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The California Marijuana Possession Statute: An Infringement on the Right of Privacy or Other Peripheral Constitutional Rights

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THE CALIFORNIA MARIJUANA POSSESSION STATUTE: AN INFRINGEMENT ON THE RIGHT OF PRIVACY OR OTHER PERIPHERAL CONSTITUTIONAL RIGHTS?

The question of the constitutional validity of the California marijuana possession statute in light of recent decisions will be examined in this comment. Before undertaking the constitutional analysis, a review of the statute itself is in order.

Under California law, a person who "plants, cultivates, harvests, dries, . . . processes . . . or possesses" marijuana[1] is committing a felony,[2] and, if convicted, faces a mandatory sentence of 1 to 10 years in the state prison for a first offense, 2 to 20 years for a second offense, and 5 years to life imprisonment for a third offense.[3] In contrast to the harsh penalties for offenses involving the possession of marijuana, using marijuana or being under its influence are misdemeanors, punishable by county jail sentences ranging from 90 days to 1 year.[4] The severity of punishment for possession of marijuana may also be contrasted with the misdemeanor penalty assessed for possession of LSD (lysergic acid diethylamide).[5]

If the narcotic possessed is one of the "hard" narcotics such as heroin, morphine, or cocaine, which are addictive whereas marijuana is not,[6] the punishment is quite similar to the penalties for marijuana possession. The statute assesses penalties of 2 to 10 years for a first conviction, 5 to 20 years for a second conviction and 15 years to life imprisonment for a third conviction.[7]

As a further contrast, it is noted that there is no law against the mere possession of alcoholic beverages in spite of the well-known

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[1] The statutory definition of marijuana is: "all parts of the plant Cannabis sativa L. (commonly known as marijuana), whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seed or resin." CAL. HEALTH & SAFETY CODE § 11003.1.

[2] Under CAL. PEN. CODE § 17 a felony is defined as "a crime which is punishable with death or by imprisonment in the state prison."

[3] CAL. HEALTH & SAFETY CODE § 11530.

[4] CAL. HEALTH & SAFETY CODE § 11721. In practice the part of the statute prohibiting use of marijuana has little importance because if the accused possesses marijuana he will be prosecuted under the felony provisions of section 11530; if he does not possess marijuana but is under its influence then section 11721 will be applied. Boyko & Rotberg, *Constitutional Objections to California's Marijuana Possession Statute*, 14 U.C.L.A.L. REV. 773, 785 n.63 (1967).

[5] CAL. HEALTH & SAFETY CODE § 11910 treats a first conviction for the possession of LSD (classified as a restricted dangerous drug in CAL. HEALTH & SAFETY CODE § 11901(c)) as a misdemeanor subject to a maximum punishment of a $1000 fine and 1 year imprisonment in the county jail.

[6] CAL. WELF. & INST'NS CODE § 3009 states: "A 'narcotic addict,' as used in this subdivision refers to any person, adult or minor, who is addicted to the unlawful use of any narcotic as defined in Division 10 of the Health and Safety Code, *except marijuana*." (emphasis added).

[7] CAL. HEALTH & SAFETY CODE § 11500.

dangers of this intoxicant.[8] Criminal penalties are imposed only when alcohol is used in some abusive manner, such as when a person is intoxicated in public[9] or operates a motor vehicle while under the influence of alcohol.[10]

The legislative history of marijuana regulation shows a trend of increasingly severe penalties for its possession. In 1907 marijuana was first regulated by the California Legislature when it was included within the class of substances which had to be labeled as "poison."[11] Possession of marijuana was lawful until 1915 when possession unless prescribed by a physician was prohibited.[12] In 1929 the legislature passed the State Narcotic Act[13] which regulated the possession of marijuana by including it among habit forming, narcotic and other dangerous drugs and substances. Thus marijuana was at this time first included among the "hard" narcotics such as heroin, morphine, and cocaine.[14]

In 1939 the Narcotics Act was incorporated into the California Health and Safety Code[15] along with the same illicit narcotics gathered together in 1929.[16] Marijuana possession and the planting provisions were placed in section 11530, a separate section, in 1959.[17] The present mandatory felony sentences were part of a scheme by which longer sentences for possession of all narcotics were imposed in 1961.[18] Prior to 1961 the punishment for marijuana possession was in the alternative so that the trial judge in his discretion could make the offense either a misdemeanor or a felony depending on the sentence imposed.[19]

It is clear that the most recent development in a long history of

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[8] Even where possession by certain groups likely to misuse alcohol is discouraged, the method of control is to restrict the sale of alcoholic beverages to them. For example, CAL. BUS. & PROF. CODE § 25658(a) makes sale of alcoholic beverages to a minor a misdemeanor, and CAL. PEN. CODE § 397 makes the sale of alcoholic beverages to any habitual drunk a misdemeanor. *See In re* Luera, 28 Cal. App. 185, 152 P. 738 (1915), holding a municipal ordinance making the possession of alcohol illegal to be an unconstitutional abridgment of the privileges and immunities guaranteed a citizen by U.S. CONST. art. IV, § 2, and amend. XIV, § 1. *But see In re* Yun Quong, 159 Cal. 508, 114 P. 835 (1911), where the privileges and inmmunities argument failed when used to attack a conviction for possession of opium. For an interesting view why different societal attitudes concerning marijuana and alcohol prevail, see note 178 *infra*.

[9] CAL. PEN. CODE § 647(f) punishes as a misdemeanant one "[w]ho is found in any public place under the influence of intoxicating liquor . . . ."

[10] CAL. VEHICLE CODE §§ 23101-02.

[11] Cal. Stats. 1907, ch. 102, §§ 1-10, at 124-26 (Indian hemp, another name for marijuana, is used in the statute).

[12] Cal. Stats. 1915, ch. 604, § 2, at 1067-71 (Loco weed, another name for marijuana, is used in the statute).

[13] Cal. Stats. 1929, ch. 216, § 1, at 380-83.

[14] *Id.*

[15] Cal. Stats. 1939, ch. 60, §§ 11000-797, at 755-76.

[16] Cal. Stats. 1939, ch. 60, § 11712, at 771.

[17] Cal. Stats. 1959, ch. 1112, § 7, at 3194-95.

[18] Cal. Stats. 1961, ch. 274, § 7, at 1305.

[19] Cal. Stats. 1959, ch. 1112, § 7, at 3194-95.

regulation of marijuana possession is by far the most severe.[20] But even in the face of felony punishment it appears that more and more arrests are made and convictions obtained in California for the possession of marijuana.[21] Reliable sources claim that use of marijuana and its availability are on the upswing.[22] These facts tend to indicate that the statute is punishing offenders without any significant deterrent effect.

Timeliness of Constitutional Attack

The question of the constitutionality of the marijuana possession statute is of more than purely academic interest because of the increasing number of arrests,[23] the severity of the punishment,[24] the inconclusive evidence available on the nature of the drug and its effects,[25] and the growing public controversy over the entire subject of marijuana regulation.

Recently there has been increasing debate across the nation over the harshness of the marijuana possession laws as compared to the alleged effects of the drug.[26] The Commissioner of the United States Food and Drug Administration has said that the "severity of the penalties is inconsistent with the nature of the drug itself."[27] The United States Presidential Commission on Law Enforcement and Administration of Justice has called for a reevaluation of the marijuana laws.[28] Even in the light of increasing arrests and growing public controversy there is little likelihood of immediate repeal of the California marijuana possession statute although there is a possibility that legislation may be introduced making possession of marijuana subject to alternative felony-misdemeanor sentencing or reducing the punishment to a misdemeanor.[29]

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[20] See Boyko & Rotberg, *supra* note 4, at 781-85 for a thorough legislative history of the marijuana possession laws in California.

[21] BUREAU OF CRIMINAL STATISTICS, DRUG ARRESTS AND DISPOSITIONS IN CALIFORNIA 1964, at 51, shows that arrests for possession of marijuana have tripled since 1960. The report also indicates that juvenile arrests for marijuana possession have increased over 500% since 1960. *Id.* at 88.

[22] *Id.* at 10. Testimony of Dr. Joel Fort before a hearing of the Assembly Committee on Public Health, San Francisco, September 28, 1967. Dr. Fort has served on the medical staff of the U.S. Public Health Service Hospital in Lexington, Kentucky, and with the United Nations Division of Narcotic Drugs. He has been the director of both the Center for Treatment and Education on Alcoholism in Oakland, California, and the Health Department Center for Special Problems in San Francisco, California. He is a consultant on drug addiction to the World Health Organization.

[23] *See* note 21 *supra.*

[24] *See* text accompanying notes 2-3 *supra.*

[25] For a discussion of the evidence on the nature of marijuana see Boyko & Rotberg, *supra* note 4, at 777.

[26] *See generally* THE MARIJUANA PAPERS (Solomon ed. 1966); THE UTOPIATES (Blum ed. 1964). For some historical background on marijuana, see R. DEROPP, DRUGS AND THE MIND 61-114 (1957).

[27] San Francisco Chronicle, Oct. 15, 1967 (This World), at 19, col. 3.

[28] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 224-25 (1967).

[29] Interview with Mr. Thomas Carroll, consultant to the Assembly Committee on Criminal Procedure, in San Francisco, California, September 28, 1967.

Up to the present time there have been no cases raising well-argued constitutional objections to the California marijuana possession statute.[30] Whatever the reason for the scarcity of constitutional attack, it seems that without legislative action modifying the statute, constitutional objections will be raised with greater frequency.[31]

Constitutional Objections to the Marijuana Possession Statute—A General View

Two possible constitutional defenses to the California marijuana possession statute are raised in this comment. The first defense would bring the possession of marijuana within the right of privacy. This doctrine of privacy as a substantive bar to a criminal statute was first recognized in *Griswold v. Connecticut*[32] and that case will be used as a starting point for analysis.

The second defense is based on the reasoning of *Griswold*, not the holding. This defense would bring possession and use of marijuana within other unnamed but fundamental guarantees included in the amendments to the Constitution.[33]

These defenses constitute a two-pronged attack which have the

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[30] Cases where constitutional objections have been raised include People v. Mitchell, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (1966), which involved a challenge to CAL. HEALTH & SAFETY CODE § 11530 based on the free exercise of religion clause of the first amendment. The appeal failed as the defendant did not show he sincerely believed marijuana was essential to the practice of his religion and that no antisocial consequences were involved. People v. Glaser, 238 Cal. App. 2d 819, 48 Cal. Rptr. 427 (1965), and People v. Mistriel, 110 Cal. App. 2d 110, 241 P.2d 1050 (1952), both involved challenges to marijuana possession statutes on the ground that due process of law was denied the appellants since the state had no basis for making marijuana, an allegedly beneficial herb according to appellants, illegal to possess. The court in each case decided that since possession of marijuana was a public offense, the legislative showing of a rational relationship between the statute and the recognized purpose of the state to legislate for the health, safety and general welfare of the people was sufficient.

[31] Apparently the vast majority of those persons prosecuted under the statute have defended on theories of illegal search and seizure, *e.g.*, People v. Reeves, 61 Cal. 2d 268, 391 P.2d 393, 38 Cal. Rptr. 1 (1964), or lack of knowledge of the actual possession of marijuana, *e.g.*, People v. Redrick, 55 Cal. 2d 282, 359 P.2d 255, 10 Cal. Rptr. 823 (1961) (opium); People v. Perez, 213 Cal. App. 2d 436, 28 Cal. Rptr. 751 (1963). In People v. Rodriguez, 151 Cal. App. 2d 598, 601, 312 P.2d 272, 274 (1957), the court said that it is "essential to the crime . . . that the defendant have physical or constructive possession, coupled with knowledge of the present and narcotic nature of the substance."

When the evidence of possession is dubious or sketchy, CAL. HEALTH & SAFETY CODE § 11556 is often employed. This section makes it a misdemeanor to visit or be in a place where marijuana is being used. The provision can be resorted to for practical reasons in charging the defendant who might willingly plead guilty to this offense but would contest felony prosecution under the possession statute.

[32] 381 U.S. 479 (1965).

[33] For the discussion of fundamental peripheral rights see text accompanying notes 64-110 *infra*.

same origins in the Constitution.[34] The reasoning of *Griswold* is basic to both the right of privacy and the other peripheral yet fundamental rights. The potential success of these constitutional defenses will be best understood by a consideration of how the California courts have applied *Griswold* and other cases involving personal rights.

Before discussing the two-pronged attack mentioned above it should be emphasized that these are not the only possible constitutional objections to the marijuana possession statute. In a proper case the right to free exercise of religion as expressed in the first amendment could be used to carve out an exception to the statute as was done in *People v. Woody*[35] where a California statute prohibiting the possession of peyote[36] was under consideration. The right to the free exercise of religion would be applicable to the marijuana possession statute if a user could show that the use of marijuana was *essential* to his religion as well as showing his *sincerity* in his religious belief.[37]

Also it might be argued that the California marijuana possession statute violates the constitutional guarantee against cruel and unusual punishment found in the eighth amendment. The statute might be invalidated by the guarantee against cruel and unusual punishment if the possession of marijuana is conduct which the court would consider not within the legislative power to punish as a felony. It is the discrepancy between the conduct and the punishment which makes the punishment cruel and unusual under the ruling of *Robinson v. California.*[38] By making possession of marijuana a felony, thus equating such conduct with the whole spectrum of common law felonies such as rape, arson, larceny and murder, the statute would seem to be

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[34] *See* Griswold v. Connecticut, 381 U.S. 479, 484, where the Court spells out its penumbra theory in which the peripheral rights, of which privacy is one, are expanded.

[35] 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

[36] CAL. HEALTH & SAFETY CODE § 11500.

[37] This was a major point in People v. Woody, 61 Cal. 2d 716, 720-22, 394 P.2d 813, 817-18, 40 Cal. Rptr. 69, 73-74 (1964). *See In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), where the California Supreme Court granted habeas corpus to a defendant in a peyote possession case and remanded the case to the trial court on the question of whether defendant's belief that the use of peyote for religious purposes was honest and bona fide. *But see* Leary v. United States, 36 U.S.L.W. 2218 (5th Cir. Sept. 29, 1967), where appellant, Dr. Timothy Leary, failed to show to the court's satisfaction that the use of marijuana was essential to his practice of Hinduism; *see* Finer, 19 HASTINGS L.J. 667 (1968); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *noted in* 28 OHIO ST. L.J. 369 (1967), where the court refused to follow the *Woody* case on the grounds that even if defendant were sincere, the first amendment would not protect him in his use of marijuana and peyote.

[38] 370 U.S. 660 (1962). The case struck down as unconstitutional a California statute making criminal the status of being "addicted to the use of narcotics." Justice Douglas in a concurring opinion, *id.* at 676, said: "A punishment all out of proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" *See* Driver v. Hinnat, 356 F.2d 761 (4th Cir. 1966), and Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966), where the cruel and unusual punishment argument was successfully applied to drunkenness prosecutions of alcoholics under local statutes.

imposing cruel and unusual punishment.[39]

There is also an argument that the classification of marijuana as a narcotic in section 11001 and the prohibition of possession in section 11530 of the California Health and Safety Code violate the equal protection clause of the fourteenth amendment. In order to satisfy the equal protection guarantee the statute must "cover all persons who are logically, scientifically or by dint of common sense includable in order to effectuate the legitimate goals of the statute."[40] Making possession of marijuana illegal, while excluding other euphorics such as alcohol, might be considered a violation of the guarantee of equal protection, by this test.

In considering the constitutional defense of equal protection the court would have to pass on the legislative policy behind the classification, a step which the courts have been reluctant to undertake in cases where the question of marijuana has arisen.[41] In the two cases where the statutory classification of marijuana has been considered, the court assumed that the classification was rational.[42] In light of recent cases where courts have reviewed legislative policy, it would seem that a court might now take more initiative in reviewing the statutory policy in applying the equal protection test.[43]

Although the foregoing discussion demonstrates there are a number of potential constitutional objections to the California marijuana possession statutes,[44] this comment will discuss in detail only the two constitutional attacks raised by the *Griswold* decision, *i.e.* the right of privacy and the other peripheral rights found within the Bill of Rights. These possible constitutional attacks are more thoroughly examined in the next section.

Griswold v. Connecticut

Support from United States Supreme Court cases is necessary in order to raise the dual attack of the peripheral fundamental rights and the right of privacy since these rights are not found specifically in the Constitution. As noted, the leading case supporting the ex-

[39] For discussion of the cruel and unusual punishment argument, see Boyko & Rotberg, *supra* note 4, at 791.

[40] *Id.* at 787-88.

[41] People v. Glaser, 238 Cal. App. 2d 819, 48 Cal. Rptr. 427 (1965); People v. Mistriel, 110 Cal. App. 2d 110, 241 P.2d 1050 (1952). Both cases are discussed in note 30 *supra*.

[42] *Id.*

[43] *E.g.*, People v. O'Neil, 62 Cal. 2d 748, 401 P.2d 928, 44 Cal. Rptr. 320 (1965), where the court thoroughly reviewed the legislative policy behind the statute in determining the legal test for addiction within the meaning of CAL. VEHICLE CODE § 23105, which prohibits the operation of a motor vehicle by a narcotic addict; Wollam v. City of Palm Springs, 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963), where pursuant to an examination of municipal policy the court found that there were alternative methods of controlling traffic congestion other than by the broad regulation of loudspeaker trucks by the unconstitutional municipal ordinance in issue. *See generally* McLaughlin v. Florida, 379 U.S. 184, 191 (1964); Skinner v. Oklahoma, 316 U.S. 535, 541, 543 (1942).

[44] For a general discussion of the constitutional arguments against the marijuana possession statute, see Boyko & Rotberg, *supra* note 4, at 785-95.

istence of the right of privacy and the proposition that there exist other peripheral but fundamental constitutional rights which are not expressly enumerated in the Constitution is *Griswold v. Connecticut*.[45] Consequently, a thorough understanding of the *Griswold* decision is necessary before examining how the California courts have applied it.

The Court in *Griswold* overturned the Connecticut "anti-birth control" statute.[46] This "uncommonly silly law" as it was called by Justice Stewart,[47] was an antiquated, rarely invoked statute making it a criminal offense to use birth control devices for the purpose of preventing conception.[48] It was no surprise that the law was invalidated. The importance of the case lies in the way in which the statute was held unconstitutional.

Privacy was the basis for the Court's decision,[49] and as a substantive right privacy was raised as a defense to any application of the Connecticut statute.[50] The right of privacy relied on in *Griswold* is not the procedural right of privacy which protects an individual from unreasonable searches and seizures employed in enforcing constitutionally valid statutes.[51] The right of privacy recognized in *Griswold* is also to be distinguished from the right of privacy found in the law of torts which allows one to recover monetary compensation for an invasion of his privacy.[52] The right of privacy applied in *Griswold* is a direct substantive bar to any statute in question.[53]

In *Griswold* the Court held that the statute infringed on the zone of privacy which a married couple possessed.[54] Within this zone the couple was free to decide whether or not they would use contraceptive devices.[55] Support for this right of privacy was found by looking to the "specific guarantees in the Bill of Rights having penumbras, formed by emanations from those guarantees that help give them life and substance."[56] The Court found that the right of privacy protected in *Griswold* was created by "several fundamental constitutional guarantees"[57] and based its decision on five of these guarantees contained in the Bill of Rights:

> Various guarantees create zones of privacy. The right of association

[45] 381 U.S. 479 (1965).

[46] *Id.* at 485.

[47] *Id.* at 527 (dissent).

[48] CONN. GEN. STAT. REV. § 53-32 (1958). "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

[49] 381 U.S. at 485.

[50] *Id.*

[51] *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961); People v. Cahan, 44 Cal. 2d 434, 438, 282 P.2d 905, 907 (1955), where the court said that "important as efficient law enforcement may be, it is more important that the right of privacy . . . be respected."

[52] *See generally* W. PROSSER, TORTS § 112, at 829-51 (3d ed. 1964); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[53] 381 U.S. at 485.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 484.

[57] *Id.* at 485.

> contained in the penumbra of the First Amendment is one . . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[58]

The Court reinforced its argument that penumbral zones of privacy existed by showing that past decisions had found fundamental constitutional rights not specifically mentioned in the Constitution.[59] Rights such as freedom of inquiry, freedom of thought, and freedom to teach were designated as peripheral rights.[60] These rights were considered essential because "[w]ithout those peripheral rights the specific rights would be less secure."[61]

While the language of *Griswold* is broad, the holding itself is narrow. The case is significant in that six Supreme Court Justices found a right of privacy within the Constitution.[62] Of greater importance than the holding of *Griswold* is the reasoning of the Court that the peripheral rights do exist and are essential to the specific rights.[63] A close examination of the California cases is necessary in considering the scope of privacy and the other peripheral rights.

California's Treaiment of Griswold

The rule of *Griswold* is clear with regard to the right of privacy in its effect on a statute prohibiting the use of birth control devices. The question presented here is whether or not possession of marijuana can be brought either within the right of privacy, or within any of the peripheral but fundamental constitutional guarantees. This

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[58] *Id.* at 484.

[59] *Id.* at 482-83.

[60] *Id.* at 482, *citing* Frankfurter's concurring opinion in Wieman v. Updegraff, 344 U.S. 183, 195 (1952).

[61] 381 U.S. at 482-83.

[62] Although six justices found privacy, they did not all find it in the same place in the Constitution. Justices Goldberg, Brennan and Chief Justice Warren joined with Justice Douglas in finding privacy supported by fundamental personal rights found in the penumbra of the Bill of Rights. Such personal rights are not confined to the specific terms of the Bill of Rights. *Id.* at 486.

Justices Goldberg, Brennan and Chief Justice Warren went on to use the ninth amendment as authority for the right of privacy as "there are additional fundamental rights, protected from governmental infringement which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Id.* at 488.

Justice Harlan found support for privacy in the due process clause of the fourteenth amendment. "The Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom." *Id.* at 500.

Justice White also relied on the fourteenth amendment as the Connecticut statute deprived married couples of "liberty" without due process of law. *Id.* at 502.

[63] *Id.* at 483.

is the question which will plague the lawyer who has but one significant United States Supreme Court decision on the substantive right of privacy from which to work.

Peripheral but Fundamental Constitutional Rights

In looking to the California cases the right of privacy as a substantive right has not been applied by the courts. Instead two California cases have cited *Griswold* for the proposition that broad unnamed peripheral rights exist within the Bill of Rights.[64] This reliance on the reasoning of the court in *Griswold* appears to be the significance of that case to the California courts although it may be that the proper fact situation has not come before the courts where the right of privacy might be applicable. An examination of the actual California cases will better indicate if these two attacks are applicable to the marijuana possession statute.

A key California case using *Griswold* as authority is *In re Klor*.[65] The case involved construction of section 311.2 of the California Penal Code dealing with preparation and distribution of obscene material.[66] The trial court interpreted the statute to mean that the accused was guilty if he prepared the obscene photographs found in his possession *or* intended to distribute the photographs. The alleged error in the trial court's instruction was allowing the jury to find the accused guilty for mere preparation and possession of the obscene material without the essential intent to distribute it.[67]

The California Supreme Court in *Klor* held that this construction given by the judge in his instructions to the jury was not what the legislature intended and would attribute to the statute an unwarranted unconstitutional extension.[68] The court said that "[n]o constitutionally punishable conduct appears in the case of an individual who prepared material for his own use or for such personal satisfaction as its creation affords him."[69] *Griswold* was cited in support of the court's statement that the judge's instruction would be clearly unconstitutional.[70]

The court's theory seems to be that the purpose of the obscenity statute is to prohibit possession of obscene material with the intent to distribute it.[71] This is conduct which is clearly within the legislative power to sanction criminally.[72] On the other hand possession

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[64] *In re* Klor, 64 Cal. 2d 816, 820, 415 P.2d 791, 794, 51 Cal. Rptr. 903, 906 (1966); Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 226, 235, 58 Cal. Rptr. 520, 527 (1967).

[65] 64 Cal. 2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966).

[66] CAL. PEN. CODE § 311.2 reads: "Every person who knowingly: . . . prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

[67] 64 Cal. 2d at 818-19, 415 P.2d at 792-93, 51 Cal. Rptr. at 904-05.

[68] *Id.* at 818, 415 P.2d at 792, 51 Cal. Rptr. at 904.

[69] *Id.* at 821, 415 P.2d at 794, 51 Cal. Rptr. at 906.

[70] *Id.* at 820, 415 P.2d at 794, 51 Cal. Rptr. at 906.

[71] For discussion see *id.* at 820-21, 415 P.2d at 794-95, 51 Cal. Rptr. at 906-07.

[72] *Id.* at 819-20, 415 P.2d at 793-94, 51 Cal. Rptr. at 905-06.

without the necessary intent to distribute the obscene photographs must be distinguished. Mere possession of the photographic material, obscene or not, is conduct so *essential* to the first amendment's freedom of expression that it lies within a constitutionally protected area and therefore is not subject to criminal sanction.[73]

A square decision on the constitutionality of the statute was avoided by the court in *Klor*. Instead, the statute was construed in such a way as to avoid finding it unconstitutional.[74] Nevertheless it seems that the statement by the court that possession of obscene material for one's own use or satisfaction would be constitutionally protected is as much a part of the holding of the case as the construction of the statute.[75]

Finot v. Pasadena City Board of Education[76] is a well considered case which finds protected personal rights in the periphery of the constitutional amendments using *Griswold* as authority.[77] In *Finot* the California Court of Appeal held that a high school teacher could wear a beard without losing his job.[78] This right to wear a beard came within the periphery of the first amendment right of free speech.[79] The wearing of a beard, while not speech, is expression through nonverbal conduct which is brought within the scope of the right of free speech.[80] The court in *Finot* emphasized this point:

> It seems to us that the wearing of a beard is a form of expression of an individual's personality and that such a right of expression, although probably not within the literal scope of the First Amendment itself, is as much entitled to its *peripheral* protection as the personal rights established . . . with respect to the right of parents to educate their children as they see fit.[81]

The wearing of a beard was also held to be a liberty protected by the due process provisions of the state and federal constitutions.[82] The court considered this right to be one of the "constitutionally unnamed but constitutionally protected personal liberties."[83]

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[73] *Id.* at 821, 415 P.2d at 794, 51 Cal. Rptr. at 906.

[74] *Id.* at 821, 415 P.2d at 795, 51 Cal. Rptr. at 907, where the court said: "A fundamental canon of statutory interpretation requires that a statute be construed to avoid unconstitutionality if it can reasonably be so interpreted."

[75] The court said, *id.* at 818, 415 P.2d at 792, 51 Cal. Rptr. at 904: "We hold that the construction placed on the statute by the trial court does violence to the legislative intent and, moreover, would attribute to the statute a gratuitous unconstitutional reach." For a similar case using *Klor* as authority, see People v. Samuels, 250 A.C.A. 571, 58 Cal. Rptr. 439 (1967). *See also* State v. Wetzel, 173 Ohio St. 16, 179 N.E.2d 773 (1962), which held that the Ohio obscenity statute does not prohibit the mere possession of obscene material for private gratification. The requisite intent to distribute the material is necessary.

[76] 250 A.C.A. 226, 58 Cal. Rptr. 520 (1967).

[77] *Id.* at 235, 58 Cal. Rptr. at 527.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* (emphasis added). The cases cited by the court and omitted from the quotation recognize a fourteenth amendment "liberty" to educate one's children as one desires. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[82] 250 A.C.A. 226, 234, 58 Cal. Rptr. 520, 526 (1967), relying on U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1, § 13.

[83] *Id.* at 235, 58 Cal. Rptr. 526-27.

By a careful reading of the *Klor*[84] and *Finot*[85] cases it is apparent that the California courts are using *Griswold* as authority for the proposition that fundamental peripheral rights exist within the specific amendments of the Bill of Rights. This approach used by the California courts may be the significance of the *Griswold* decision in the near future. Instead of finding a right of privacy and relying on the holding of *Griswold*,[86] the reviewing court can rely on the reasoning of *Griswold* that there are broader constitutional rights than those embodied in the amendments themselves.[87] For this approach *Griswold v. Connecticut* is authority, and indeed very good authority.[88]

Notwithstanding the persuasiveness of the *Griswold* decision that peripheral fundamental rights are necessary and present,[89] the real problem is to demonstrate that possession of marijuana factually comes within these peripheral rights. By considering the nature of marijuana, the reasons for its use and the conduct punished by the statute (*i.e.* mere possession), it would seem that possession of marijuana could be brought within a constitutional right.

Possession of marijuana is conduct essential to its use. This type of possession is conduct wholly personal to the user or the possessor since no one else is involved. If possession of obscene literature is protected by the first amendment under the freedom of expression as it was in *Klor*,[90] it is difficult to distinguish the possession of marijuana factually. Expression through the taking of photographs as was the case in *Klor* and expression through the use of marijuana are both forms of sensory perception. It would seem that possession as conduct absolutely necessary to such personal expression should come within the first amendment whether it is obscene material or marijuana which is possessed.

Possession of marijuana might be protected as a fundamental liberty within the due process clause of the fifth or fourteenth amendment. The court in *Finot v. Pasadena City Board of Education*[91] held that the wearing of a beard was a liberty within the due process clause of the fourteenth amendment as well as conduct which came within freedom of expression guaranteed by the first amendment.[92] Reliance was placed on the United States Supreme Court

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84 64 Cal. 2d 816, 820, 415 P.2d 791, 794, 51 Cal. Rptr. 903, 906 (1966), *citing* Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

85 250 A.C.A. 226, 235, 58 Cal. Rptr. 520, 527 (1967), *citing* Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

86 The *Griswold* decision has been criticized as ill-founded and vague. See for example, the dissent of Justice Black in Griswold v. Connecticut, 381 U.S. 479, 507 (1965); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 244, 252 (1965).

87 381 U.S. at 482-83.

88 It is quite easy to come to the unwarranted conclusion that the citation of a court to *Griswold* is a recognition of the right of privacy. *See* Boyko & Rotberg, *supra* note 4, at 794, where the authors did just that.

89 For a discussion, see 381 U.S. at 482-83.

90 64 Cal. 2d at 820, 415 P.2d at 794, 51 Cal. Rptr. at 906.

91 250 A.C.A. 226, 58 Cal. Rptr. 520 (1967).

92 *Id.* at 235, 58 Cal. Rptr. at 527.

decision of *Kent v. Dulles*[93] where the Court said: "[Travel] may be as close to the heart of the individual as the choice of what he *eats*, or wears, or reads."[94] Just as the court in *Finot* found that appellant had a right to wear a beard which could not be denied him in the absence of a compelling interest on the part of the state,[95] the user of marijuana who smokes or ingests it might bring himself within the scope of the personal liberties of the due process clause of the fifth or fourteenth amendment by similar reasoning.[96]

The Right of Privacy

The right of privacy as a substantive bar to a criminal statute has not been specifically adopted by the California courts in any particular case. In cases where privacy might have been applied, other more historically protected constitutional rights have been relied upon. For example, as has been noted, *Klor* and *Finot* relied on the freedom of expression in safeguarding the possession of obscene material and the wearing of a beard. In *People v. Woody*[97] the free exercise of religion was another long protected constitutional right which the court applied to protect the use of peyote by the members of the Native American Church.

In the absence of California cases the right of privacy as a substantive guarantee has only *Griswold v. Connecticut* to support it. Earlier United States Supreme Court cases have indicated that within the "spirit" of the Constitution privacy has long been recognized.[98] Justice Brandeis emphasized this in his dissent in *Olmstead v. United States*:[99]

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men.[100]

The problem raised with respect to the marijuana possession statute and the *Griswold* decision is the extension of the zone of privacy from the "sacred precincts of marital bedrooms"[101] to an individual who purposefully induces a mild hallucinatory mental condition through the use of marijuana.

Just as there is now a zone of marital privacy, there are individual zones of privacy which the Court in *Griswold* went to

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93 357 U.S. 116 (1958).

94 *Id.* at 126 (emphasis added).

95 250 A.C.A. at 238, 58 Cal. Rptr. at 529.

96 *See In re* Luera, 28 Cal. App. 185, 152 P. 738 (1915), discussed in note 8 *supra*.

97 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 68 (1964).

98 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Boyd v. United States, 116 U.S. 616 (1886).

99 277 U.S. at 478.

100 *Id.* (emphasis added).

101 381 U.S. at 485.

great lengths to describe.[102] Just as the individual may express himself graphically,[103] verbally,[104] and physically[105] in certain constitutionally protected ways, it can be argued that the individual has a zone of privacy in which he can express himself mentally through the use of marijuana. It may be for spiritual purposes, as was the case in *People v. Woody*,[106] or for the mere enjoyment of the experience. *Griswold* certainly indicates that a zone of privacy exists with respect to conduct essential to free expression.[107] For the reason that expression dealing solely with the mind is the most private form of expression possible, it is submitted that possession of marijuana as a necessary incident to its use is conduct which could be brought within the zone of privacy which exists within the first amendment. With more decisions defining the contours of the right of privacy, the step to possession of marijuana could be made.

Certainly the recent cases which have been decided in California such as *In re Klor* and *Finot v. Pasadena City Board of Education* might have applied the right of privacy as a constitutional defense. Instead, as noted earlier,[108] the cases were decided on the basis of rights found in the periphery of the first amendment. It is not surprising that a court would apply a long protected and more specific right such as the freedom of expression rather than the recently enunciated right of privacy. This was clearly the choice of the court in *Finot* when it said with respect to the right of privacy:

> [T]he unnamed rights retained by the people under the Ninth Amendment generally have received little, if any, specification as such by the United States Supreme Court . . . . [W]e deem it unnecessary to decide whether appellant's right to wear a beard while engaged in classroom teaching . . . is protected by the Fourth, Fifth and Ninth Amendments to the United States Constitution . . . .[109]

It is evident from *Finot* and *Klor* that the California courts are reluctant to apply the right of privacy as the sole constitutional basis for a decision.[110] It seems that the right of privacy has been and will be treated only as an additional basis for a court's decision until the United States Supreme Court further defines the right of privacy or a case is raised where the California courts have no alternative but to apply or reject it. The California marijuana possession statute may present such a case.

Personal Rights in Conflict with the Police Power of the State

If a court were to find that possession of marijuana for personal use was within one of the constitutional rights raised above, the marijuana possession statute would not be automatically invalidated. In

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[102] *Id.* at 484.

[103] *E.g., In re* Klor, 64 Cal. 2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966); People v. Samuels, 250 A.C.A. 571, 58 Cal. Rptr. 439 (1967).

[104] *E.g.*, Saia v. New York, 334 U.S. 558 (1948); Wollam v. City of Palm Springs, 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963).

[105] *E.g.*, DeJonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly).

[106] 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

[107] *See* 381 U.S. at 484.

[108] Text accompanying notes 84-88 *supra.*

[109] 250 A.C.A. at 233, 58 Cal. Rptr. at 525.

[110] See text accompanying notes 84-88 *supra.*

order to hold the statute unconstitutional the court must also find that the state has no valid reason for prohibiting such conduct.[111] Consequently, it is important to examine the general approach of the courts in handling constitutional questions in which personal liberties are limited by state law.

There seems to be a very similar analysis of questions involving state infringements upon personal liberties by both the United States Supreme Court and the California courts. In this section the approach of the California courts to such constitutional questions is examined generally with the specific consideration of the marijuana possession statute raised in a later section.[112]

The Bagley v. Washington Township Tests

The California Supreme Court expressly provided a three-step analysis for questions involving state infringement of personal liberties in *Bagley v. Washington Township.*[113] This analysis emphasizes that the state must justify its infringement of the individual's rights by showing a compelling interest and that the infringement. even if justified, must be as narrowly worded as possible.[114] In *Bagley* Justice Tobriner speaking for the court laid down the tests:

> [W]e hold that a governmental agency which would require a waiver of constitutional rights as a condition of public employment must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.[115]

This test has been followed expressly in *Finot v. Pasadena City Board of Education*[116] and in other cases involving the right of government employees to keep their jobs irrespective of their political activities[117] as well as in a case involving recipients of social welfare benefits.[118]

While the tests of the *Bagley* decision have not been expressly set out in a decision protecting the personal liberties of an individual citizen who is not a government employee or one receiving government benefits, such tests would seem to apply to criminal legislation. The language of the California Supreme Court in *People v. Woody*[119] shows that the *Bagley* type of reasoning is present with special em-

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111 See text accompanying notes 119-25 *infra.*

112 See text accompanying notes 148-78 *infra.*

113 65 Cal. 2d 499, 501-02, 421 P.2d 409, 411, 55 Cal. Rptr. 401, 402 (1966). The case involved the permissible limits of public restrictions on political activities of public employees under the first amendment.

114 *Id.*

115 *Id.*

116 250 A.C.A. 226, 236, 58 Cal. Rptr. 520, 527 (1967).

117 *E.g.*, Rosenfield v. Malcolm, 65 Cal. 2d 559, 561, 421 P.2d 697, 698, 55 Cal. Rptr. 505, 506 (1967).

118 Parrish v. Civil Serv. Comm'n, 66 A.C. 253, 425 P.2d 223, 57 Cal. Rptr. 623 (1967); 18 HASTINGS L.J. 228 (1966); *see* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 233 (1965). Professor Emerson was counsel for appellant in the *Griswold* case.

119 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

phasis on the state's compelling interest in a case where no state benefit is in issue. The *Woody* case is an excellent example of the court's refusal to go off on the mere rational relation of the statute to the state's avowed purpose.[120] Instead the court applied the technique of balancing the infringement on the personal liberty against the interest of the state in regulating the individual's conduct.[121]

The defendant in *Woody* was convicted for possession of peyote,[122] but contended that the law conflicted with his use of it as a form of religious expression as a member of the Native American Church. The court, considering the record independently,[123] examined the conflicting interests of the state and the individual and reversed the conviction.[124] For the court Justice Tobriner stated:

> We have weighed the competing values represented in this case on the symbolic scale of constitutionality. On the one side we have placed the weight of freedom of religion as protected by the First Amendment; on the other, the weight of the state's "compelling interest." Since the use of peyote incorporates the essence of the religious expression, the first weight is heavy. Yet the use of peyote presents only slight danger to the state and to the enforcement of its laws; the second weight is relatively light. The scale tips in favor of the constitutional protection.[125]

The burden on the state to show a compelling interest why personal liberties should be impaired is found in many United States Supreme Court decisions as well.[126] For example in *Griswold v. Connecticut* the Court rejected the minimum rationality standard and reviewed the judgment of the state legislature.[127] Justice Gold-

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120 *Id.* at 722-23, 394 P.2d at 818-19, 40 Cal. Rptr. at 74-75.

121 *Id.*

122 CAL. HEALTH & SAFETY CODE § 11500 makes possession of any narcotic other than marijuana a felony. For the planting provisions, see CAL. HEALTH & SAFETY CODE § 11540. Peyote grows in small buds on the top of a small, spineless cactus, *Lophorphora williamsii*, in Texas and northern Mexico. When taken internally, it causes vivid hallucinations and beyond this its users experience greater comprehension and even a sense of friendliness towards others. People v. Woody, 61 Cal. 2d 716, 720, 394 P.2d 813, 816, 40 Cal. Rptr. 69, 72 (1964).

123 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

124 *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.

125 *Id.*

126 *E.g.*, McLaughlin v. Florida, 379 U.S. 184, 196 (1964); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Gibson v. Florida Legislative Investigative Comm., 372 U.S. 539, 546 (1963); NAACP v. Button, 371 U.S. 415, 438-39 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

127 381 U.S. at 482. In cases where economic interests are involved, the Supreme Court has invoked the minimum rationality standard holding that as long as the state law in question is rationally related to some permissible purpose within the police power of the state, the exercise of power is constitutional. *E.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955); Lochner v. New York, 198 U.S. 45, 64 (1905). The California courts have applied this standard to two of its drug statutes. *In re* Yun Quong, 159 Cal. 508, 114 P. 835 (1911) (possession of opium); People v. Glaser, 238 Cal. App. 2d 819, 48 Cal. Rptr. 427 (1965); People v. Mistriel, 110 Cal. App. 2d 110, 241 P.2d 1050 (1952) (possession of marijuana).

The reasoning behind this standard lies in the reluctance of the courts to substitute their judgment for that of the state legislature thereby usurping the primary function of the legislature. In Purity Extract & Toxic Co. v.

berg gave the reason for this in a concurring opinion:

> In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[128]

In *Griswold* the alleged purpose of the Connecticut legislature was to discourage extramarital relations and the statute rationally related to this purpose.[129] In spite of the rational relationship, the state did not carry the burden of demonstrating that the purpose of the statute was compelling enough to warrant the infringement of the individual right of privacy.[130]

Even when a compelling interest is shown by the state, a further test must be satisfied. This is the test enumerated in *Bagley* that there must be no alternative less subversive of constitutional rights available.[131] Under this test even when the state has a "compelling interest" strong enough to outweigh the intrusion into the citizen's rights, outright prohibition is not permitted if there is a suitable alternative.[132] California recognized this rule in *Wollam v. City of Palm Springs*.[133] In *Wollam* a city ordinance banning the use of sound trucks was held unconstitutional as it was too broad a criminal sanction.[134] The court stated:

> An ordinance narrowly drawn may properly reach to the evils which it seeks to avoid. Instead, here, the ordinance sweeps within its broad ambit the constitutional right to tell a whole story by means of this method of communication.[135]

The broad sweep of the Connecticut statute was also a major point in *Griswold*[136] and Justice Douglas emphasized it in the majority opinion when he said:

> [A] "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[137]

Lynch, 226 U.S. 192, 201-02 (1912) the Court said: "[U]nless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system." *See also* Mugler v. Kansas, 123 U.S. 205 (1887).

128 381 U.S. at 497, *quoting from* Bates v. Little Rock, 361 U.S. 516, 524 (1960).

129 381 U.S. at 498, 505-06.

130 *Id.* at 497-98, where Justice Goldberg said in a concurring opinion: "Although the Connecticut birth control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any 'subordinating [state] interest which is compelling' or that is 'necessary . . . to the accomplishment of a permissible state policy.'"

131 65 Cal. 2d at 501-02, 421 P.2d at 411, 55 Cal. Rptr. at 402.

132 *Id. See also* note 150 *infra*.

133 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963); *see* Saia v. New York, 334 U.S. 558 (1948).

134 59 Cal. 2d at 288, 379 P.2d at 488, 29 Cal. Rptr. at 8.

135 *Id.*

136 381 U.S. at 485.

137 *Id., quoting from* NAACP v. Alabama, 377 U.S. 288, 307 (1964); *see*

The Connecticut legislature sought to attain its avowed purpose through means which had a "maximum destructive impact" on the rights of an individual.[138] In such a situation narrower means are appropriate to achieve the same ends.[139]

Independent Review of the Record

When constitutional questions have been presented involving personal liberties, the California Supreme Court has relied on its own evaluation of scientific facts and expert testimony by independently reviewing the whole record.[140] This has also been the approach taken in some United States Supreme Court cases.[141] The courts review the entire record because a constitutional question involving the "compelling interest" of a state is a mixed question of law and fact.[142] Therefore the question before the court is subject to a constitutional judgment in which the lower court's findings are not binding upon the appellate court.[143]

A California example of this procedure is *People v. Woody* where the court looked at the whole record and drew its own inferences from the facts and expert testimony in holding that peyote could not work a permanent deleterious injury on the user.[144] This was contrary to the decision of the trial court. The court in *Woody* said:

> The state asserts that the compelling reason for the prohibition of Peyotism lies in its deleterious effects . . . . We set forth the reasons why *we believe* the contentions to be unfounded.
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> . . . .

Shelton v. Tucker, 364 U.S. 479, 488 (1960), where the Court said: "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

138 381 U.S. at 485.

139 *Id.*; *see, e.g.*, NAACP v. Button, 371 U.S. 415, 433 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Talley v. California, 362 U.S. 60, 63 (1960); Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 339, 392 P.2d 385, 389, 38 Cal. Rptr. 625, 629 (1964).

140 *See, e.g.*, People v. Woody, 61 Cal. 2d 716, 720-23, 394 P.2d 813, 816-19, 40 Cal. Rptr. 69, 73-75 (1964); People v. O'Neil, 62 Cal. 2d 748, 401 P.2d 928, 44 Cal. Rptr. 320 (1965), where the court looked to outside sources to determine the definition of a narcotic addict within the meaning of CAL. VEHICLE CODE § 23105.

141 Robinson v. California, 370 U.S. 660, 668-69 (1962) (Douglas, J., concurring).

142 In reviewing the state's "compelling interest" the court must look to the facts the state has relied on to see if such facts are sufficient to permit an impairment of the individual's constitutional rights. For discussions, see Sherbert v. Verner, 374 U.S. 398, 406 (1963); People v. Woody, 61 Cal. 2d 716, 722, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964).

143 People v. Woody, 61 Cal. 2d 716, 722, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964). *See also* the dissent of Harlan, J. in Roth v. United States, 354 U.S. 476, 497-98 (1957), where he said of the Court's determination of an obscenity issue: "I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based."

144 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

> The record . . . does not support the state's chronicle of harmful consequences of the use of peyote.[145]

Were the marijuana possession statute to be attacked as depriving an individual of his right of privacy or of one of the other peripheral but fundamental rights, it would appear that the reviewing court would take under consideration the entire record for independent judgment on the constitutional question.[146] The court would then apply the test laid down in *Bagley v. Washington Township*[147] in analyzing the constitutionality of the statute.

The State's Compelling Interest: What Dangers Does Marijuana Hold for the User and Society?

As this discussion has indicated, even if a court were to find that possession of marijuana comes within the right of privacy or could be included as one of the unnamed but constitutionally protected rights, there would be no assurance that the marijuana possession statute would be declared unconstitutional.[148] If the state can successfully show a "compelling interest"[149] why it can abridge a personal right by methods which are not unnecessarily broad[150] the statute will stand. For this reason it is important to examine the facts and information available which might be introduced into the record as evidence concerning marijuana and its effects on the user and society. By the presence of such evidence in the record an appellate court could independently examine the record in making its decision[151] as was the case in *People v. Woody*.[152]

It is not within the scope of this comment to delve in detail into the factual bases of the arguments for and against marijuana. This has been done elsewhere.[153] This section will briefly outline and analyze some of the leading arguments which law enforcement agen-

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[145] *Id.* (emphasis added). The court, *id.* at 720, 394 P.2d at 816, 40 Cal. Rptr. at 72, also said: "An *examination of the record* as to the nature of peyote and its role in the religion practiced by defendants . . . compels the conclusion that the statutory prohibition most seriously infringes upon the observance of the religion." (emphasis added). For the view of the California Attorney General's Office to the contrary, see 39 OPS. CAL. ATT'Y GEN. 276 (1962).

[146] *See* cases cited notes 140-41 *supra*.

[147] 65 Cal. 2d at 501-02, 421 P.2d at 411, 55 Cal. Rptr. at 402. See text accompanying note 115 *supra*.

[148] *See* text accompanying note 111 *supra*.

[149] Cases cited note 126 *supra*.

[150] Cases cited note 139 *supra*. It would seem that the presence of alternatives less subversive of the individual liberty is really part of the compelling interest argument. The state cannot have a "compelling interest" strong enough to outweigh the infringement on one's personal liberties if there are other alternatives less subversive to constitutional rights available. See text accompanying notes 131-32 *supra*.

[151] *See* text accompanying notes 131-32 *supra*.

[152] 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

[153] Boyko & Rotberg, *supra* note 4, at 775-81. *See id.* at 783 n.44 for citations to authorities supporting the present method of regulating marijuana.

cies,[154] legislative committees,[155] and others[156] have advanced as reasons why the use and possession of marijuana should remain illegal. It must be emphasized that the body of available research concerning marijuana is not extensive and the results are quite inconclusive.[157] This is particularly evident when the information concerning marijuana is compared with what is known about other substances such as alcohol, tobacco and the hard narcotics such as morphine, heroin and cocaine.[158]

The three most frequently advanced and widely publicized arguments against the use of marijuana and therefore its possession, are: (1) that the use of marijuana leads to criminal acts, (2) that the use of marijuana is a steppingstone to addiction to more serious drugs, and (3) that marijuana's use is per se harmful to the user.[159]

Criminal Activity

The charge that the use of marijuana leads to criminal acts must be divided into two parts. The first argument is that a person under the influence of marijuana is likely to commit serious crimes. This view is roundly criticized in the *LaGuardia Report*.[160] Although published in 1944 the *LaGuardia Report* is the only extensive, authoritative study on marijuana and its consequences.

The statistics that the majority of marijuana users arrested are first offenders[161] do not support the charge that it leads to an increase in criminal acts. Such statistics simply show that the use of marijuana may lead to being arrested for the criminal offense of possession of marijuana.

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[154] *E.g.*, BUREAU OF NARCOTIC ENFORCEMENT, THE NARCOTIC PROBLEM: A BRIEF STUDY 12 (4th ed. 1965).

[155] *Hearings on Narcotics and Dangerous Drugs Before the California Assembly Interim Comm. on Criminal Procedure* 24 (1963); CALIFORNIA STATE ASSEMBLY INTERIM COMM. ON PUBLIC HEALTH, REPORT OF SUBCOMM. ON NARCOTICS AND DANGEROUS DRUGS 11-15 (1959).

[156] Boyko & Rotberg, *supra* note 4, at 783 n.44.

[157] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 224-25 (1967).

[158] The only authoritative study on marijuana in the United States is the report by the MAYOR'S COMMITTEE ON MARIHUANA, THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK (1944). Better known as the *LaGuardia Report*, it is based on a controlled study of regular marijuana users in New York City in 1944. The significant parts of the *LaGuardia Report* are reprinted in THE MARIJUANA PAPERS 233-360 (Solomon ed. 1966). Reference will be made to that source.

[159] Boyko & Rotberg, *supra* note 4, at 775-81.

[160] Conclusions 10 and 11 by the MAYOR'S COMMITTEE ON MARIHUANA, in THE MARIJUANA PAPERS, *supra* note 158, at 260 read: "Marihuana is not a determining factor in the commission of major crimes . . . . Juvenile delinquency is not associated with the practice of smoking marihuana . . . ." For views to the contrary, see H. ANSLINGER & W. TOMPKINS, THE TRAFFIC IN NARCOTICS 18-26 (1953); THE MARIJUANA PAPERS 439 (Solomon ed. 1966).

[161] BUREAU OF CRIMINAL STATISTICS, DRUG ARRESTS AND DISPOSITIONS IN CALIFORNIA 1966 at 63. This report indicates that 65.3% of those adults arrested for possession of marijuana had no prior record, and 22.1% had only a record for minor offenses.

The second part of the charge is that the use of marijuana introduces the user into a criminal underworld. If this is so, it is because the use[162] and possession[163] of marijuana are illegal. The user is naturally going to be involved with those who supply and sell marijuana. Also marijuana is not addictive as recognized by statute in California[164] and by the legal tests of addiction laid down in recent cases.[165] Therefore the user will not be driven to illegal means to acquire it.

Marijuana as a Steppingstone to Addictive Narcotics

The argument that the use of marijuana leads to heroin addiction and addiction to other disabling drugs has been made by California law enforcement agencies and legislative committees.[166] Recent official state sources discredit this argument.[167] In addition one of the leading texts on pharmacology states that marijuana habituation does not lead to the use of heroin.[168]

Harm to the User

The harmful effects which marijuana might have on the user is one of the most important yet least researched problems. Before considering the physiological effects, if any, which marijuana may have, it is pertinent to examine the immediate psychological effects a person experiences after use. It is for these mental reactions or effects that marijuana is taken. Dr. Joel Fort, a leading authority in the field of drugs,[169] has described these reactions:

> Marijuana is taken for euphoria, reduction of fatigue, and relief of tension. . . . Small to moderate doses also increase appetite, distort the time sense, increase self-confidence and, like alcohol, can relax some inhibitions.[170]

This description is remarkably similar to the reasons why the

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[162] CAL. HEALTH & SAFETY CODE § 11721.

[163] CAL. HEALTH & SAFETY CODE § 11530.

[164] CAL. WELF. & INST'NS CODE § 3009. The statute is set out in note 6 *supra.*

[165] People v. O'Neil, 62 Cal. 2d 748, 755, 401 P.2d 928, 932, 44 Cal. Rptr. 320, 324 (1965) (distinguishing habituation from addiction); People v. Victor, 62 Cal. 2d 280, 302-04, 398 P.2d 391, 405-06, 42 Cal. Rptr. 199, 213-14 (1965). Both cases hold that an addict must be one who is physically and emotionally dependent on a narcotic as well as having developed a tolerance for the drug.

[166] BUREAU OF NARCOTIC ENFORCEMENT, THE NARCOTIC PROBLEM: A BRIEF STUDY 12 (4th ed. 1965); CALIFORNIA STATE ASSEMBLY INTERIM COMM. ON PUBLIC HEALTH, REPORT OF SUBCOMM. ON NARCOTICS AND DANGEROUS DRUGS 11-15 (1959).

[167] BUREAU OF CRIMINAL STATISTICS, DRUG ARRESTS AND DRUG DISPOSITIONS IN CALIFORNIA 1964 at 10. It has been suggested that addiction to narcotics is based on the user's own psychological structure and his environment rather than the fact that he once used marijuana. *See* Clausen, *Social and Psychological Factors in Narcotics Addiction,* 22 LAW & CONTEMP. PROB. 34, 43 (1957).

[168] L. GOODMAN & A. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 300 (3d ed. 1965).

[169] *See* note 22 *supra* for a description of Dr. Fort's qualifications.

[170] Fort, *Social and Legal Response to Pleasure-giving Drugs,* in THE UTOPIATES 213-14 (Blum ed. 1964).

average individual has a cocktail before dinner.

According to the *LaGuardia Report* the psychological effects of marijuana are only temporary and:

> [N]either the ingestion of marihuana nor the smoking of marihuana cigarettes affects the basic outlook of the individual except in a very few instances and to a very slight degree. . . . In other words, reactions which are natively alien to the individual cannot be induced by the ingestion or smoking of the drug.[171]

Concerning the more serious question of the permanent effects which marijuana may have on the user, there is very little information available.[172] The *LaGuardia Report* did not find any direct effect on the organs of the body aside from the psychological experiences temporarily induced by marijuana.[173] Dr. Fort is in accord with this view:

> [U]nlike alcohol marijuana does not produce, even with prolonged or excessive use, addiction or irreversible physical damage to the body, although dependency or habituation and toxic effects can occur.[174]

It is also significant in considering possible harm to the user to remember that California by statute and case law in 1965 recognized that marijuana itself was not an addictive drug.[175]

Clearly the evidence of the effects of marijuana on the user and society is insufficient and inconclusive. While lawyers and judges may speculate on the medical and sociological effects of marijuana, there does remain the fact that possession of marijuana is a felony in California.[176] While it would be preferable to have more evidence on the subject, the statute should be considered in the light of those facts presently available. As one of the few legal articles on marijuana has said:

> Serious questions as to the soundness of legislative judgment arise when the abusive drinker faces few and minor penalties and a cigarette smoker is prompted and cajoled to incur the risk of fatal or incapacitating disease, while, in contrast, onerous reprisals await the marijuana smoker merely for privately using or having possession or control of the drug.[177]

Inconclusive facts, ignorance and fear of the effects of marijuana are not proper bases for making possession of marijuana criminal and certainly not for making possession of marijuana a felony.[178]

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171 THE MARIJUANA PAPERS, *supra* note 158, at 334.

172 PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 224-25 (1967).

173 THE MARIJUANA PAPERS, *supra* note 158, at 284.

174 Fort, *supra* note 170, at 213.

175 *See* notes 164-65 *supra*.

176 CAL. HEALTH & SAFETY CODE § 11530.

177 Boyko & Rotberg, *supra* note 4, at 781.

178 At least one writer feels that the attitude taken towards marijuana in the United States stems from the puritan work ethic and its intolerance of inaction. Murphy, *The Cannabis Habit: A Review of Recent Psychiatric Literature*, 15 U.N. BULL. ON NARCOTICS 20 (1963). *See also* W. ELDRIDGE, NARCOTICS AND THE LAW 13-34 (1962), for the same view with respect to all drugs. These views would suggest the various reasons given for the illegality of marijuana are nothing more than convenient rationalizations when compared with the permissive treatment which alcohol and tobacco receive under the law.

Conclusion

A constitutional attack on the marijuana possession statute would be extremely timely. Considering the legislative inertia in this area,[179] the harsh penalty assessed for marijuana possession,[180] the recent development of California case law with respect to personal rights as evidenced in *People v. Woody*,[181] *In re Klor*,[182] and *Finot v. Pasadena City Board of Education*,[183] a constitutional objection raised to the marijuana possession statute should receive prompt and perhaps sympathetic judicial consideration.[184]

It is submitted that the advocate would have to emphasize the following points in presenting his case:

(1) Possession of marijuana for mere personal use comes within one of the peripheral but fundamental constitutional rights. *Finot v. Pasadena City Board of Education* and *In re Klor* are authority for inclusion of possession as conduct essential to a means of expression within the first amendment's periphery. *Finot* might also be used as authority for calling the right to possess marijuana a constitutional "liberty" within the fourteenth amendment.[185] In order to bring marijuana within a zone of privacy also implicit in the first and other amendments, *Griswold v. Connecticut*[186] is the proper authority.

(2) Once the possession of marijuana is considered to be a fundamental constitutional right, then the balancing of the state's interest against the infringement of the individual's rights is in issue. The test of *Bagley v. Washington Township* is in point. The state

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179 *See* text accompanying note 29 *supra.*

180 CAL. HEALTH & SAFETY CODE § 11530.

181 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

182 64 Cal. 2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966).

183 250 A.C.A. 226, 58 Cal. Rptr. 520 (1967).

184 It would seem significant that most of the California Supreme Court opinions involving personal liberties are presently being written by Justice Tobriner. In these opinions Justice Tobriner has reflected a deep concern for the individual and his creative spirit in the same vein that Justice Douglas has in his United States Supreme Court opinions. *See, e.g.*, People v. Woody, 61 Cal. 2d 716, 727-28, 394 P.2d 813, 821-22, 40 Cal. Rptr. 69, 77-78 (1964), where Justice Tobriner said: "In a mass society which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan . . . ." *See also* Zeitlin v. Arnebergh, 59 Cal. 2d 901, 922-23, 383 P.2d 152, 166, 31 Cal. Rptr. 800, 814 (1963), where, in an obscenity case, he said: "The quicksilver of creativity will not be solidified by legal pronouncement; it will sometimes flow into new and sometimes frightening fields. If, indeed, courts try to forbid new and exotic expression, they will surely and fortunately fail." It would seem that such libertarian views could easily encompass the possession and use of marijuana as a means of "self-expression" or "creativity" within the periphery of the first amendment.

185 *See* 250 A.C.A. 226, 235, 58 Cal. Rptr. 520, 527 (1967), where the wearing of a beard is considered such a liberty; *see* text accompanying notes 91-96 *supra.*

186 *See* text accompanying notes 97-110 *supra.*

must show a "compelling interest" why it should limit the personal rights according to *People v. Woody*.[187] The appellate court under the *Woody* decision may make an independent examination of the record in ascertaining whether a compelling interest is shown.[188]

If it is thought that the statute is so broad as to be unnecessarily restrictive of constitutional rights, both *Griswold v. Connecticut* and *Wollam v. City of Palm Springs* are good authority that a narrower statute is in order, *i.e.* one criminally sanctioning abuses of marijuana and not its mere use and possession.[189]

(3) Although the state has the burden of showing a "compelling interest," the advocate would have to assemble the facts on marijuana and introduce them into the record in order to show a lack of harm to the user and society. It is not necessary to show marijuana is absolutely harmless. A showing of slight harm would be sufficient as then the state's "compelling interest" requirement would not be satisfied when balanced with the individual's fundamental rights.[190]

Whether or not an argument such as that set forth in this comment is feasible in light of practical circumstances is left up to the advocate to decide. Considering the injustice the statute creates through felony arrests and convictions and the abridgment of the individual's freedom to experience and to express himself without harm to others, the California marijuana possession statute ought to be declared unconstitutional in its present form.

Addendum

The case of *People v. Aguiar*[191] was decided by the California Court of Appeal as this issue went to press. This case held that the equal protection clause of the fourteenth amendment to the United States Constitution did not invalidate the California marijuana possession statute. In answering appellant's argument that marijuana should be classified in the same way as alcohol and other euphorics, the court first examined the power of the state to legislate against drugs in general. This due process analysis of the court depended upon finding some rational relationship between the statute and the state's promotion of the public health, safety, comfort, and welfare.[192] Although it was judicially noticed that respected medical opinion considered that marijuana was neither habit-forming nor harmful,[193] the court concluded that as long as there was "some" evidence upon which the statute could be based then the court must uphold the statute.[194] This conclusion was qualified with the provision that such a rule so obtains *unless* the statute invidiously discriminates against

187 *See* text accompanying notes 113-39 *supra*.

188 *See* text accompanying notes 140-47 *supra*.

189 *See* text accompanying notes 131-39 *supra*.

190 *See* People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964), where the court said that since "[t]he use of peyote presents only *slight danger* to the state and to the enforcement of its laws . . . [t]he scale tips in favor of the constitutional protection." (emphasis added).

191 257 A.C.A. 691, 65 Cal. Rptr. 71 (1968).

192 *Id.* at 697, 65 Cal. Rptr. at 174.

193 *Id.* at 697, 65 Cal. Rptr. at 174.

194 *Id.* at 697, 65 Cal. Rptr. at 175.

any group (the equal protection argument) and *unless* it does not intrude on specially protected areas enumerated in the Bill of Rights.[195]

The discussion of constitutionally protected areas is relevant since if possession of marijuana were within such an area, then more than just "some" evidence upon which the legislature could act would be necessary in order for the statute to be upheld. Indeed under the analysis which has been advanced in this comment, the state would have to show a compelling interest why it should infringe upon the constitutional rights.[196] The court found that it was not up to it to weigh fact-finding studies against each other since only some evidence of marijuana's harm was sufficient to uphold the statute.[197] This statement is not borne out by the California cases where the state's compelling interest has been in issue. Where the state must demonstrate a compelling interest to justify the statute then just such a judicial resolution of the factual issues is required in order to determine the interest of the state.[198] This was clearly the situation in *People v. Woody*[199] discussed in this comment.

The court pointed out that there is no constitutionally protected right to indulge in the use of euphoric drugs. For this proposition a number of United States Supreme Court cases were cited which upheld the state's power to legislate against the possession, use and manufacture of alcoholic beverages.[200] These cases dealt with the right of a citizen to use alcohol within the privileges and immunities clause and the due process clause of the fourteenth amendment. In light of the broad interpretation of personal liberties in the intervening years since the decisions of the cases cited and in light of the subsequent incorporation of much of the Bill of Rights into the fourteenth amendment, it is submitted that these cases are very much in doubt today. It can also be noted that since the alcohol possession cases also deal with infringements on the privileges and immunities of citizens rather than the constitutionally protected areas of the Bill of Rights discussed in this comment, the cases can be distinguished.

The opinion also discussed *Griswold v. Connecticut*[201] and *In re Klor*.[202] In noting that the principles of *Griswold* did not apply to the possession of marijuana, the court restricted itself to the holding of *Griswold* that only marital privacy was protected.[203] In fact the court expressly mentioned that appellant invoked no constitutional principle analogous to marital privacy to protect the right to use euphoric drugs.[204] Thus the door was left open for such an argument as that advanced in this comment that a right of privacy exists with respect to expression dealing solely with the mind.[205]

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195 *Id.* at 697, 65 Cal. Rptr. at 175.
196 See text accompanying notes 119-30 *supra.*
197 257 A.C.A. at 697, 65 Cal. Rptr. at 175.
198 See text accompanying notes 140-47 *supra.*
199 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
200 257 A.C.A. at 698, 65 Cal. Rptr. at 175.
201 381 U.S. 479 (1965).
202 64 Cal. 2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966).
203 257 A.C.A. at 700, 65 Cal. Rptr. at 176.
204 *Id.*
205 See text accompanying notes 97-109 *supra.*

The court's discussion of *Klor* was limited to deciding that the case did not hold that the United States Constitution protects all private conduct.[206] This is indeed true. As has been suggested in this comment, only conduct essential to freedom of expression is to be protected by the first amendment as construed by *Klor*.[207] The similarity between possession of obscene material for personal gratification and possession of marijuana for personal use has already been discussed in this comment and was not mentioned by the court in its opinion.

Basically the decision of *People v. Aguiar*[208] holds that the state has a right to legislate against use and possession of marijuana as long as there is some evidence available that it is harmful, provided that no area of constitutional protection is invaded and provided that the equal protection test is met. The purpose of this comment has been to advance the proposition that areas of constitutional protection do exist with respect to possession and use of marijuana thus requiring the state to come forward and show a compelling interest why it can infringe upon these rights. This proposition is still unanswered in California.

*Michael A. Town**

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206 257 A.C.A. at 700, 65 Cal. Rptr. at 176.
207 See text accompanying notes 89-90 *supra*.
208 257 A.C.A. 691, 65 Cal. Rptr. 171 (1968).
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