1-1-1976

California's New Marijuana Law: A Sailing Guide for Uncharted Waters

Gerald F. Uelmen
Santa Clara University School of Law, guelmen@scu.edu

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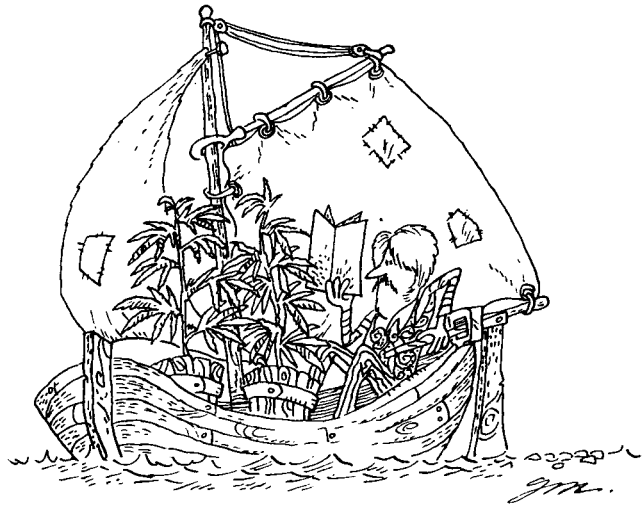


By Gerald F. Uelmen

On July 9, 1975, Governor Brown signed Senate Bill No. 95, and California joined the growing ranks of states[1] which have dramatically reduced the penalties for possession and use of small quantities of marijuana. Eleven weeks later, on September 26, 1975, the Governor signed Senate Bill No. 268, providing for a mandatory sentence of five years to life imprisonment for anyone convicted of selling or offering to sell more than one-half ounce of a substance containing heroin, and California became one of the few states[2] which have disinterred harsh mandatory sentences as a means of controlling drug traffic. Thus, California drug laws now reach to two extremes on the spectrum of punishment, depending upon the drug: possessing or transporting less than one ounce of marijuana is punishable by a maximum of a $100 fine; selling more than one-half ounce of a substance containing heroin is punishable by a mandatory prison sentence of five years to life. Both new laws took effect on January 1, 1976, and are certain to have a dramatic impact upon future operations in every aspect of the California criminal justice system. The purpose of this article is to assess the impact of these new laws and identify some of the problems that they will create for judges, prosecutors and defense attorneys who will be struggling with their application.

Senate Bill No. 95: Possession and Use of Marijuana.

1. Reduced Penalties

The chart which appears as Table 1 summarizes the new penalties for the various offenses, contrasting them to the penalties for other regulated drugs. Certainly the most dramatic and widely publicized change in the law is the reduction of the maximum penalty for possession of one ounce or less of

[1]Oregon was the first state to reduce the penalty for possession of a small quantity (less than 1 oz.) of marijuana to a fine in 1973. During the past year, similar legislation was enacted in Alaska, Colorado, Maine and Ohio.

[2]*Cf.* McKinney's Consol. Laws of N.Y. Penal Law §220 ff.

TABLE 1
CALIFORNIA PENALTIES FOR DRUG OFFENSES

[ALL SECTION NUMBERS REFER TO CALIF. HEALTH & SAFETY CODE.]

	MARIJUANA		CONCENTRATED CANNABIS	NON-NARCOTIC DRUGS (E.G., AMPHETAMINES, BARBITURATES)	NARCOTIC DRUGS (E.G., OPIATES, HEROIN, PEYOTE, COCAINE)
	Less Than One Oz.	More Than One Oz.			
POSS.	$100 Fourth Offense in Two Years: Diversion. (§11357)	6 Mos./$500 (§11357)	1 Yr. Jail/1-5 Prison/$500 (§11357)	(1) 1 Yr. Jail/1-10 Prison (2) 2-20 (2 Yr. Min.) (§11377)	(1) 2-10 (2) 5-20 (3) 15-Life (§11350)
POSS. FOR SALE	(1) 2-10 (2 Yr. Min.) (2) 5-15 (3 Yr. Min.) (3) 10-Life (6 Yr. Min.) (§11359)			(1) 2-10 (2 Yr. Min.) (2) 5-15 (3 Yr. Min.) (3) 10-Life (6 Yr. Min.) (§11378)	(1) 5-15 (2) 10-Life (3) 15-Life (§11351)
GIVING AWAY	$100		(1) 5-Life (3 Yr. Min.) (2) 5-Life (5 Yr. Min.) (3) 10-Life (10 Yr. Min.)		(1) 5-Life (2) 10-Life (3) 15-Life
TRANSP.	(§11360)				
SALE	(§11360)	(§11360)	(§11360)	(§11379)	(§11352)
SALE TO MINOR BY ADULT	(§11361)	(§11361)	(1) 10-Life (5 Yr. Min.) (2) 10-Life (10 Yr. Min.) (3) 15-Life (15 Yr. Min.) (§11361)	(§11380)	(§11353)
CULT-IVATION	(1) 1-10 (1 Yr. Min.) (2) 2-20 (2 Yr. Min.) (3) 5-Life (5 Yr. Min.) (§11358)				PEYOTE: (1) 1 Yr. Jail/1-10 Prison (2) 2-20 (§11363)

marijuana from a possible 10 year prison sentence to a fine of not more than $100 (§ 11357(b)).[3] Even where possession is of a quantity greater than one ounce, the maximum penalty has been reduced to no more than six months imprisonment in the county jail, and/or a fine of no more than $500 (§ 11357(c)).

Similar reductions in penalty are also in store for those who "give away" or "transport" less than one ounce of marijuana. These offenses will be punishable by a fine of not more than $100 (§ 11360 (c)). Previously, California drug laws recognized no distinction between "sales" and "gifts" of drugs, treating all transfers alike. The distinction between a "sale" or "gift" is likely to become a frequently litigated issue, turning upon "whether any consideration is given or to be given in exchange for the marijuana."[4] Apparently, the giving away of marijuana in a "friendship" context is a much more frequent transaction than its sale. It has been reliably estimated that 71 per cent of less than monthly smokers have never bought marijuana, but received it from a friend.[5]

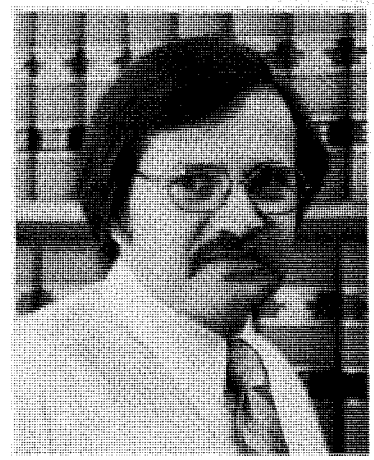
The maximum penalty of a five year to life prison sentence remains in the California Health and Safety Code for sale of *any* quantity of marijuana, or for giving away or transporting more than one ounce (§ 11360 (a)). This creates a very vivid contrast, in which the distinction between a "gift" and a "sale," or the distinction between transfer of less than one ounce or more than one ounce, can mean the difference between a $100 fine or life imprisonment. Such distinctions are seldom "black and white," and the lack of a "middle ground" in the law will certainly create problems if prosecutorial discretion is not wisely and uniformly applied. These problems were avoided in the Oregon law by providing that any transfer of marijuana could be punished as either a misdemeanor or a felony (10 year maximum) in the discretion of the sentencing judge.[6]

[3]Unless otherwise noted, all section numbers refer to the provisions of the California Health & Safety Code, as amended by S.B. 95. Stats. 1975, Ch. 248.

[4]Legislative Counsel's Digest, S.B. 95 (1975).

[5]E. Goode, *The Marijuana Smokers,* (1970) p. 255.

[6]16 Oregon Rev. Stat., §167.207 Subd. 2 (1973).



GERALD F. UELMEN received his B.A. from Loyola University (1962) and J.D. and LL.M. from Georgetown University (1965, 1966). After serving as an Assistant United States Attorney in Los Angeles (1966-70), he joined the Faculty of Loyola University School of Law where he is a Professor of Law. He is the co-author of Drug Abuse and the Law *(West, 1974), and a Certified Specialist in Criminal Law.* *The assistance of Gary J. Singer, Loyola Law School '77, in the preparation of this article is gratefully acknowledged.*

Quantitative Issues

With the quantity of marijuana becoming pivotal, we can expect to see two issues being consistently raised. First, what should be weighed? Marijuana commonly contains a mixture of all parts of the cannabis plant, and occasionally other plant substances such as parsley or tobacco may be mixed in as well. Defendants will be heard to argue that non-useable cannabis seeds and stalks, and substances from plants other than cannabis, should be separated before the weigh-in, relying upon cases which have held non-usable residue cannot be used to establish possession.[7] Prosecutors will counter by pointing to the statutory definition of marijuana, which includes "all parts of the plant Cannabis Sativa L., whether growing or not [and] the seeds thereof. . .," although it specifically excludes "the mature stalks of the plant" and "the sterilized seed of the plant

[7]*People v. Villabolos,* (1966) 245 Cal.App. 2d 561; *People v. Leal,* (1966) 64 Cal. 2d 504.

which is incapable of germination."[8] These exceptions, which recognize and protect the legitimate use of hemp stalks for rope and sterilized marijuana seeds as canary food, may present serious problems for police laboratories, which are ill-equipped to analyze seeds to ascertain if they are "capable of germination," or to trace the origin of plant substances to the stems rather than the stalks. The legislative history of S.B. 95 offers little guidance as to how this issue should be resolved, but the drastic penalties reserved for quantities greater than one ounce suggest a very strict approach to measurement.[9] Secondly, will it be a defense for a defendant to assert that he honestly believed he was in possession of *less* than one ounce, when in fact he possessed *more* than one ounce? The statute makes no suggestion that knowledge of the *quantity* possessed is an element of the crime. Can such a requirement be implied? In a related context, it has been said that "a mistake of fact relating only to the gravity of an offense will not shield a deliberate offender from the full consequences of the wrong actually committed."[10] While the difference between less than one ounce and more than one ounce affects only the "gravity" of the offense, the difference in degree of punishment is so extreme that it bears greater resemblance to the difference between conduct which is "innocent" and conduct which is "criminal."[11] Thus, a good faith belief that the quantity possessed was less than one ounce should be recognized as a valid defense.

Escalator Clause Out

One unique characteristic of California drug laws has been the "escalator clause" by which the penalties reserved for second and third offenders are greatly increased. With respect to the penalties for possession, giving away, and transporting less than one ounce of marijuana, this pattern has been abandoned. Multiple offenders will face no more than the same $100 fine they faced on their first conviction. Even second and third offenders possessing *more* than one ounce will face no greater penalty than the six months in jail and/or $500 fine proscribed for first offenders. There is a provision, limited for some unexplained reason to the offense of simple possession of less than one ounce of marijuana, that one who has three prior convictions within the previous two years shall be "diverted" pursuant to Sections 1000.1 and 1000.2 of the California Penal Code (§ 11357(b)). The real effect of this provision, however, is to *reduce* the penalty for fourth offenders, since Penal Code § 1000.2 provides for dismissal of the charges upon successful completion of the "education or treatment program" to which the defendant is diverted. As an alternative, if the defendant is not accepted for or refuses to accept diversion, the only penalty which can be imposed is the same $100 fine specified for all other offenders.

Amended Offenses

Three other offenses that previously applied to marijuana use have been amended, so their application will be limited to drugs *other* than marijuana: (1) The offense of possession of pipes or other devices used for smoking or injecting controlled substances (§11364); (2) The prohibition of knowingly visiting or being in a room or place where controlled substances are being smoked or used (§ 11365); and (3) The crime of using or being under the influence of a controlled substance (§ 11550). Thus, mere use of marijuana, apart from its possession, is no longer any crime at all in California.[12] It may take some ingenuity, however, to devise a way to use it without possessing it!

Cultivating Penalty Same

One offense that remains untouched by the new law is the crime of cultivation of marijuana, (§ 11358), still carrying a penalty of one to ten years. The "grow your own" cult has achieved great popularity in California, with detailed guides for the care and feeding

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[8]Cal. Health & Saf. Code §11018 (West Supp. 1975).

[9]*See People v. Coles,* (N.Y. Sup. Ct., May 29, 1975) 17 Crim. L. Rptr. 2282.

[10]*People v. Lopez,* (1969) 271 Cal.App. 2d 754, *holding* that defendant's reasonable belief recipient was over 21 would not be a defense to charge of furnishing drugs to a minor.

[11]*Cf. People v. Hernandez,* (1964) 61 Cal. 2d 529.

[12]However, public intoxication by marijuana can still be punished under Penal Code §647 (f).

of cannabis plants being commercially published and sold. Back country hikers frequently stumble upon miniature marijuana plantations in out of the way meadows. Now that the risks of cultivating and growing marijuana are so much greater than simply purchasing it in small quantities, we might expect "home grown" marijuana to decline in popularity—but no such effect has been reported in Oregon.

2. Concentrated Cannabis

Hashish is extracted from resin scraped off the flowering top of the cannabis plant. It can be smoked or eaten, and is thought to be about five to eight times as potent as marijuana.[13] California law has never treated hashish or other forms of concentrated cannabis differently than marijuana. Marijuana was defined to include "the resin extracted from any part of the plant,"[14] and one who possessed or sold hashish was liable to the same penalties imposed for less potent forms of marijuana. This comes to an end with the new marijuana law. Simple possession of *any* amount of "concentrated cannabis" may be a felony or misdemeanor, in the discretion of the sentencing judge, with a maximum term of one to five years in state prison (§ 11357 (a)). Transfer or transportation of "concentrated cannabis" carries the same five year to life term reserved for sale of marijuana.

"Concentrated cannabis" is defined as "the separated resin, whether crude or purified, obtained from marijuana." (§ 11006.5). Thus, in addition to hashish, such exotic concoctions as "ganja," a combination of resin with the leaves and flowering tops of the cannabis plant, would be included.

The effect of this change in the law upon the use patterns of marijuana as opposed to hashish will be interesting to observe. The rise in the popularity of hashish was attributed to stepped up efforts to control the illegal importation of marijuana—hashish being less bulky and easier to smuggle in.[15] Whether the greater risks of possessing hashish as opposed to marijuana will result in a decline in its popularity remains to be seen.

Species Definition

The legal definition of "concentrated cannabis" may create a renaissance for the "species defense." This defense, recently asserted in many marijuana cases, was based on the contention that the marijuana plant is actually at least three different species of plant: Cannabis Sativa L., Cannabis Ruderalis, and Cannabis Indica.[16] The statutory definition of marijuana in California Health and Safety Code § 11018 refers only to the plant "Cannabis Sativa L." In dried crushed form, it is virtually impossible to tell which species of the plant marijuana came from. Nonetheless, in *People v. Van Alstyne,*[17] the Court held that the § 11018 definition included *all* species of the marijuana plant. The Court expressed its confidence that "[h]ad the possibility that marijuana is polytypical in species been called to the attention of the Legislature, we are satisfied that the Legislature. . .would have adopted a new [definition] that expressly included all newly-recognized species."[18] A warning, however, was implicit in the final paragraph of Justice Cobey's opinion: ". . .while the legislative intent behind Section 11018 is, to our mind, perfectly clear, and was expressed in words entirely adequate in 1972 to convey that intent, scientific advances have since rendered these words obsolete for that

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[13]Delong, *Dealing With Drug Abuse: A Report to the Ford Foundation,* (1972) p. 97.

[14]Cal. Health & Saf. Code §11018 (West Supp. 1975).

[15]E. Brecher, *Licit & Illicit Drugs,* (1972) p. 443.

[16]*See* Fullerton & Kurzman, *The Identification and Misidentification of Marijuana,* (1974) 3 Contemp. Drug Problems 291.

[17]46 Cal.App. 3d 900 (1975). *Accord: United States v. Walton,* ___ F.2d ___ (D.C.Cir. 1974). *Contra: United States v. Lewallen,* 385 F.Supp. 1140 (E.D.Wis. 1974); *United States v. One 1966 Chevrolet Sedan,* ___ F.Supp. £££, 14 Cr.L. 2387 (S.D.Fla. 1974).

[18]46 Cal.App. 3d at 917. The Court apparently overlooked the fact that the Legislature had recognized the existence of another species of marijuana in Health & Safety Code §26254, enacted in 1939, regulating the labeling of a number of drugs, including "cannabis indica." When this section was repealed in 1970, and replaced by Health & Safety Code §26634, the reference to "indica" was dropped, and only "cannabis" is listed, suggesting that the 1970 Legislature was well aware of the multiplicity of species, and capable of resolving the ambiguity created by this diversity.

fewer legal entanglements will result from their use, and the more inclined attorneys will be to utilize the advantages of this modern method of recording testimony.

Conclusion

The time has come for trial lawyers to take bold strides with the advances in available technology. Hopefully, the advantages which Ohio has experienced with video taped testimony will bring about early adoption by California of legislation permitting video taped trials. Michigan experiments have shown that video taping eliminates the "trial-of-the-trial" conducted by court and counsel on evidentiary questions, with all of its potentialities for jury confusion. Video taped trials, utilizing video taped deposition testimony, offer the opportunity to conduct this phase outside of the jury's presence, and to conduct it with adequate time to research precedent and avoid erroneous rulings.

At the very least, it is time for California and other states to take the small step of permitting video tapes to be used in lieu of traditional stenographic reporting during pretrial depositions, with a view toward developing experience among bar members in the use of this, after all, not very new medium.

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purpose. In our opinion, section 11018 as now worded constitutes a potential trap for the unwary and the Legislature would be well advised to rewrite the section so that it plainly says what it means. Otherwise enforcement of the policy of the section will be imperilled."[19] The warning went unheeded: not only does the new marijuana law make no change in the legal definition of marijuana, it *incorporates* that definition in defining the newly proscribed substance "concentrated cannabis." Newly enacted Health and Safety Code § 11006.5 defines "concentrated cannabis" as "the separated resin, whether crude or purified, obtained from marijuana." Since marijuana is still defined in § 11018 as the plant Cannabis Sativa L., the argument will be made that only hashish derived from this species of plant is included in the proscription. The argument may have an even stronger basis in the context of hashish use, as compared to marijuana. Since most marijuana grown in North America is apparently of the species Sativa L.,[20] it may be fair to assume that crushed marijuana found in this country was not derived from one of the more exotic species, such as Indica or Ruderalis, which are indigenous to the Middle East.[21] Much of the hashish found in this country, however, is imported from the Middle East,[22] creating a substantial likelihood it may have been derived from a species other than Cannabis Sativa L.

The use of the term "resin" to describe hashish has also been criticized as ambiguous, since different compounds will be extracted from the plant depending upon which solvent is used in the extraction process.[23] By not limiting the definition of "concentrated cannabis" to resin which includes the pharmacologically active ingredient of marijuana, tetrahydrocannabinols, the Legislature may have included harmless substances having no psychoactive effect.

3. Destruction of Arrest and Conviction Records

Three principle provisions of the new law relate to destruction of arrest and conviction records. First, all those arrested for or convicted of possession of marijuana, regardless of amount, or giving away or transporting less than one ounce of marijuana, will have their record of arrest and/or conviction

[19] (1975) 46 Cal.App. 3d at 918.

[20] *See* note 15, *supra.*

[21] *Id.*

[22] E. Brecher, *Licit and Illicit Drugs,* (1972) p. 443.

[23] Stein, Laessig & Indriksons, *An Evaluation of Drug Testing Procedures Used by Forensic Laboratories and the Qualifications of their Analysts,* 1973 Wisc. L.Rev. 727, 769.

automatically expunged, by destruction of the record, after two years (§ 11361.5(a)). Secondly, all those who were arrested for or convicted of possession of marijuana, regardless of amount, *prior* to January 1, 1976, may *petition* the Superior Court for the county in which the arrest or conviction took place, to have the records pertaining to the arrest or conviction destroyed (§ 11361.5(a)). Destruction is mandatory once the court determines that the arrest or conviction for simple possession of marijuana did occur. The petitioner is required to pay the costs of destruction of the records, up to a maximum of $50. No exception is noted for those who are still serving probationary or prison sentences pursuant to the conviction they seek to expunge, nor is the two year waiting period imposed upon convictions occuring after January 1, 1976 applicable to convictions prior to that time. Thirdly, once an arrest or conviction record is destroyed, either automatically or upon petition, no public agency can rely upon the arrest or conviction as grounds to "alter, amend, assess, condition, deny, limit, postpone, qualify, revoke, surcharge, or suspend any certificate, franchise, incident, interest, license, opportunity, permit, privilege, right, or title." (§ 11361.5(c)). Presumably, the conviction record *can* be so used during the two year period before expungement. If so, this provision may offer little consolation to the school teacher who is dismissed for two years. If the only purpose of the two year delay is to preserve the rather weak sanction for multiple offenders, it makes little sense to condition the prohibition of public reprobation upon prior destruction of the record.

Courts Flooded

The breadth of these provisions is staggering, when one contemplates the approximately 50,000 arrests that have been made for marijuana possession in each of the past five years in California.[24] A literal flood of petitions from the victims of these arrests and subsequent convictions can be expected to deluge the California courts.

In other states where wholesale statutory expungement or reduction of prior sentences has been attempted, courts have held these provisions invalid on the ground that the power of clemency or commutation is constitutionally vested exclusively in the executive. For example, the Texas legislature, as part of a statutory reduction in penalties for marijuana possession, included a provision permitting all those *previously* convicted of marijuana offenses to petition the court in which they were sentenced for "resentencing" in accord with the new law. This provision applied regardless of whether the offenders were presently serving a sentence, were on probation or parole, or had been discharged from a sentence.[25] In *State ex rel Smith v. Blackwell,*[26] the Texas Court of Criminal Appeals found this provision unconstitutional, as a violation of Article IV, Section 11 of the Texas Constitution, which provides:

> "In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction,. . .to grant reprieves and commutations of punishment and pardons."

Governor's Power

Since the new law resulted in a reduction of sentence for previously convicted offenders, it was held to infringe upon the power of commutation exclusively vested in the governor. A similar position was taken by the Colorado Supreme Court, interpreting a Constitutional provision very similar to that of Texas.[27] These cases are particularly significant, because the California constitutional provision relating to reprieves, commutations and pardons is virtually identical to that of Texas and Colorado:

> "Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment."[28]

This raises two issues: (1) Is the expungement provision of the new marijuana

[24]California Bureau of Criminal Statistics, *Crime and Delinquency in California,* 1972.

[25]571 Tex. Rev. Civ. Stat., Article 4476-15 (Vernon Supp. 1975).

[26](1973) 500 S.W.2d 97.

[27]*People v. Herrera,* (Colo. 1973) 516 P.2d 626.

[28]Cal. Const., art. V, §8.

law the equivalent of a "reprieve," "pardon" or "commutation?" (2) Is the pardon power vested exclusively in the governor?

A "pardon" has been defined as an exemption from punishment and a removal of any disqualifications or disabilities which would ordinarily have followed from the conviction.[29] While an "expungement" has virtually the same effect, certain collateral effects of conviction have been preserved; most notably, government employment and licenses can be denied on the basis of the defendant's conviction despite its expungement.[30] Procedurally, the pardoning power can be exercised only after conviction.[31] Expungement, on the other hand, has the effect of voiding the conviction by judicial dismissal of the accusation filed against the defendant.[32] At least as applied to past convictions, the provisions of § 11361.5 of the new marijuana law thus go further than previous expungement provisions, in *expressly* prohibiting the denial of government employment or licenses, and in providing that an actual record of a valid conviction be destroyed. Thus expungement is virtually indistinguishable from a pardon. Similarly, there is no meaningful distinction between a "commutation" and an expungement of a conviction upon which a defendant is still serving the sentence.

Constitutional Question

Whether the pardon power is exclusively vested in the governor is an unsettled question in California.[33] In *People v. Odle,*[34] the Supreme Court limited the effect of Penal Code § 1260, providing an appellate court may "reduce. . .the punishment imposed," to situations where it finds errors relating to the punishment imposed by the trial court. The Court noted that "to construe the Section otherwise would give the court clemency powers similar to those vested in the governor, and raise serious questions relating to the separations of powers."[35] Previous enactments of the Legislature granting "expungement"[36] have avoided the problem by providing that the court retroactively enter a verdict of not guilty and *vacate* the judgment of conviction, so the process differs from a pardon—the court is simply exercising its continuing jurisdiction over the defendant. The new marijuana law ignores such procedural niceties: the record of conviction is simply destroyed. Thus the stage may be set for a full scale constitutional test of the exclusiveness of the governor's power of pardon.

4. Procedural Rights of Offenders

Those arrested for possessing, giving away or transporting less than one ounce of marijuana cannot be taken into custody and booked by the arresting officer (§ 11357(b)). Upon presentation of satisfactory evidence of identity, and giving a written promise to appear in court, the defendant must be released by the arresting officer. The procedure to be followed in issuing the notice to appear is described in California Penal Code § 853.6, as amended by S.B. 95.

Just as in the case of a traffic ticket, the defendant will be able to dispose of the case without ever appearing in court—simply by posting the amount of bail fixed by the magistrate, then failing to appear. California Penal Code § 853.6 provides that, after forfeiting bail, the magistrate "may in his discretion order that no further proceedings shall be had." The only exception, requiring a personal appearance by the defendant, is where he has previously been convicted of the same section—but even then, the magistrate can declare no further proceedings upon finding undue hardship will be imposed upon the defendant by requiring him to appear.

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[29] *People v. Biggs,* (1937) 9 Cal.2d 508, 511.

[30] *See* Note, *The Effect of Expungement on a Criminal Conviction* (1967) 40 So.Cal.L.Rev. 127; Baum, *Wiping Out a Criminal or Juvenile Record,* (1965) 40 Cal.State Bar J. 816.

[31] Calif. Const., Art. 5, §8; *People v. Brunner,* (1973) 32 Cal.App. 3d 908.

[32] See Cal. Penal Code §1203.4 (West 1972).

[33] This question was noted, but not reached, in In Re Collie, (1952) 38 Cal.2d 396.

[34] 37 (1951) Cal.2d 52.

[35] 37 Cal.2d at 58.

[36] Cal. Penal Code §§1203.4, 1203.4a (West 1972). *See* Baum, *Wiping Out a Criminal or Juvenile Record,* (1965) 40 Cal.State Bar J. 816.

When and if the defendant does appear in court, it will in all likelihood be without a lawyer. (Who would hire a lawyer when all that's at stake is a fine of $100?) At this point, we might ask whether the defendant will be entitled to have the public defender appointed to represent him? And whether the defendant is entitled to a trial by jury? Since one purpose of S.B. 95 was, ostensibly, "to unclog the courts," it would seem inconsistent with that purpose to require appointment of counsel and jury trials for cases involving no more than a $100 fine. Yet, apparently that is precisely what the Legislature did!

Misdemeanor vs. Infraction

Constitutionally, neither the appointment of counsel[37] nor a jury trial[38] are required when a defendant is charged with an offense not punishable by a jail sentence. Consistent with these rulings, the California Penal Code defines an "infraction" as an offense which is not punishable by imprisonment, and provides:

> "A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him unless he is arrested and not released on his written promise to appear, his own recognizance, or a deposit of bail."[39]

Both the right to appointed counsel and jury trial have been held applicable to those charged with misdemeanors in California.[40]

Section 17 of the California Penal Code provides that all crimes which are not felonies (punishable by imprisonment in the state prison) are misdemeanors, "except those offenses that are *classified* as infractions." Thus, it would seem logical that the new offenses of possession, giving away or transporting less than one ounce of marijuana, being punishable by no more than a $100 fine, would be treated as infractions. Nonetheless, in defining each of these offenses, the Legislature declared the violator "is guilty of a *misdemeanor* and shall be punished by a fine of not more than $100." That this departure from the ordinary scheme of classification was a deliberate and conscious choice of the Legislature is readily apparent. First, *any* description of an offense as felony, misdemeanor or infraction is unusual, since most penal provisions simply specify the penalty. Thus, the specific use of the word "misdemeanor" indicates the Legislature's intent that this offense *not* be treated as an infraction. Secondly, the Legislature's intent to provide a right to jury trial appears from the provision for diversion of fourth offenders, in which it is required that the three prior convictions be charged and "found to be true by the jury upon a jury trial." (§11357(b)). Apparently, this step was taken in the belief that the classification of "misdemeanor" would carry a stronger flavor of disapprobation of marijuana use then merely calling it an "infraction."

Fourth Amendment Protection

There may be justification other than linguistic gamesmanship for treating these offenses as misdemeanors, rather than infractions, despite their light penalty. The appointment of counsel at least insures that some attention will be paid to the circumstances under which the marijuana was seized. If defendants were not entitled to appointment of counsel, it is unlikely that they would ever raise Fourth Amendment objections in marijuana possession cases, and the limitations which the constitution imposes upon police searches could quickly become a dead letter in marijuana possession cases—precisely the kind of cases where the protection may be needed most.

5. Effect Upon Diversion Programs

During each of the past two years, pursuant to the provisions of California Penal Code §§ 1000-1000.2, approximately 25,000 defendants charged with drug offenses have been "diverted" to treatment programs in lieu of prosecution. Seventy-seven per cent of these cases have involved simple possession of marijuana.[41] Assuming most of these marijua-

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

[38] *Duncan v. Louisiana*, (1968) 391 U.S. 145.

[39] Cal. Penal Code §19c (West 1972).

[40] *In Re Masching*, (1953) 41 Cal.2d 530; *Mills v. Municipal Court*, (1973) 10 Cal.3d 288, 298.

[41] Report, State Office of Narcotics and Drug Abuse, *Penal Code Section 1000: The Drug Offender Diversion Program* (August, 1975).

na possession cases involved less than one ounce,[42] a sizable reduction in the flow of defendants into diversion programs can be anticipated. While diversion remains available in all marijuana possession cases, it can be anticipated that most defendants will prefer to simply pay the fine. An attempt to estimate the size of this reduction was made by the State Office of Narcotics and Drug Abuse, which recently surveyed prosecutors and probation departments. Estimating that only 20 per cent of marijuana possession cases involve more than one ounce, it was predicted that diversion caseloads may decline as much as 60 per cent.[43] Some of the slack may be picked up by the expanded eligibility for diversion resulting from the enactment of A.B. 1274, which became effective January 1, 1976, and which added several new offenses to the list of divertable offenses contained in Penal Code § 1000.[44]

6. Effect Upon Juveniles

Since approximately one-third of arrests for marijuana possession in California involve juveniles,[45] an important question arises as to the effect of the new legislation upon juvenile court proceedings. The answer, apparently, is none. Juvenile Court jurisdiction over juvenile marijuana users is posited upon § 602 of the California Welfare and Institutions Code, which provides:

> "Any person who is under the age of 18 years when he violates any law of this state. . .defining crime. . .is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

Thus, regardless of whether marijuana possession is classified as a felony, misdemeanor or infraction, it is still a "crime," and brings a juvenile within the jurisdiction of the juvenile court.

Nor would the provisions for issuing "citations" to offenders, rather than taking them into custody, have application to juvenile offenders. Under § 625.1 of the Welfare and Institutions Code, a police officer can take a minor into temporary custody without a warrant whenever he has reasonable cause to believe the minor has committed a public offense in his presence.

B. Senate Bill No. 268: Sale of Heroin.

1. Mandatory Prison Sentences

Senate Bill No. 268 literally sailed through the Legislature, sweeping through the Assembly 70 to 1 and the Senate 29 to 0. It was a predictable response to a startling statistic: 64 per cent of 2,012 convicted heroin sellers in 1973 received probation.[46] The bill even received the unprecedented endorsement of the President of the United States, who noted in a speech to the Legislature that "here in California, from the latest figures I've seen, less than one out of five convicted hard-drug pushers ever serves time in prison."[47]

The solution to this problem offered by Senate Bill No. 268 is not a new one: mandatory prison sentences have frequently been seized upon as an expedient answer to crime problems in the past. Yet every noteworthy study of the past two decades has condemned this solution as illusory and self-defeating,[48] culminating in the adoption of the following standard by the American Bar Association Project on Minimum Standards for Criminal Justice:

> "The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense."[49]

The mandatory sentencing provision of

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[42]Based upon a nationwide sample, the National Commission on Marijuana and Drug Abuse estimated that 67 per cent of all state marijuana arrests were for possession of less than one ounce. *Marijuana: A Signal of Misunderstanding,* (1972) (First Report of the National Commission on Marijuana and Drug Abuse), p. 111.

[43]1 Joint Newsletter, P. 7 (State Office of Narcotics and Drug Abuse, June 1975).

[44]The following offenses are added to Penal Code §1000 by A.B. 1274: Health & Safety Code §11358 (Cultivation of Marijuana); §11550 (Being Under Influence of Controlled Substance); Penal Code §381 (Inhaling Fumes); 647 (f) (Public Intoxication by Drug); Business & Professions Code §4230 (unauthorized Possession of Prescription).

[45]California Bureau of Criminal Statistics, *Crime and Delinquency in California,* 1972.

[46]Los Angeles Times, Sept. 27, 1975, Part II, p. 1.

[47]*Id.*

[48]Model Penal Code §6.02, comment, pp. 13-14 (Tent. Draft No. 2, 1954); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, p. 143 (1967); Task Force Report: Corrections 27-28 (1967); Working Papers of the Nat'l Commission on Reform of Federal Criminal Laws, Vol. II, pp. 1251-55 (1970).

[49]ABA Standards Relating to Sentencing Alternatives and Procedures, §2.1 (c).

Senate Bill No. 268 is contained in new Penal Code Section 1203.07, which will prohibit the granting of probation or suspending the execution or imposition of sentence for three classes of offenders:

1. Any person convicted of violating § 11351 of the Health and Safety Code by possessing for sale one-half ounce or more of a substance containing heroin. Section 11351 of the Health and Safety Code prohibits the Possession for Sale of a number of narcotic drugs in addition to heroin, but only heroin is encompassed by § 1203.07.[51] No quantity is specified in § 11351 as sufficient to establish that the purpose of possession was for sale; the intent to sell can be established by expert testimony based upon the quantity of the drug, how it was packaged, the prior activity of the defendant, and whether or not he was addicted to the drug.[52] Normally, possession of one-half ounce of heroin would be sufficient to establish an intent to sell, since addicts would seldom have that large a quantity in their possession for personal use.[53]

2. Any person who is convicted of violating § 11352 of the Health and Safety Code by selling or offering to sell one-half ounce or more of a substance containing heroin. Section 11352 of the Health and Safety Code, like Section 11351, encompasses a number of narcotic drugs in addition to heroin. It prohibits not only the sale or offering to sell these drugs, but also the transporting, importing, furnishing, administering or giving away of the drug. Only those defendants convicted of *selling* or *offering to sell* the drug will be subject to the mandatory sentencing provisions of § 1203.07, which means the provision may be unavailable if the defendant is charged alternatively with "selling, furnishing and giving away" the drug, as is currently routine practice in most prosecutor's offices.[54] On the other hand, if the defendant is charged only with "sale" or "offering to sell," then the "purchasing agent" defense should be available to the defendant. This defense, by which the defendant asserts he was not the actual seller of the drug, but was merely acting as the agent of the purchaser in acquiring the drug from someone else and delivering it to the purchaser,[55] would not be available to a defendant who is charged with "furnishing" or "giving away" a drug, since one need not be the actual "seller" to commit those offenses.[56]

The inclusion of "offering to sell" one-half ounce or more means many defendants may be subjected to the mandatory sentencing provisions of § 1203.07 simply as a consequence of their own false bravado. Those who offer to sell frequently boast of their access to quantities far in excess of reality.

3. Any person convicted of violating § 11351 of the Health and Safety Code by possessing for sale heroin, or convicted of violating § 11352 of the Health and Safety Code by selling or offering to sell heroin who has one or more prior convictions for violating § 11351 or § 11352 of the Health and Safety Code. Regardless of the quantity involved, one who sells, offers to sell, or possesses for sale heroin will be subject to the mandatory sentence provisions if he has previously been convicted of violating either § 11351 or § 11352. The

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[50]Opium, Opiates such as methadone, Opium Derivatives such as codeine and morphine, Mescaline, Peyote, Tetrahydrocannabinols and Cocaine are all included within the ambit of §11531.

[51]One may question whether there is a rational basis for singling out heroin and classifying it differently than other narcotic drugs. *Cf. People v. McCabe,* (1971) 49 Ill.2d 338. There are few differences between heroin and other opiates in terms of potential for addiction. See De Long, *Dealing With Drug Abuse: A Report to the Ford Foundation,* (1972) pp. 71-85.

[52]*People v. Newman,* (1971) 5 Cal.3d 48.

[53]At one grain per dose, one-half ounce of pure heroin can represent more than 225 individual doses. One grain is approximately 65 milligrams. Heroin addicts have been known to develop a very high tolerance to the drug, however, and some studies have reported addicts receiving as much as 200 milligrams (three grains) of pure heroin in a single dose and not batting an eye. Daily habits of up to 28 grains per day have also been reported. See Brecher, *Licit and Illicit Drugs,* (1972) p. 104.

[54]A verdict need not specify upon which of the three premises, (sell, furnish or give away) the statute was violated. *People v. Pierre,* (1959) 176 Cal.App.3d 198.

[55]*Adams v. United States* (5th Cir. 1955) 220 F.2d 297.

[56]Even where one is charged with "sale," however, the California courts have not been hospitable to the "purchasing agent" defense, holding the evidence sufficient to find aiding and abetting a sale. *People v. Guttierez,* (1962); 207 Cal.App.2d 529, 531; *People v. Becerra,* (1959) 175 Cal.App. 2d 53, 55. But *see People v. Bernal,* (1959) 174 Cal.App.2d 777, 785.

prior convictions, of course, need not have involved heroin, since § 11351 and § 11352 apply to other narcotic drugs as well.

This is not, of course, the first time that the Legislature has resorted to the mandatory prison sentence as a means of dealing with narcotic offenders. In Section 11370 of the Health and Safety Code, prison sentences are mandated for any person convicted of a long list of drug offenses[57] if they have any prior felony conviction involving a narcotic drug, marijuana, peyote or cocaine. The impact of §11370 has been substantially diluted, however, by the discretionary power of the sentencing judge to strike the allegation of a prior conviction over the objection of the prosecutor. An attempt to limit that power, by requiring the concurrence of the prosecutor before an allegation of a prior conviction could be struck,[58] was held unconstitutional as an invasion of the judicial power of sentencing in *People v. Tenorio.*[59] Although in *Tenorio* the prior conviction only had the effect of enhancing the penalty and did not render the defendant ineligible for probation, the power to strike a prior has also been recognized in the context where one effect of the prior would be to render the defendant ineligible for probation under § 11370.[60]

Judiciary Decision

One can certainly question whether the new mandatory provision of Penal Code §1203.07 will fare any better than the old one in Health and Safety Code § 11370 when it confronts the independence of the judiciary. The power to strike priors is clearly bottomed on the power to dismiss contained in Section 1385 of the Penal Code. As noted in *People v. Burke:*[61] "The authority to dismiss the whole includes, of course, the power to dismiss or 'strike out' a part." This principle can be logically extended beyond prior convictions as the triggering mechanism. For example, the allegation that a sale or offer to sell or possession for sale involved more than one-half ounce of heroin, which must be established before § 1203.07 can take effect, could also be struck. Such an allegation would stand in no better posture than an allegation that a person used a firearm in the commission of an offense, which triggers an additional five year penalty pursuant to Penal Code §12022.5. In *People v. Dorsey,*[62] the Court held the allegation of the use of a firearm could be struck at the time of sentencing if "the trial court finds that allowing such a finding to stand would be counter-productive to the eventual rehabilitation of the defendant and that such additional incarceration is neither necessary nor desirable in the handling of that particular offender."

The statutory manipulation by which S.B. 268 created Penal Code §1203.07 may also raise serious questions of equal protection of the laws, by creating artificial and irrational classifications of offenders who are or are not eligible for probation. Prior to the enactment of S.B. 268, all those convicted of possession for sale (§11351) or sale of narcotic drugs (§11352) who had a prior felony conviction involving either those drugs or marijuana were ineligible for probation by virtue of the provisions of Health and Safety Code §11370. When S.B. 268 removed §11351 and §11352 from the operation of §11370, however, and placed those offenses under the operation of new Penal Code §1203.07, it included *only* those offenses involving heroin. Thus, all those who possess for sale or sell *any quantity* of the *other* drugs proscribed in §11351 or §11352 including opium, morphine, cocaine, methadone and peyote, remain

[57]Those liable for mandatory sentences under §11370 include defendants convicted of violating the following sections of the Health and Safety Code: §11350 (Possession of Narcotics), §11353 (Adult Sale of Narcotic to Minor), §11355 (Selling Substance Falsely represented to be Controlled Substance), §11357 (Possession of Marijuana), §11359 (Possession of Marijuana for Sale), §11360 (Sale of Marijuana), §11361 (Adult Sale of Marijuana to Minor); §11363 (Cultivating Peyote), §11366 (Maintaining Place for Sale of Narcotics); §11368 (Forging Prescription). §11351 (Possession of Narcotics for Sale) and §11352 (Sale of Narcotics) were eliminated from this list by S.B. 268.

[58]Cal. Health and Safety Code §11718. After the *Tenorio* decision, §11718 was repealed. Stats 1972, ch. 1407, §2, p. 2987.

[59](1970) 3 Cal. 3d 89.

[60]*In Re Gomes,* (1973) 31 Cal. App.3d 733.

[61](1956) 47 Cal.2d 45, 51.

[62](1972) 28 Cal.App. 3d 15, 18.

eligible for probation, even if they have several prior convictions. Those who simply possess these drugs, or possess or sell less dangerous drugs such as marijuana, remain ineligible for probation if they have prior convictions, by virtue of §11370 of the Health and Safety Code. Another anomaly is that new Penal Code §1203.07 is operative upon one who sells or possesses for sale heroin, irrespective of amount, if he has a prior conviction under §11351 or §11352 of the Health and Safety Code. The prior conviction section of Health and Safety Code §11370 was much broader, extending to any felony offense involving specific drugs. Thus, a defendant who sold one-tenth of an ounce of heroin would be ineligible for probation under Penal Code §1203.07 if he were previously convicted of a sale of one-tenth of an ounce of heroin to an adult. On the other hand, the same defendant *would* be eligible for probation if his prior conviction was for selling 10 pounds of heroin to a minor, because the conviction would be under § 11353 of the Health and Safety Code, rather than the two offenses specified in Penal Code § 1203.07, and the broader prior felony provisions of Health and Safety Code § 11370 no longer apply.

No rational reason appears for these classifications, and even applying the most generous standards of equal protection, it is unlikely they could withstand a constitutional attack.[63]

2. Aggregate Weight

The mandatory prison sentence provisions of S.B. 268 are triggered by a sale, offer to sell, or possession for sale of "one-half ounce or more of a substance containing heroin." The significance of this phraseology can only be appreciated in the context of the typical pattern of heroin distribution. As the drug passes from importer to wholesaler to retailer, it is "cut" or diluted at every stage of the distribution process. Typically, a "street ounce" of heroin contains less than 5 per cent heroin.[64] By defining the cut off point as aggregate weight, or "one-half ounce of a substance containing heroin," rather than pure weight, the degree of dilution becomes irrelevant: one is equally liable whether he possesses one-half ounce of pure heroin or one grain of heroin diluted by one-half ounce of milk sugar. The explanation for use of this aggregate weight standard apparently lies in the difficulty presented to police laboratories if they were required to do *quantitative* analysis, and actually determine the percentage of a drug contained in a substance. It is much easier to simply determine whether the substance contains *any* heroin, than to ascertain the percentage it contains. Whether this is ample justification to lump all possessions of one-half ounce together, regardless of the degree to which the substance has been "cut," is open to serious question. The degree of the "cut" directly corresponds to the level at which one would be in the distribution chain.[65]

Nonetheless, aggregate weight has been used as the standard in both New York and New Jersey, and has withstood constitutional challenge in those states.[66]

3. Elimination of Minimum Parole Terms

Senate Bill No. 268 eliminates the minimum parole terms contained in Sections 11350, 11351 and 11352 of the Health and Safety Code. These provisions delayed eligibility for release on parole beyond the one-third of the minimum normally required by Penal Code §3049, requiring instead that, in the case of sale of narcotics, a first offender serve three years of the five-life sentence, a second offender serve 10 years of a 10-life sentence, and a third offender serve 15 years of a 15-life sentence. Lest we suspect the Legislature of magnanimity in this gesture, however, it should be noted that the California Supreme Court had found the 10 year

[63]Compare *Marshall v. United States,* (1974) ___ U.S. ___, 94 S. Ct. 700.

[64]Brecher, *Licit and Illicit Drugs,* (1972) p. 99.

[65]*Id.* But *see Interim Report of the Temporary State Commission to Evaluate the Drug Laws,* New York, State Legislative Document No. 10, (1972), p. 60, suggesting the inequity is superficial, because even when cut to 5%, possession of one ounce "is indicative of major dealership."

[66]*United States v. Haynes,* (2d Cir. 1968) 398 F.2d 980; *State v. McDonald,* (N.J. 1966); 224 A. 2d 18; *People v. Cameron,* (1973) 73 Misc. 2d 790, 791.

minimum for parole eligibility contained in §11352 was unconstitutional, constituting both cruel and unusual punishment under Article I, Section 6 of the California Constitution, in *In Re Foss*.[67]

In any event, those subjected to the mandatory prison sentences required by new Penal Code § 1203.07 will be eligible for parole after serving the usual one-third of their sentence.

Minimum parole terms still remain, however, in the Health and Safety Code provisions establishing penalties for possession and sale of non-narcotic drugs.[68] In terms of the rational basis for classification required by the equal protection clause, it is difficult to justify a requirement that one selling *marijuana* must serve three years to a five-life term,[69] while one serving a five-life term for sale of *heroin* is eligible for parole after 20 months.

4. Cruel and Unusual Punishment

Most of those who fall within the ambit of the mandatory prison sentence imposed by new Penal Code §1203.07 will face a maximum term of life imprisonment. Those convicted of possession of heroin for sale face a penalty of five-15 years imprisonment for a first offender, 10-life for a second offender, and 15-life for a third offender.[70] Those convicted of sale of heroin face five-life, 10-life and 15-life sentences for first, second and third offenders, respectively.[71]

In *In Re Lynch*,[72] the California Supreme Court held that a life term for a second offense of indecent exposure extracted cruel and unusual punishment, in view of the nature of the offense, a comparison of the punishment for other offenses deemed more serious, and a comparison of how the same offense is punished in other jurisdictions. Applying these criteria, a close question is presented whether the life terms imposed for these offenses are "cruel and unusual." The Supreme Court did not reach the question of the constitutionality of the life maximum in striking the 10 year minimum for parole eligibility in *In Re Foss*.[73] Yet, it is clear from *In Re Lynch*[74] that:

> "The test is whether the maximum term of imprisonment permitted by the statute punishing his offense exceeds the constitutional limit, regardless of whether a lesser term may be fixed in his particular case by the Adult Authority."

When made in the context of drug laws,

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[67](1974) 10 Cal.3d 910. *Cf. People v. Ruiz*, (1975) 49 Cal.App. 3d 739.

[68]See Health and Safety Code §§11358, 11359, 11360, 11361, 11377, 11378, 11379, 11380.

[69]Health & Safety Code §11360.

[70]Health & Safety Code §11351.

[71]Health & Safety Code §11352.

[72] (1972) 8 Cal. 3d 410.

[73]*Supra*, n. 65.

[74](1972) 8 Cal. 3d at 419.

TWENTY-THIRD ANNUAL PRESS-BAR AWARD

The twenty-third Annual Berton J. Ballard Press-Bar Award will be given for the best story, feature, editorial, or series of related articles published by unspecialized newspapers for the public at large between July 1, 1975, and June 30, 1976, concerning the administration of justice in California.

1. The State Bar of California provides the $500 prize and The Society of Professional Journalists (Sigma Delta Chi), conducts the contest. The prize will be awarded at the State Bar Convention September 19-23 in Fresno. The jury may make Awards of Merit and special commendation to others whose pieces also serve the purpose of the award well.

2. In donating the prize, the State Bar aims to improve the administration of justice in California by encouraging writers and editors to inform the people about our system of justice and how it may work better. Entries are made in the name of their author or authors. Entries can also be made for a writer by his newspaper, a civic group, the local bar association, or friends.

We try to keep things simple: Just one set of your entry, mounted flat, not folded, on 8½ x 11 or 8½ x 13 paper or card stock will do.

3. Basis of judgment: Accuracy, writing skill, public service, significance of the event, subject matter difficulty, enterprise, and originality.

4. Deadline: July 9, 1976.

5. Please send your mounted clippings with a simple covering letter to: **Secretary, Berton J. Ballard Press-Bar Awards Jury, State Bar of California, 601 McAllister Street, San Francisco, California 94102.**

the cruel and unusual punishment argument has had mixed reviews in other jurisdictions. In *People v. Lorentzen*,[75] the Michigan Supreme Court struck down a 20 year mandatory minimum sentence for sale of marijuana, and in *Downey v. Perini*,[76] the United States Court of Appeals for the Sixth Circuit found sentences of 10-20 years for possession of marijuana for sale and 20-40 years for sale of marijuana were cruel and unusual. However, mandatory life sentences for sale of heroin and cocaine were upheld by the New York Court of Appeals in *People v. Broadie*.[77]

C. Conclusion

With the adoption of both Senate Bill No. 95 and Senate Bill No. 268 within the same three month period, the California Legislature did indeed go "from one extreme to the other."

Senate Bill No. 95 is a far reaching piece of legislation, and will certainly result in some reduction in the caseloads being carried by the courts, prosecutors, public defenders, and probation officers, although not as substantial as if the new possession offenses had been classified as "infractions." The new law also promises relief from the stigma of an arrest/conviction record for thousands of those who were charged under previous laws, although the reality of that promise may face a serious constitutional test. The contrast between the leniency of the new penalty provisions and the harshness of remaining provisions of the California drug laws will certainly create greater pressure for broader reform of California drug laws. Finally, the reduction in penalties will not immunize the marijuana possession laws from broad constitutional attacks. Shortly after Alaska enacted new legislation similar to California's, its Supreme Court unanimously held that *any* criminal punishment of private use of marijuana is a violation of the constitutional right of privacy.[78] The Legislature's failure to amend the basic statutory definition of marijuana may also provide new grist for the "species" defense, especially in hashish cases. All of these problems certainly suggest that the controversy surrounding the law's treatment of marijuana users has certainly not been laid to rest with Senate Bill 95.

Senate Bill No. 268 faces an even rockier road in the courts. Its mandatory sentencing provisions are likely to fare no better than previous efforts to impose mandatory sentencing in California when faced with the progeny of the *Tenorio* decision. The irrational classifications of offenders it creates may run afoul of the equal protection clause. Its use of an aggregate weight standard is based upon a questionable premise. And the life imprisonment it mandates raises a substantial issue of cruel and unusual punishment. All of these problems certainly suggest that the solution to the problem of the heroin seller may lie elsewhere than in the political expediency of mandatory sentencing.

[75](1972) 387 Mich. 167, 194 N.W. 2d 827.
[76](6th Cir. 1975)___ F.2d ___, 17 Cr.L.Rep. 2324.
[77](1975) ___ N.Y.2d ___, 17 Cr.L. Rep. 2285.

[78] *Ravin v. State*, (Alaska Sup. Ct., May 27, 1975) 537 P.2d 494. The court based its decision upon a State Constitutional guarantee of privacy very similar to Article I, §1 of the California Constitution. A test case based upon the right of privacy was filed in California by the National Organization for Reform of Marijuana Laws on October 31, 1975.