should not be taken as the primary goal of punishment because it does not work. We can send men to the moon but we cannot cure them of criminal tendencies. Because of this we are only kidding ourselves if we accept the rehabilitative ideal as our primary concern in criminal punishment. Unfortunately the Ouimet Committee fell into this trap.78

Furthermore, rehabilitation is only successful when the offender wants to be rehabilitated. He first has to become convinced that his conduct is wrong. I suggest that this is an impossible task in the case of marihuana users. A substantial segment of society, as well as the users, are convinced that such conduct is not wrong. It is the law that should be reformed, not the offenders. Finally, we must not forget that in attempting to reform a person we are depriving him of his liberty. Before we do this, we must be pretty sure about our purposes. Even if we had a ‘cure’, the efficacy of rehabilitation is still doubtful because “it is more of an affront to human dignity to subject a man to compulsory improvement than it is to punish him.”79 This is especially true in the case of a marihuana offender who very likely needs no rehabilitation.

(c) Incapacitation

Of course, the purpose of this is to deprive the offender of the capacity to commit further crimes. As was mentioned before, this deprivation of liberty should be done only after serious consideration. The Ouimet Committee accepted this by recommending that sentences of imprisonment should only be imposed where the protection of society clearly requires such penalty.80 The question now becomes whether this purpose is consistent with punishing marihuana offenders.

We first must ask ourselves whether the marihuana offender will repeat his crime. We must answer yes. [As long as a person feels that a law has no

78 See at p. 189.
79 Fuller, op. cit.,
80 See Report at p. 190.
rational basis, then no amount of punishment will induce him to stop offending.] Does this mean that because of this recidivism we must 'lock-up' the marihuana offender for substantial periods of time knowing that his acquaintances in prison will have a debilitating effect upon him? The only way to answer this is to ask whether society needs to be protected from his conduct. As I have tried to show earlier, the harm caused to society by the use of marihuana is minimal. If there is any harm at all, it is to the individual user. And as we have already seen this individual harm is also doubtful. With such evidence we may conclude that the incarceration of marihuana offenders is of nebulous value for three reasons. First, we are depriving a man of his liberty when his conduct is not injurious to society. Secondly, the long term effect of imprisonment on the offender is much more harmful than if he went unpunished. Finally, incarceration increases the cost of an already over-used prison system while at the same time it deprives society of many useful participants.

(d) Deterrence

If any theory is to justify the punishment of marihuana offenders, it must be this one. This theory may be further broken down into particular deterrence (of the sentenced party himself) or general deterrence (other potential offenders). As you will see in the section on the jurisprudence in this area, deterrence is the prime consideration of our courts in sentencing marihuana users. We have already disposed of the value of particular deterrence in this area when it was suggested that the marihuana offender will likely repeat his conduct because he cannot be convinced that his behaviour is wrong or harmful. Is the same true of general deterrence? The answer must be yes. It is evident that the use of marihuana today, is increasing at high rates. Therefore the criminal law has not been an effective deterrent. The question now becomes why? The most important reason is that we have assigned the criminal law a function that is beyond its competence. We have decided that marihuana use is immoral and have attached criminal sanctions to such conduct. We disregarded the practical considerations which we discussed previously. We have called conduct criminal which does no significant harm. Sentencing of such conduct will not be an effective deterrent because “for sanctions to be meaningful they must be considered by potential violators as having a rational basis.”

Furthermore, because of enforcement problems which we have discussed, there is little likelihood that a user of marihuana will be caught. Because of these two factors, the criminal law tends to lose its authoritative character. Its general deterrent effect is minimal.

In applying the principles of criminal punishment to the problem of marihuana, one can see that the criminal law is an ineffective tool for regulating such conduct. If we had kept the purposes of the criminal law sentencing in mind when we recognized the “problem”, we should have realized that it would be incompetent for the task of controlling the problem.

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81 Skolnick, op cit., p. 623.
D. Other Considerations

Before I conclude this section I would like to discuss two other factors which should be considered before the criminal law is used to control immoral behaviour. These factors are implicit in the other sections of this paper. However, they are of sufficient importance to be explicitly described. The first consideration is that the criminal law will not be implemented unless there is social consensus that the conduct in question should be prohibited. This is because a law will have little effect unless the majority of the population accepts it. In the case of the criminal law the conduct prohibited is not inherently bad. Its quality is defined as such by society. This has been aptly described by the sociologist, Howard S. Becker, in describing deviant behaviour:

“Deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender’. The deviant is one to whom that label has been successfully applied; deviant behaviour is behaviour that people so label.”

Therefore, in order that the stigma of being called criminal has any effect, there must be a social consensus that the conduct in question is truly criminal. This relationship between the public and the law leads us into questions of political philosophy. We must decide the scope of the law making power of the state. This problem has been described in the Wolfendon Report as follows:

“We have had to consider the relationships between law and public opinion. It seems to us that there are two over-definite views about this. On the one hand it is held that the law ought to follow behind public opinion, so that the law can count on the support of the community as a whole. On the other hand, it is held that a necessary purpose of the law is to lead or fortify public opinion. Certainly it is clear that if any legal enactment is markedly out of tune with public opinion it will quickly fall into disrepute. Beyond this we should not wish to dogmatize, for on the matters which we are called upon to deal with we have not succeeded in discovering an unequivocal public opinion, and we have felt bound to try to reach conclusions for ourselves rather than to base them on what is often transient and seldom precisely ascertainable.”

What role should public opinion play in the case of marihuana? Can we find an unequivocal public opinion on the issue of marihuana? The Canadian Institute of Public Opinion informed me that no opinion polls have been taken in Canada about marihuana. However, it seems that a significant number of young people in our society believe that the use of marihuana is neither criminal nor immoral. Whether this segment is large enough to deny the criminal sanction is for the legislator to decide. But perhaps the legislator should be leading public opinion in this area. He has the evidence before him describing the effects of such behaviour of which the majority of the public is unaware. He is the one who should be directing the use of the criminal law. Public opinion does not realize the limits of the criminal law. The legislator should. Therefore it is he who should make the decision and not the ‘silent majority’.

88 See Report at p. 10.
84 A Gallup Poll in the U.S. (Oct. 1969) showed 84% against the liberalization of the laws, 12% in favour and 4% undecided.
This leads us to our next consideration. That is whether there are reasonable alternatives to the criminal law in regulating such behaviour. I would suggest that there are. However, this is not the place to describe them. For our purposes it may be sufficient to say that it has been proposed that marihuana be regulated like alcohol. For instance, the government would set quality standards, would prohibit its sale to the young and would prohibit driving under its influence.

In conclusion I would like to briefly summarize the effects of the preceding discussion. The only justification for criminally proscribing the use of marihuana is that it involves conduct which may result in harm to the individual user. The costs of using the criminal law on the individual, society and the criminal process are grave. I would suggest that the costs are sufficient to preclude the use of the criminal law in this area. Finally even if the costs were insufficient to deter its use, I would argue that the criminal law should not be used because it is an ineffective tool in controlling the use of marihuana. Enforcement problems make apprehension unlikely. Judicial application of the laws will have little effect on potential users of marihuana. Correctional facilities are unlikely to convince the user of the “wrongness” of his conduct. In other words the criminal law is incompetent to deal with the problem of marihuana.

V. MARIHUANA AND THE COURTS

(a) The Canadian Case Law

Within the last few years the Courts have been attempting to expound certain principles in sentencing offenders of the Narcotic Control Act. This was really a necessity as the volume of such cases before the Courts required some uniformity in judicial action. Before this time, however, the Courts in such cases relied on the accepted general principles of punishment. In other words, the narcotic offender was treated like the common criminal. For instance, in R. v. Zimmer, a case of trafficking, the Court accepted the principles laid down in R. v. Calder, an attempted robbery case. These principles are shown below:

"It should be said at once that the purpose of punishment for crime is not that, through the medium of a judge who is authorized by law to impose it, vengeance may be wreaked upon the guilty for their crime, as though crime was private in character. In the narrow sense a crime is usually an offence against an individual, involving his person or his property. . . . In the broader sense, in which the courts must regard it, crime is an offence against the State and is punished by the State on much different principles. The main purpose of the imposition of punishment is the good of the State, that is, society generally. If the culprit by his conduct has demonstrated that he is anti-social, then society excludes him from its membership temporarily or permanently. Punishment is also imposed as a deterrent to others from committing similar crimes. It is the expression of the condemnation by the State of the wrong done to society. There must, therefore always be a right proportion

86 (1956) 17 W.W.R. 528.
between the punishment imposed and the gravity of the offence. It is in that
sense that it is said that certain crimes 'deserve' certain punishments and not on
any theory of retribution. Added to the foregoing, of course, there is the desir-
ability of reforming the criminal wherever that is possible, and restoring him
to society."

There are two prominent types of cases which have consistently come
before the Court. These are possession and trafficking, or possession for the
purpose of trafficking.

The first series of cases with which we will deal are those of possession.
The first case is \textit{R. v. Ross}, in which the defendant was convicted of posses-
sion and given 18 months. The evidence was that it was only constructive
possession. This excessive sentence was appealed (even the Crown joined in
the appeal). The B.C. Court of Appeal reduced the sentence to one year, and
stated:

"On appeals from sentences the Court of Appeal should see to it that sentences
are commensurate with the gravity of the offences".\footnote{87 (1955) (B.C.C.A.) 15 W.W.R. 134.}

Two things here should be noted. First, the Court is still treating the narcotic
offender as a common criminal. Secondly, this is the Court which has been
most active in developing the jurisprudence in this area.

The next case is \textit{R. v. Budd}, a 1965 unreported B.C. Court of Appeal
case. Here the 21 year old female student was convicted of possession of
marihuana. She appealed a six months sentence. The Court, in dismissing
the appeal said:

" . . . this Court will support his (i.e., trial judge) imposition of even greater
penalties in the future in an attempt to stamp out the incipient social evil
in our community".\footnote{88 \textit{Ibid.}, p. 134.}

Notice how the public interest here is protected at the expense of completely
disregarding the interest of the individual.

This case was discussed in \textit{R. v. Hartley and McCallum (No. 2)}.\footnote{89 (1968) 2 C.C.C. 187.}
The defendants here were 18 and 21 years of age with neither having a previous
criminal record. Each was given six months. In the course of the judgment
the Court clearly shows the priorities which it has chosen. This case shows
the Court evolving specific principles for a special problem. The Court has
recognized the problem. It has developed an approach albeit a very
conservative one. Deterrence is still to override rehabilitation. It is sub-
mitted that this is only one of the many cases where the Court has
diminished the importance of the latter purpose at the expense of not fully
effecting the legislative purpose. As we saw in a previous section, Mr. Fulton
clearly intended that rehabilitation was primary in the new legislative
approach. He admitted that the old approach (i.e., deterrence) was a failure.
However, the important thing is that the Court is consciously attacking a
contemporary problem. Unfortunately their decisions are marred by the
unconscious effect of their own prejudices and values. Below are the key
statements from the case:
"The predominant factor in this case is the deterrent effect upon others. This Court two years ago in the Budd case (R. v. Budd decided January 15, 1965 unreported), said that the possession of marijuana is a serious offence and it must be punished severely. The purpose of course was to deter the use of marijuana, among other reasons, because users must obtain supplies, and the supply of the drug involves trafficking, and that, as the market increases, that traffic becomes organized, and the organized traffic tends to increase the use of the drug. It was our hope then, although I was not party to that decision, that substantial gaol sentences imposed upon people convicted of having possession of marijuana for their own use would reduce the number of users, and consequently the trafficking necessary to supply the market. We also feared that if we did not treat this offence seriously that the traffic would continue to develop and users would increase. Our fears have been borne out by the experience over the past few years. Our hopes have been disappointed because with deference some of the members of the magisterial bench have failed to fully appreciate our purpose in the Budd case. Too many of these convictions for possession of marijuana have been treated too leniently..."

"In this case the deterrent aspect, as I said, is the important one. The rehabilitation of offenders is secondary. If the use of this drug is not stopped, it is going to be followed by an organized marketing system. That must be prevented if possible. We think that is the principal consideration which should move us."  

The next case is R. v. Adelman. The defendant was convicted of possession of marihuana. He was a 25 year old brilliant student who had no previous record. The trial judge gave him a suspended sentence. On appeal, the Court of Appeal imposed a six months sentence. It laid down sentencing guidelines for magistrates:

"The sole concern of judges and magistrates in imposing sentences is to act in the public interest. That public interest may be advanced in two ways:

(1) By the imposition of a sentence which will deter others from the commission of the same offence, or

(2) By the imposition of a sentence that will promote the rehabilitation of the prisoner so that he will not offend again and will become a useful member of society."

However, in applying this to its particular facts, the Court said that

"There is no question of rehabilitation here. This respondent does not require to be rehabilitated. His need is a change of attitude and that rests with himself."  

In effect, the defendant was severely penalized because of his intelligence. The Court felt that he was more blameworthy than the average person because of his aptitude.

The next case is R. v. Reynolds. The defendant was convicted of possession of marihuana and was given one day and a $500 fine. He had no previous record. Here the Court applied general principles to an offence under a statute which had a policy that required a more particular approach:

"Under the present state of the law the primary element in determining the sentence is that of deterrence."  

However, the Court proceeds and expounds a theory which gives more discretion to the trial judge:
"Imprisonment is not mandatory although the element of deterrence remains primary. It is the function of the judge or magistrate imposing sentence in the first instance, to apply his mind judicially to the question, whether in the particular case before him special circumstances exist which justify a sentence that is not primarily deterrent in its effect."\(^\text{97}\)

In *R. v. Falk*\(^\text{98}\) the Manitoba Court of Appeal, in laying down a very particular approach for cases of possession of marihuana, gave the trial judge a great deal of discretion in disposing of such cases. It stated:

"Under this circumstance the protection of the public becomes a matter of more than usual significance. It becomes a particularly important objective to which magistrates and judges should give careful attention when considering the question of sentencing. Each case must be dealt with on its own merits, but it is my view that in the present situation it will often be appropriate to impose a term of imprisonment even on first offenders, where in other circumstances suspended sentence might be deemed an adequate disposition."\(^\text{99}\)

The final case in this area is *R. v. Lehrmann*.\(^\text{100}\) It reviews most of the recent jurisprudence in this area. The defendant, a young University student and teaching assistant, was convicted of unlawful possession of marihuana. He had no previous criminal record and the offence involved a relatively small amount of the drug for personal use. At trial he was given one day in jail. However, the Alberta Court of Appeal increased this term to three months. It decided that a sentence of one day was inadequate because the use of marihuana has become all too prevalent. Deterrence is primary and not enough magistrates consider this when imposing sentences:

"... the sentence imposed in the case we now have under consideration can have little or no deterrent effect on other persons who may wish to engage in or experiment with the use of the narcotic in question, and it seems to me that the deterrent effect of sentences meted out in such cases is a matter of paramount importance."\(^\text{101}\)

The Court then went on to say that the defendant should, above all, have appreciated the necessity of maintaining a high standard of personal conduct and setting a good example to the young people with whom he was in contact.\(^\text{102}\)

Our next area of concern is section 4 of the Act which prohibits trafficking or possession for the purposes of trafficking any narcotic drug. We should remember the Debates to see the legislative intention for this offence. It appeared to be agreed that this is a very despicable offence and this is shown in the life imprisonment for which the offender is liable.

Like the previously discussed offence, the courts did not develop a rationale for sentencing traffickers until quite recently. The older cases did not discuss the purposes of sentencing in this area. A typical case is *R. v. Wilson*,\(^\text{103}\) where the magistrate gave the convicted trafficker 6 months and $200. The Court of Appeal increased this sentence to 4 years and $200 because it felt that the magistrate was too lenient.

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97 Ibid., p. 767.
99 Ibid., p. 216.
101 Ibid., p. 204.
102 Ibid., p. 204.
Before we discuss any rationale which has developed we should look at distinctions which have been introduced into this offence. The first is found in R. v. Kazmer et al. The Court here distinguished between those traffickers in the business and those not. At p. 154 the Court said:

"We think this class of offence (i.e., not in the business) is not as serious as that of selling drugs in a business and in consequence some distinction in the degree of punishment imposed should be recognized by the imposition of sentences of imprisonment less than the maximum permitted by the Opium and Narcotic Drug Act."

In this case the Court reduced the sentence from 7 years and $1000 plus whipping to 5 years and $500 plus whipping. This distinction has been accepted in R. v. Stephenson and R. v. Seibel.

In R. v. Campbell, there are two further distinctions introduced. One is explicit and the other is implicit in the decision. The first distinction is the one between a trafficker who is a drug addict and one who is not. In the case of the latter, the Court is likely to be more severe.

"The fact (i.e., that he was a non-addict) ... was a circumstance proper to be considered by the learned county court judge. It shows that this operation was a full scale capping operation, indicating that the trafficking was a cold blooded mercenary business."

A second possible distinction is one between a trafficker of heroin and one of marihuana. In this case, Campbell was trafficking heroin. He received 10 years for the offence. Even though large amounts were found, this sentence appears to be quite severe since it was his first offence. It is much higher than the cases of trafficking in marihuana which we will discuss later. The Court here does not refer to any such distinction.

In recent years courts have been recognizing the drug problem and have attempted to develop a rational approach to sentencing. A good case exemplifying this is R. v. Hudson, in which Kelly, J. A. wrote a well thought out opinion. Hudson was an 18 year old Yorkviller who was convicted of trafficking. The magistrate suspended the passing of sentence upon the defendant entering a recognizance to observe for two years certain conditions (e.g., reside with parents, 10 p.m. curfew, return to school). The Ontario Court of Appeal accepted Kazmer's distinction but it decided that Hudson fell in neither class. He was part of a sub-culture of young persons characterized by a retreat from the world of reality through the use of drugs. Kelly, J. A. then gave a description of life, conditions and philosophy in Yorkville. He recognized that the ordinary purposes of sentencing should not apply in this case.

"Those of whom the accused is one, who have accepted the use of psychedelic drugs as a socially desirable as well as a personally desirable course of conduct, are not as likely to be discouraged by the type of punishment ordinarily meted out to other traffickers; such treatment will likely serve to confirm them in their belief in the drug cult."

105 21 W.W.R. 256; 117 C.C.C. 292.
108 Ibid., p. 679.
110 Ibid., p. 506.
Rehabilitation was Kelly's prime concern. He was convinced that
"it is apparent that a solution, if one exists, must be found in the voluntary
rejection of that way of life (Yorkville) and a return to conformity to the
standards not unacceptable to the majority of society."\(^{111}\)

Hence he accepted the magistrate's decision although recognizing its
possible weaknesses.

"When there have been more occasions from which it is possible to appraise the
effect of such a disposition, and if it should be proven by such experience that a
Magistrate could not consider that his disposition gave adequate recognition to all
of the principles proper to sentencing, it may well be that this Court may feel that
there was an error in principle in a sentence similar to that imposed on the
accused. Until such experience has been accumulated, even realizing that the
Magistrate is venturing into an area where there is little to guide him, I do not
find him in error when he decided it was expedient that the accused be released
on probation upon entering into a recognizance which contained the terms which
the Magistrate imposed."\(^{112}\)

The reasoned approach of Kelly, J. A. was effectively diluted in \(R. v.
Simpson\).\(^{113}\) This 19 year old Yorkviller was convicted on 4 counts of
trafficking marihuana. The magistrate gave the defendant 4 months definite
and 6 months indefinite on each of the 4 charges, to be served concurrently.
The accused appealed the sentence emphasizing the principles laid down in
\(Hudson\). The Court (Aylesworth, Mackay, Kelly, Evans, Laskin) however,
said that \(Hudson\) must be confined to its particular facts. It did not stand
for the proposition that "those who traffic in marihuana are to receive lenient
treatment in some special cases if it appears that the convicted persons are
members of a particular cult ..."\(^{114}\)

The Court also pointed out the importance of deterrence in relation to
rehabilitation:

"The Magistrate in imposing sentence properly charged himself as to the elements
to be considered, namely, reformation, deterrence and prevention, but in our view,
upon the facts before him, failed to attribute sufficient importance to the element
of deterrence to others so that the evils inherent in trafficking in drugs may be
checked if not eliminated. The sentences imposed, however, were proper even
although the Magistrate over-emphasized the importance of the element of refor-
mation as contrasted with deterrence. Accordingly, we do not propose to interfere.
Nevertheless, it is important that we give our reasons for not doing so. At the
conclusion of the argument of the appeal, we indicated our disposition of it and
that we would deliver our reasons for dismissal at a later date.\(^{115}\)

Finally the Court emphasized the public interest in the form of general
deterrence:

"Some six months or more have elapsed since the decision in \(R. v. Hudson\) and
in the case at bar statistical information was introduced demonstrating that the
evil of trafficking in marijuana in the City of Toronto is markedly on the increase,
that such trafficking among juveniles now are a matter of frequent occurrence in the
Juvenile Courts of the city.
The appellant was a frequenter of 'Yorkville' and belonged to the proselytizing
cult so aptly described in the \(Hudson\) case. Undoubtedly, many members of that
cult are intelligent enough to know better than to expect that they may run
counter to the criminal law of this country without risking imprisonment; those of
them who Jack such an intelligence must learn what to expect from such conduct.

\(^{111}\) Ibid., p. 505.
\(^{112}\) Ibid., p. 508.
\(^{113}\) (1968) 2 O.R. 270. (Ont. C.A.).
\(^{114}\) Ibid., p. 271.
Finally and importantly, the protection of the public must include consideration of the interests, health and well-being of the vast majority of young people comprising individuals presently uncommitted to the use of this drug. As I have said, the sentence was appropriate; it is by no means a severe one, bearing in mind the gravity with which the offence must be regarded by reason of the maximum penalty of life imprisonment provided by the statute.\textsuperscript{115}

This view was also accepted by the Manitoba Court of Appeal in \textit{R. v. McNicol}.\textsuperscript{116} The defendant was convicted of possessing marihuana for the purpose of trafficking. The magistrate gave him one month and $400 so that his imprisonment would not interfere with his entrance into university. The Court of Appeal increased this sentence to one year. The public interest, in the form of general deterrence, clearly overrode the interest of the individual, in the form of rehabilitation.

"In the instant case, a sentence of one month in jail, to which was added a fine of $400, was totally inadequate for the nature, the gravity and the increased prevalence of the offence. Furthermore, the learned magistrate seemed much too concerned with the possible rehabilitation of this young offender. In doing so, he completely disregarded the interests of the community and put those of the individual ahead of those of the community."\textsuperscript{117}

Interestingly, the Court quoted extensively from \textit{Commonwealth of Massachusetts v. Leis and Weiss} to show marihuana is a harmful and dangerous drug. Unfortunately, it appears that Canadian courts only quote American cases when they substantiate the Court's decision.

In \textit{R. v. Martin} (unreported)\textsuperscript{118} the defendant was a 22 year old housewife. She was convicted of trafficking in marihuana and given 4 years. The Court justified this severe penalty by pointing out that life was the maximum penalty for this offence. "This maximum penalty reflects the gravity of the crime."

In \textit{R. v. Racine},\textsuperscript{119} the 21 year old defendant had no previous record. He was convicted of trafficking 1½ lbs. of marihuana. At trial he was given two months. The Court of Appeal increased this to 9 months because the trial sentence may have been an effective special deterrent but it was an inadequate general deterrent.

*The sentence imposed might deter the accused but it was sadly deficient in deterring others from engaging in the most repulsive of trades."

In \textit{R. v. Tremayne},\textsuperscript{120} the Court tries to balance the general deterrent purpose of sentencing and the reformative purpose:

*You are all young and this is your first conviction. However, I must impose a substantial term of imprisonment, both for the protection of the public and as a deterrent to others. I am, however, not going to make it so long that you will not have any hope of reform."

A recent case which emphasized rehabilitation is \textit{R. v. Nolet}.\textsuperscript{121} The defendant's sentence was reduced to 2 years less a day because, having regard

\textsuperscript{115} \textit{Ibid.}, p. 272.

\textsuperscript{116} (1968) 5 C.R.N.S. 242.

\textsuperscript{117} \textit{Ibid.}, p. 250.

\textsuperscript{118} (B.C. Cty. Ct.) April 23, 1969 (unreported).

\textsuperscript{119} (B.C.C.A.) April 2, 1969 (unreported).

\textsuperscript{120} (Ont. Cty. Judge Weaver), April 28, 1969, (unreported).

\textsuperscript{121} (Alta. C.A.) May 6, 1969 (unreported).
to the offender's youth, there was a better prospect of rehabilitation if sentence was served in a provincial jail. However, the description of this case is sketchy so that it would be premature to draw any conclusions about a change in judicial approach.

Another recent case which tended to diminish the role of deterrence in this area is R. v. Lurre.122 The 21 year old defendant brought marihuana back from Mexico and gave some to each of his roommates. The trial judge said that it was not in the public interest to impose a long sentence here. The Court of Appeal agreed and dismissed the Crown's appeal:

"Although deterrence, an important factor in the sentencing of marihuana offenders, was usually to be best achieved by a meaningful term of imprisonment, there were cases where the imposition of a lenient or even suspended sentence could be in the public interest."

An interesting refinement was introduced by R. v. Mills.123 In that case, the 19 year old offender, with no previous record, was convicted of selling one 1 gram of marihuana to the R.C.M.P. In approving a sentence of only one month and $500, McFarlane, J. stated:

While this sale must be regarded as falling within the definition of 'traffic' in sec. 2(1) of the . . . Act, I think the respondent's conduct would not be described as trafficking in the commonly accepted sense of the word."

The next case is Proc. Gen. Du Canada v. Lebrun.124 This case was decided in Quebec where the problem is not as acute as in British Columbia or in Toronto. A typical Quebec approach is taken in which the public interest is paramount. At trial the accused was given 12 months but the Court of Appeal increased this trafficking conviction to 7 years. The Court of Appeal said:

". . . at a time when the incidence of certain crimes was constantly increasing and on the other hand when systems for rehabilitation were in operation, it had become not only permissible but necessary in the interests of society that courts should accentuate exemplariness in sentencing."

The last case which I could find in this area is also a Quebec case, R. v. Grandbois.125 The 24 year old defendant was charged with trafficking in $7.00 worth of hashish. I would like to comprehensively discuss this case because it does such a thorough, albeit onesided job. The Court first proceeds in defining and distinguishing marihuana and hashish. Then it goes on to describe the effects of these drugs. It refers to a brochure published by l'Opta to quote Dr. Andre Boudreau who describe, the deleterious effects of these drugs. Then it quotes the poet Baudelaire who also describes these harmful effects (this must be a first!). It then quotes the "Memorandum to Consumers" in which the Minister of National Health and Welfare substantiates these descriptions. Finally it refers to Judge Tauro, C.J.C., of Massachusetts, who in a case thoroughly reviewed the American jurisprudence and had before him such experts as Dr. D. B. Louria of New York who testified that marihuana was harmful. The Quebec court then reaches some conclusions:

125 Vol. 6, Pt. 4, August 69, C.R.N.S. 313.
"(a) That the use of marihuana and hashish involves serious dangers;
(b) That there is a direct relationship between the use of these drugs and the use of heroin;
(c) That in order to procure these drugs, one must necessarily associate with those who traffic in them, or with 'pushers' who live off crime."

The Court then quotes Alvin Moscow's book "Merchants of Heroin" (1968). The author had access to the services and records of the Federal Bureau of Narcotics. He reproduces passages from this book. Unfortunately the court was unaware of Skolnik's criticisms on the bias of this Bureau.

Finally, the Court quotes from a brief from counsel for the Attorney-General of Canada. It described the conditions of the drug problem in Montreal in 1965. This is the first Brandeis-type brief accepted in a Canadian court of which I am aware since its notorious treatment in the Saumur case.

Then the Court discusses the jurisprudence which we have already reviewed. In conclusion the Court held:

"I have not taken into consideration the fact that you have no previous criminal record, and that you have been in prison since October, 1968. I am therefore sentencing you to two years in the penitentiary, and I hope that the authorities in the St. Vincent de Paul Penitentiary will, after assessing your capabilities, place you in the federal rehabilitation center where you will have the opportunity to learn a trade and to return to society, better prepared to face the difficulties of life."

Some Tentative Conclusions on the Sentencing of Narcotic Offenders

1. Judicial Action

(1) The Courts have not developed uniformity of action in the area of sentencing. But there is some consistency in that the public interest usually overrides the interest of the individual. However, there are a few sporadic cases where the individual interest does supersede.

(2) Of all the principles of sentencing, deterrence is clearly primary in Canadian cases of narcotic offences. This is so even after Mr. Fulton admitted in the 1960 Debates that this approach had failed in the past.

(3) The Courts have not questioned the Legislature's use of the criminal law power to regulate and restrict the use and traffic of narcotic drugs in Canada.

(4) The Courts are not offering the Legislature any suggestions on how or why these laws should be changed. This may be a product of a lack of expertise or of the concept of parliamentary sovereignty.

126 Ibid., p. 332.
127 J. H. Skolnik, Supra n. 22 at pp. 597-601.
129 Lebrun, p. 336.
2. **The Problem**

   (1) The Courts have recognized that this is a significant social problem. They have generally taken a conservative approach and assumed that marihuana is harmful.

   (2) The Courts hardly ever refer to scientific and social evidence on narcotic drugs. When they do, they only refer to the evidence which tends to show that marihuana is harmful. I saw no evidence to the contrary being referred to.

   (3) The Courts recognize that the problem is increasing. However, they tend to attribute this to inadequate sentencing. They do not ever question the effectiveness of the present policies of the legislature.

3. **Characteristics of Cases**

   (1) The problem is definitely localized. The majority of cases have been decided by the B.C.C.A. and the O.C.A. to a lesser extent.

   (2) There were no cases decided by a Maritime court.

   (3) Most cases concern marihuana.

   (4) Most cases, in both possession and trafficking, deal with first offenders.

4. **Characteristics of Offenders**

   (1) They are usually intelligent young people (in both offences) so that the rehabilitative purpose of the criminal law is not that important.

   (2) These young people are usually hippies and students rather than other types. This might suggest something about the incidence of the problem or the enforcement by police.

   (3) The Ontario Court of Appeal in *Simpson* stated that these “hippies” will not be given special treatment by the law even though in *Hudson* it recognized that the purposes of sentencing would be defeated in such cases.

   (4) There were no recent cases of middle-aged or older people. This might also suggest something about incidence or enforcement.

   (5) There was only one case of a narcotic addict.

5. **Possession**

   (1) In possession of marihuana cases of first offenders (the majority of these cases), the sentences usually range from a suspended sentence to a year. The maximum is 7 years with no minimum.

   (2) Possession of harder drugs and second offenders are treated more severely.
(3) From the Debates it appeared that in the past the Courts were lenient for such offenders. That is why no minimum was set for this offence in the 1954 legislation.

(4) The Courts definitely distinguish between marihuana and other drugs although they may deny this. They have been given a great deal of discretion in these cases as the Legislature intended.

6. Trafficking

(1) The trafficker of marihuana is likely to get from a suspended sentence to 2 years (*Lebrun* is an exception) if he is a young first offender and not in the business (as is usually the case). This is really quite lenient when you consider that life is the maximum and when you remember that many parliamentarians did not think this was severe enough.

(2) The Courts will be harsher when it is not a first offence and when the drug is not marihuana.

(3) There are some discernible distinctions in cases of this type:
   (a) whether the offender is in the business of drug trafficking or not;
   (b) the type of drug being trafficked;
   (c) the amount of drug that the offender is caught with;
   (d) whether the offender is a member of the subculture (this was rejected by *Simpson*).

(4) The law is not reaching the ‘big-time’ trafficker.

7. Specific Problems

The Courts are in a precarious position because:

(1) The laws (especially relating to marihuana) are not acceptable to many people. They feel that such offences are not criminal or immoral.

(2) The Courts are usually dealing with first offenders so that their discretion is great but their guidelines are few.

(3) The Courts are dealing with intelligent young people who do not need rehabilitation and are not deterred because of their feelings of the law. Incapacitation would likely cause more harm than it would cure. The only principle that the Courts still have is in general deterrence, even though the evidence is that the problem is ever increasing.

(4) The Courts are applying general principles to a very unique problem.

(5) The Courts have found themselves in the transitory period when the Legislature is likely to change the law very soon.
(6) The Court has the power, and perhaps the responsibility, to impose a criminal record on a young intelligent person for the rest of his life. Balanced against this is its own conception of a grave social evil that should be eradicated.

8. **Legislative Policy**

(1) Although not supposedly intended under the Act, deterrence still plays the primary role in the Courts.

(2) The deterrent effect of the Act is not as great as Parliament hoped:
(a) It has not restricted the traffic of drugs in Canada;
(b) It has not reduced the number of users of drugs in Canada.