Dissonance and Contradictions in the Origins of Marihuana Decriminalization

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The movement for removal of criminal penalties for possession of marihuana in the United States provides an important case study of the causes and process of decriminalization. Between 1975 and 1978, 11 states reduced criminal penalties for possession of small amounts of the drug, but the reform movement was fragile, brief, and limited to a few states. This case study suggests that reform was driven in part by "moral dissonance" resulting from the arrest of high-status offenders. Although public opinion has always been deeply divided on decriminalization of marihuana possession, a narrow "policy window" was created in the 1970s by the expressed concern of political leaders about the effect of arrest on high-status youths and the support of law enforcement agencies interested in efficient use of limited resources. Even after the window for reform closed at the end of the 1970s with a shift in national leadership, deep moral ambivalence renders criminalization symbolic and police place a low priority on marihuana arrests.

Many have observed that the 1970s was a period when a wide variety of deviant groups and their supporters began to mobilize to challenge popular stereotypes and to demand an end to discriminatory treatment (see, e.g., Weitzer 1991). The decriminalization of marihuana represents one part of this pattern. Previous research on the origins of criminal laws justifiably has been criticized for analysis of isolated case studies of one particular law, which Hagan (1980) claims has resulted in confusion in attempts to explain a law's passage. The study reported here attempts to avoid this problem by analysis of the legislative process in 11 states which, over a five-year period, removed jail sentences for possession of small amounts of marihuana. These laws, sometimes collectively referred to as "decriminalization," often specify

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decriminalization. We also demonstrate that the effects of these laws were primarily symbolic, and thus it should not be surprising that another type of symbolic response, de facto decriminalization, was a commonly accepted alternative that addressed conflicting social-class and political interests more adequately than statutory change. According to these formulations, a theory of decriminalization and its consequent contradictions must include consideration of the national mood, political leadership, concerns of interest groups, especially law enforcement and drug users, as well as public opinion.

Establishing Moral Dissonance

The social and economic costs of enforcement of prohibition of alcohol are legendary. During the 1920s there was a growing perception that the authorities' attempts to enforce prohibition were leading to disrespect for law in general and to a total breakdown in the social order (Kvig 1979). Repeal promised an end to the diversion of police from the arrest of "casual" law violators (Engelmann 1979:35), an easing of the hopeless clogging of the courts and prisons, and an elimination of "thou shalt nots" that are so tempting to the young (p. 191). Similar problems in law enforcement have also been central to the history of marihuana prohibition.

During the first half of the 20th century, marihuana use was concentrated among Latin Americans (LaGuardia Commission on Marihuana 1944), African Americans, the Greenwich Village "beat" community, and jazz musicians (Polsky 1967). These usage patterns are of great significance, for research on alcohol prohibitions (Gusfield 1963), opium laws (Morgan 1978), and other drug legislation (Musto 1973; Helmer 1975) indicates that the most severe punishment is reserved for those instances where a substance is publicly associated with a threatening minority group. During the 1960s, however, patterns of marihuana use began to change. By 1970 Goode reported survey data indicating that marihuana smokers were likely to be urban, college graduates in their early 20s. By 1977, 50% of those aged 18–25 had used this substance (Abelson & Fishburne 1977). A survey in 1979 (Fishburne et al.) indicated that 68% of those aged 18–25 reported that they had used marihuana. In addition, 69% of whites, 62% of all others, and 73% of those with college training had used the drug. These figures indicate not only that marihuana use increased dramatically during the 1970s among those 18–25, but that the increase especially occurred among middle-class, college-educated whites—a totally different picture from what existed during the 1930s. These demographic changes in the typical marihuana user provided the key social context for the reform of marihuana laws.
Given what is known about the relationship between patterns of drug use and penalty structures, it was not completely surprising that, coincident with these changing patterns of marihuana use, several states reduced marihuana possession penalties to misdemeanor levels, among them Nebraska (Galliher et al. 1974) and Utah (Galliher & Baslick 1979). The increasing risks of arrest for affluent young people were critical ingredients in the passage of these new laws, especially in homogeneous states where drug use was not associated with any local minority group (Galliher et al. 1974; Galliher & Baslick 1979). A statewide survey in Utah revealed widespread marihuana use by young people of nearly all ages and all social classes (Galliher & Baslick 1979:291): “Economic status is no deterrent to obtaining drugs and youngsters of all economic levels are involved,” the survey concluded. An attorney who supported reduction in drug penalties explained to the Utah state senate: “These are your kids, after all.” Another attorney involved in the lobbying effort said: “We also pointed out that the courts would be reluctant to convict in marihuana possession cases since the marihuana problem was hitting middle-class families and Mormon youth.”

In Nebraska a prosecutor’s son was arrested for marihuana possession, and his lawyers lobbied with a state legislator for misdemeanor penalties retroactive to the date of his arrest. Prior to the law’s passage, the Nebraska State Highway Patrol recorded an average of only 15 marihuana possession cases per year; after the change, arrests rose precipitously (Galliher et al. 1974).

By the late 1970s, Nevada was the only U.S. state retaining felony penalties for possession of the slightest amount of marihuana. Yet, just as was originally true in Nebraska, these severe penalties could not be enforced. In 1974, of the 214 persons convicted for marihuana possession, only 14 were actually sentenced to prison. In 1978, only 13 were sentenced to prison, and these were all “special cases” involving other criminal charges (Galliher & Cross 1982:983). The president of the Nevada Peace Officers complained in legislative hearings on misdemeanor penalties: “Judges are not sending people to prison as the present law calls for for smoking a joint of grass. . . . As a consequence, the law, as it stands today is being subverted. It’s being met with a lot of cynical amusement by the young people today” (ibid., p. 384). The experience in both Nebraska and Nevada suggests that the police desired a law that could be enforced when felony penalties began to be widely seen as inappropriate for marihuana users increasingly concentrated in the middle and upper classes. Similar evidence of difficulties in marihuana law enforcement from across the United States were disclosed in a federal report published in the early 1970s (National Commission on Marihuana & Drug Abuse 1972).
The Demise of Decriminalization in the 1980s

If the 1972 NCMDA Report provided the form as well as the timing of the states' decriminalization laws, perhaps we should again look to the federal level to understand why only 11 states passed such laws and why none did so after 1978. What seems important, if not essential, to this legislation is federal leadership. That leadership was briefly available during the Ford administration and early in the Carter administration, but missing prior to that time and thereafter. Until his resignation in 1974, President Nixon had consistently opposed decriminalization of marihuana, even after the publication of his commission's report, which he rejected. After Nixon left office and until 1978 there was considerable agreement among national political leaders on the desirability of marihuana decriminalization. However, this changed after marihuana use by Carter White House staff was reported. Carter was besieged by further charges of drug use among senior White House staff being leaked to the press. The Republican Senate minority leader called for an official investigation by the Justice Department into drug use among White House staff (Smith 1978). President Carter gave no support to decriminalization thereafter, undoubtedly in part because partisan political conflict with Republican opposition had not been the usual path to success, and Carter could have been expected to know that a partisan political conflict on marihuana decriminalization without whole-hearted Republican support would be hard to win.

At the time marihuana decriminalization bills were being passed, Skolnick (1978:27-28) observed: "Basically, the strategy of decriminalization has been to reduce penalties for the socially acceptable and powerful users." Yet with "concepts like decriminalization . . . we solve some problems, but create new ones." Skolnick (1978:28) quotes from the NCMDA report: "[I]t is painfully clear . . . that the absence of a criminal penalty for private use is presently equated in too many minds with approval . . . . The commission regrets that marihuana's symbolism remains so powerful, obstructing the emergence of a rational policy." At least in this regard, Skolnick and the commission were prophetic. The symbolism of marihuana use remained a powerful part of the legislative equation.

Even as early as the late 1970s, the views political leaders expressed began to change. In 1977 Dr. Robert DuPont, the former drug-policy advisor to the Nixon and Ford administrations, reversed his earlier support for decriminalization and advocated de facto decriminalization in its place.

On the substantive merits of the issue, everybody is for decriminalization. But the real issue is symbolic. Nobody wants to have anyone, young or old, go to jail for possession of small amounts of marijuana. But being in favor of decriminalization is seen by the majority of the public as being in favor of pot. . . . It is possible to eliminate jail as a threat for simple possession of marijuana without favoring decriminalization. That is the way out! In fact, as a nation we have already done that. . . . Those who now go to jail are the sellers of marijuana. (Anderson 1981:312)

De facto decriminalization has the added advantage of being a means of avoiding the rancorous conflict that surrounded decriminalization bills in New York, California, and Mississippi.

Additional evidence concerning de facto decriminalization emerges when government records of incarceration and arrest are compared with survey data on frequency of marijuana use. If it is assumed, as some respondents argued, that the primary concern in decriminalization hinges on the issue of incarceration, then it is necessary to determine the levels at which incarceration is actually used. In 1984 questionnaires were mailed to all state departments of correction asking for the number of inmates in the state prison system whose most serious crime was marijuana possession. The 43 states responding reported a total of 2,729 prisoners, for an average of about 65 per state. Given such small numbers, one can understand why a sense of urgency or widespread dissonance was missing.

The incarceration figures can also be compared with arrest figures. The FBI Uniform Crime Reports between 1977 and 1992 indicate that total drug arrests nearly doubled, while marijuana possession arrests have declined by nearly a third. In 1977 marijuana possession arrests accounted for 61% of all drug arrests; in 1986, 36% of all drug arrests; by 1992 this figure had dropped to 25%. These figures show that the police no longer are swamped primarily by marijuana possession cases, and that over these three decades there has been a steady decrease in the emphasis on marijuana possession enforcement compared to other drugs. Thus the sense of urgency regarding the bureaucratic benefits flowing from marijuana reform has vanished. Still, compared with the about 300,000 marijuana possession arrests made annually, the numbers incarcerated for marijuana possession are minuscule and give real evidence of de facto decriminalization.

The relatively constant number of marijuana possession arrests is mirrored by levels of marijuana use that remained relatively stable between the 1970s and the 1980s. For example, in 1976 approximately 52% of high school seniors had ever used marijuana. In 1980 the figure had increased to 60% but had dropped again by 1985 to 54%, about the same level as found in 1976 (Bachman et al. 1986). One possible explanation for the
decreasing support for the decriminalization movement is that states passing such laws might have routinely experienced consequent increases in marihuana use. No such evidence exists. There were similar patterns in the frequency of marihuana use in decriminalization states compared with those without such laws (Johnston et al. 1981). The decreased proportions of all drug arrests involving marihuana and scant use of incarceration cannot be attributed to there being far fewer marihuana users or much less marihuana in circulation. Given the widespread use of marihuana reflected in survey results, these arrest and incarceration figures suggested some de facto decriminalization. Yet they also indicated that the process was not quite complete, contrary to the claims of DuPont.

If de facto decriminalization indicates how the legislative reform has been stalled, the question that remains is why it occurred and at this particular time. Himmelstein (1986) has observed that by the 1980s, or even earlier, local parents’ groups concerned about marihuana began to form, the New Right emerged as a major antimarihuana force, and federal officials no longer supported decriminalization. He concluded: “Which is cause and effect is hard to say” (p. 10). The 1980s ushered in a new conservative Republican administration. In 1986 President Reagan attempted to initiate a “national crusade” to combat the drug epidemic, which he said was “a repudiation of everything America is” (Pasztor 1986). This crusade is consistent with Reagan’s opposition to decriminalization while he was governor of California, given his fear of sending the wrong message to potential users. To this was added Mrs. Reagan’s cant, “Just Say No to Drugs.” More recently, the Bush administration’s director of drug control policy, William Bennett, joined the crusade in criticizing skeptics like economist Milton Friedman and former Secretary of State George Shultz for their observations that the nation’s drug control policies were not enforceable. Bennett was unswayed by these difficulties. “I remain an ardent defender of our nation’s laws against illegal drug use and our attempts to enforce them because I believe drug use is wrong” (Bennett 1989). When a federal judge called for legalization due to his first-hand observations of the collapse of drug law enforcement, Bennett responded by asserting that this argument was as “morally atrocious as it ever was.”

Bennett, like DuPont, apparently preferred unenforced legislation as opposed to actual decriminalization—because of the symbolic power criminal penalties provide even if unenforced. The cornerstone of the Bush administration’s efforts to control illegal drugs is found in its voluminous National Drug Control Strategy published in 1989. No mention was made there of decriminalization of marihuana, and only feeble

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recommendations were made for marihuana control, including increased intelligence in foreign drug-producing countries and stepped-up crop eradication.

Yet the failure of decriminalization produced additional dissonance and contradictions. "[R]esolutions of particular conflicts," as Chambliss noted (1979:7–8), "create further conflicts." To understand these problems, it is important to emphasize that the academic community was of little direct significance in this dispute because there was comparatively little debate about the definition of marihuana or the degree to which it is a dangerous drug. Just as in the 1930s when expert medical testimony was ignored in federal marihuana legislation (Gallihier & Walker 1977), the impact of physicians in the decriminalization process seemed blunted by the fact that even as early as the 1970s marihuana was already widely recognized as something other than a very dangerous drug. During the 1980s the medical picture remained unchanged. In 1988 a Drug Enforcement Administration (DEA) administrative law judge ruled that marihuana was "one of the safest therapeutically active substances known to man" (Isikoff 1988), with no evidence of a single cannabis-induced fatality and thus the drug should be made available for legitimate medical purposes such as the treatment of glaucoma and the nausea resulting from chemotherapy in cancer patients (Drug Enforcement Administration 1988). "But the DEA rejected its own judge's opinion and stands firm that doctors shall not prescribe marihuana."79 In 1989 the Director of the Office of National Drug Control Policy, William Bennett, publicly admitted that marihuana was no more dangerous than alcohol but still saw no reason to support any legal changes.80

Alaska, the only state to have repealed a decriminalization law, did so by referendum in 1990 after the state legislature had consistently refused to recriminalize marihuana, knowing that, if enforced, any such statute would be overturned by the state supreme court (Boyko 1990). The Anchorage Bar Association also had unanimously voted to oppose recriminalization because of problems of selective enforcement. But shortly prior to the referendum vote, William Bennett traveled to Alaska to offer his support.81 Unlike the state bar association, the minority whip of the state assembly was not concerned with actual enforcement of the measure, which called for up to 90 days in jail and a $1,000 fine. He was quoted as claiming:

> People like me understood that the law is more than just putting people in jail. It has other functions as well. The law is a witness. The law is a testament to our values. It describes what

Another leader of the drive to recriminalize marihuana said the voters should be congratulated for "sending out a strong message against drugs." Yet another leader said, "what I am hoping to achieve with this law is to begin to tell our young people, 'This stuff is harmful. It is hurting you.' And we will begin, hopefully not only to change the attitudes of the children, but the attitudes of the parents." Thus, all supporters appeared to agree that the vote itself sent a symbolic message and that was the critical issue rather than actual enforcement.

Summary: The Continuing Contradictions of Marihuana Control

The problem addressed here concerns the origins of marihuana decriminalization, both its inception and its lapse into de facto decriminalization. Two factors seem important—bureaucratic, law enforcement problems and moral dissidence. The first played a major role in decriminalization, while the second was a factor both in the origins of decriminalization legislation and in the symbolic form this reform eventually took in de facto decriminalization, which avoids jail terms without formal legal change. Marihuana decriminalization provided what initially seemed to be an ideal resolution to the conflict between the drug use of affluent Americans and the requirements of law enforcement. Among the eleven decriminalization states, there were very few instances of severe press opposition. Yet the immediate significance of the mass media and of itself is less important than might be imagined because across the nation, even in states that never decriminalized marihuana, press reports during the 1970s became increasingly sanguine about marihuana and its users (Flemmestein 1983; Shepherd 1979). If the scientific evidence remained unchanged, the mass media in the 1980s largely ceased making distinctions between marihuana and other drugs, thereby playing a role in a resurgent "drug frenzy" (Ehrenreich 1988:20). And all successful decriminalization bills had some law enforcement support, as Scheerer (1978) also found in the Netherlands. Our results are much like Inciardi's (1981), who also noted that decriminalization drives were propelled through state legislatures largely by efforts aimed at increasing law enforcement efficiency. Such instrumental considerations often dominate the agenda of local officials, responsible as they are for local social order. After the first wave of decriminalization laws

82 Ibid.
84 Donahue Show, NBC News, 16 Nov. 1999 (cited in note 81).