Non-Medical Marijuana: Rite of Passage or Russian Roulette?

July 1999

Accompanying Statement

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For certain individuals with AIDS and the 15 percent of chemotherapy patients whose nausea is not relieved by currently available medicines, marijuana may have some medicinal value. That is something to be determined by the research and clinical trials that the Institute of Medicine (IOM) recommended in its report, *Marijuana and Medicine: Assessing the Science Base*, issued earlier this year. The risks and benefits of marijuana as medicine are matters for physicians, scientists, the National Institutes of Health, and the Food and Drug Administration. Because smoked marijuana is a carcinogen and adversely affects the immune system, the IOM stressed the importance of developing an alternative delivery system, such as an aerosol using synthetic cannabinoids rather than the whole plant, and disapproved any use of smoked marijuana except by the terminally ill and those in extremis with chronic diseases, and even then only under tightly controlled circumstances.

For America's children and teens, marijuana is a dangerous drug. The extent of the danger and the most effective way to keep our youngsters from using this drug are matters for teens, parents, schools, churches, communities and public policy makers.

Marijuana's potential as medicine, as the IOM report noted, has nothing to do with whether the drug should be made more widely available or its possession, cultivation and distribution should be legalized for the general population. That is the subject of this paper, with special emphasis on the implications for children of legalization or decriminalization. Now that we know a child who gets through age 21 without smoking, using marijuana or any other illegal

drug, or abusing alcohol is virtually certain never to do so, a key measure of any drug policy should be how well it helps achieve that objective.

Recent discussions of marijuana policy have failed to make this key distinction between marijuana as medicine and marijuana as recreation. President Lyndon Johnson used to say that the problem with the Democratic party was that the politicians want to be intellectuals and the intellectuals want to be politicians. Marijuana discussions suffer an analogous problem: too many politicians want to play scientist and too many scientists want to play politician. Marijuana legalization proponents like to play doctor and prescribe marijuana by political referendum. Many opponents of decriminalizing or legalizing marijuana also like to play physician, opposing scientific inquiry to determine whether the drug might have any medicinal value. Medical marijuana should not be the nose under the tent leading to the drug's general legalization (as some proponents hope) any more than the medical use of cocaine and opiates has been regarded as an opening move in the direction of general use.

This paper on non-medical marijuana deals with the impact of decriminalization or legalization on the general use of marijuana, the dangers to health and well-being of our citizens that such use presents, how best to deal with those dangers and the ramifications of such radical changes in policy on marijuana smoking by the nation's children and teens.

The potential of marijuana as a dangerous drug for our children, as a gateway to other drug use, and as a signal of trouble is a matter of the most serious concern for American parents.

And there's plenty to justify such parental concern:

• Smoking marijuana, in and of itself, is especially dangerous for teens. The drug can impair short term memory, ability to concentrate and motor skills at a time when these are particularly important to children developing and learning in school. Marijuana can stunt the

intellectual, emotional and psychological development of adolescents. In some ways, marijuana combines the adverse health effects of both our currently legal drugs: the intoxication of alcohol with the lung damage of tobacco. Nine percent of those who ever use marijuana become dependent on it. In 1996 (the latest year for which numbers are available), more than 195,000 individuals entered treatment for marijuana; 62 percent (more than 120,000) of whom are under age 25, 45 percent (nearly 88,000) are teens or younger. There are more teens and children in treatment for marijuana than for any other substance including alcohol.

Statistically speaking, marijuana stands convicted as a gateway drug. Twelve- to 17-year-olds who smoke marijuana are 85 times more likely to use cocaine than those who do not. Among teens who report no other problem behaviors, those who used cigarettes, alcohol and marijuana at least once in the past month are almost 17 times likelier to use another drug like cocaine, heroin or LSD. To appreciate the power of these statistical relationships, remember that the 1964 Surgeon General's report on Smoking and Health found a nine to ten times greater risk of lung cancer among smokers; the early results of the Framingham heart study found individuals with high cholesterol two to four times likelier to get heart disease; and the Selikoff study found that workers exposed to asbestos were five times likelier to get lung cancer.

Biomedical and scientific studies are beginning to unearth the reason for this tight statistical relationship between use of marijuana and other drugs. Recent studies at universities in California, Italy and Spain reveal that marijuana affects levels of dopamine (the substance that gives pleasure) in the brain in a manner similar to heroin and cocaine (as well as nicotine and alcohol). While scientists have not yet uncovered the smoking gun, they have

certainly found the trigger finger. Proponents of decriminalization and legalization argue that so long as there is not conclusive proof of the gateway relationship, we should not worry about it. But parents who mistake the absence of proof for the proof of absence are playing Russian roulette with their children's lives. Although most kids who use marijuana will not move on to heroin and cocaine, teens who use marijuana are far more likely to get into harder drugs than teens who don't. Remember, most cigarette smokers will not get lung cancer; less than 20 percent will.

• Decriminalization for all ages of possession of small amounts of marijuana (e.g., an ounce, enough for 40 to 50 joints) or legalization of use, cultivation and distribution of the drug will increase use by adolescents.

We've been there, done that.

In the early 1960s a few hundred thousand individuals had smoked marijuana. Decriminalization, more lenient laws, and lax enforcement of existing state and federal laws opened the way for an enormous surge in use that peaked in 1979 when 30 million Americans smoked marijuana.

• Decriminalization or legalization of marijuana only for adults will increase use by minors.

We've been there, done that, too.

The sale of two legal recreational drugs, alcohol and tobacco, is prohibited for those under 18 (for tobacco) and under 21 (for alcohol). Use of these drugs by adolescents far exceeds their use of marijuana which is illegal for all regardless of age. Of high school tenth graders (usually 15 to 16 years old), nearly 28 percent have smoked cigarettes and 39 percent have used alcohol in the past month--in contrast, 19 percent have smoked marijuana. Among younger students, use of alcohol and nicotine is also substantially higher than marijuana use.

Of eighth graders, 23 percent drank and 19 percent smoked during the past month--in contrast, 10 percent have smoked marijuana.

This CASA White Paper, *Non-Medical Marijuana: Rite of Passage or Russian Roulette?*, makes clear that decriminalization or legalization of the drug would certainly increase use among the nation's teens and children. In a society that looks to government to protect it from unsafe cars and toys--and that recognizes that the availability of guns increases likelihood of their use--it is hard to understand why anyone would take actions likely to make this drug more readily available to our children.

Clearly, there ought to be a law. For teens, laws prohibiting the possession, distribution and cultivation of marijuana send a clear signal that smoking pot is dangerous and a conduct that society strongly disapproves.

This is not to say that all drug policies and laws on the books make sense.

Laws that prescribe mandatory sentences for possession of small amounts of marijuana are overkill. In general, mandatory sentences, especially those requiring drug and alcohol abusers and addicts to serve their entire sentence, are counterproductive. We need all the carrots and sticks we can muster to help these individuals shake their habit. Mandatory sentences take away any potential that an early release might hold as an incentive for such an inmate to enter treatment. Such sentences also remove the leverage that parole offers to get recently released inmates to continue treatment and aftercare or face a return to prison.

Mandatory sentences are particularly insidious where teens convicted of possession of marijuana are concerned. In such cases, prosecutors and judges should be given wide discretion in order to encourage the teen to stop using the drug. The best chance of achieving that objective is to permit prosecutors and judges to set a punishment proportionate to the offense, for they are

positioned to know what sanctions and opportunities are most likely to get the youngster back on track. The early results from the drug courts attest to the value of giving judges and prosecutors wide discretion in dealing with defendants.

At bottom, we must all recognize that the most important influences on children and teens are parents, relatives, friends, teachers, coaches, clergy and community. It is across the kitchen table, in the school yard, church pew and neighborhood that the problem of teen drug use will be resolved. Those who most influence teens--parents, friends, teachers, coaches, clergy--are helped by the clear signal that laws prohibiting possession, distribution and cultivation of marijuana send. Such laws provide support outside the home for the guidance that teens receive from their parents inside the home. As the IOM report on medical marijuana and a host of work sponsored by the National Institute on Drug Abuse of the National Institutes of Health indicate, smoking marijuana is a decidedly dangerous pastime for anyone, just on the basis of its adverse health implications.

Teen experimentation with marijuana should not be considered a casual rite of passage. Teens who smoke marijuana are playing a dangerous game of Russian Roulette. Most kids who smoke pot will not move on to cocaine, heroin and acid, but those who do smoke it greatly hike the odds that they will use harder drugs. Not all kids who smoke pot will become dependent on the drug, but nine percent will. Not all kids who smoke pot will go into drug treatment to try and shake the habit, but nearly 88,000 of the 195,000 individuals undergoing such treatment are teens and children and more teens and children are in treatment for marijuana than for any other drug, including alcohol. Not all kids who experiment will become regular users or pot heads but the only sure way to avoid that is not to smoke marijuana. Not all kids who smoke marijuana will so severely impair their short term memory and ability to concentrate that they will fail in school, drop out or seriously arrest their intellectual development, but many will. Not all teens who get

high on marijuana will be involved in a crippling or killing auto accident, but getting high greatly increases the dangers of driving and getting high is the reason teens (and adults) smoke pot. Society, through its laws and customs, has an obligation to do all it can to support parents and others who understand that smoking marijuana is not a rite of passage, but a very decidedly dangerous game of Russian Roulette.

As this CASA White Paper demonstrates, there is more than enough evidence that decriminalization or legalization of marijuana would greatly increase the danger that our children would use this drug. That is reason enough to reject any such course of action. The one thing our teens--and our society--do not need is a third legal drug.

John Demers, a recent *magna cum laude* graduate of Harvard Law School, did the heavy lifting and led the research effort on this White Paper. Dr. Herbert Kleber, CASA's Executive Vice President and Medical Director, William Foster, Ph.D., CASA's Senior Vice President and Chief Operating Officer and I reviewed and edited it. Others have read it and made suggestions. But, as always, CASA is responsible for its content.

Non-Medical Marijuana:

Rite of Passage or Russian Roulette?

Introduction

This CASA White Paper focuses on the suitable public policy to govern the general nonmedical use of marijuana and the appropriate parental concerns about such use by teenagers. The benefits and risks of marijuana as medicine are matters for doctors, scientists, the National Institutes of Health, and the Food and Drug Administration. Those are the experts who should determine the medicinal value of marijuana and the forums where such determinations should be made. If the drug is to be used medicinally, it should be prescribed by physicians, not by political referendum.

The non-medical use of marijuana is a matter of concern for all Americans, especially for teens, parents, schools, churches, communities, legislators, public health officials, and policy makers. They must measure the dangers of non-medical use of this drug in and of itself, the drug's potential as a gateway to other drug use, and the extent to which teen marijuana use should set off an alarm for parents. CASA has designed this White Paper to help these individuals assess the risks of proposals to decriminalize or legalize use of marijuana.

Seventy million Americans have tried marijuana, making it the nation's most commonly used illegal substance. In 1997, 19 million Americans smoked marijuana, 6.4 million did so frequently.³ Use among adolescents is particularly widespread. In 1998, nearly 23 percent of

¹ See U.S. Dep't Of Health & Human Serv's, Preliminary Results from the 1997 National Household SURVEY ON DRUG ABUSE at Appendix 5, Table 3A (1998).

² See id. at Table 4A.

³ See id. at Table 18A. "Frequent use" is defined as smoking marijuana 51 or more days in the past year. See id.

twelfth-graders were current marijuana users, meaning they had smoked it within the past month.⁴

Just under one-half had tried marijuana.⁵ One in every ten eighth graders smoked marijuana in the past month.⁶

Several aspects of marijuana use make it seem safer to use than other illegal drugs. Marijuana is the illegal drug with which Americans are the most familiar; just under a third of individuals over age 12 have at least experimented with it. Many who tried it were middle class youths whose brief period of use did not lead to addiction or affect their long-term professional and family lives. Unlike heroin, marijuana is not associated in the public imagination with impoverishment and squalor. Unlike cocaine and crack, it is not linked to violent crime and murder. Nor does marijuana carry in the general public's mind the image of unshakable addiction. Marijuana seems then a relatively benign drug, not correctly classified with cocaine or heroin, more like alcohol or tobacco;⁷ not great for your health, but not harmful enough to be illegal either.

Virtually every use of marijuana violates federal law and the law of the state in which it occurs. The federal government currently bans marijuana smoking for any reason.⁸ All states have made marijuana use illegal, but their penalties generally vary from a civil fine to a year in prison.⁹ Manufacture, distribution and importation are universally punished by prison sentences.¹⁰

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⁴ See Lloyd Johnston et al., Monitoring the Future: Preliminary Results, 1998 at Table 1b (1998).

⁵ See id. at Table 1a.

⁶ See id. at Table 1b.

⁷ For instance, in a survey of American attitudes toward substance abuse, when asked how dangerous marijuana is to one's health, 31 percent of respondents said very dangerous and 39 percent fairly dangerous. With respect to tobacco, 48 percent said very dangerous and 40 percent fairly dangerous; as for beer or wine, 22 percent said very dangerous and 47 percent said fairly dangerous. In contrast, 91 percent said cocaine was very dangerous and 93 percent said crack and heroin were very dangerous. *See* THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV. (CASA), NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE 73-74 (1995).

⁸ See 21 U.S.C. §§ 841, 844 (1994); see also infra notes 123 to 140 and accompanying text.

⁹ See infra notes 141 to 149 and accompanying text.

¹⁰ See id.

Many critics of the nation's drug policy oppose making the sale and use of these substances illegal. ¹¹ Marijuana is the favorite target of proposals to change the legal status of drugs. ¹² The most commonly advocated proposals would decriminalize or legalize use of marijuana. ¹³

Decriminalization is the repeal of criminal penalties associated with the possession of small amounts of marijuana for personal use. Most proposals would replace the criminal penalties with civil sanctions subjecting such possession to a fine, though some would repeal penalties entirely. Cultivation, importation, distribution, and possession of large quantities of the drug would remain punishable by criminal penalties. The market for marijuana would still be an illegal one.

Legalization would entail a more radical shift in drug policy. Proposed models of marijuana legalization differ in their details, but all would remove the current prohibitions not only on possession, but also on cultivation and distribution.¹⁴ Some proponents of legalization would have the government cultivate and market the drug while others leave it to the private sector and the free market.¹⁵

¹¹ For a critical assessment of the legalization of illegal drugs generally see Herbert Kleber, Joseph A. Califano, Jr., & John Demers, *Clinical and Societal Implications of Drug Legalization* in SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK 855 (Joyce Lowinson et al., eds., 3rd ed. 1997).

¹² This paper does not attempt to respond in detail to any particular decriminalization or legalization proposal. The observations made here apply generally to such proposals regarding marijuana. Of course, the specifics of each suggested set of policies or criticism of current policy will make the individual points in this paper more or less relevant to those arguments.

¹³ For an overview of the issue see MARK KLEIMAN, AGAINST EXCESS 253-85 (1992).

¹⁴ See, e.g., Arnold Trebach, For the Legalization of Drugs, in Arnold Trebach & James Inciardi, Legalize It? Debating American Drug Policy 7 (1993); How to Legalize Drugs (Jefferson Fish, ed. 1998); Joseph L. Galiber, A Bill to Repeal Criminal Drug Laws: Replacing Prohibition with Regulation, 18 Hofstra L. Rev. 831 (1990) (proposing legal regulations on marijuana and other illegal drugs that approximate those currently imposed on alcohol).

¹⁵ Compare Erik Grant Luna, Our Vietnam: The Prohibition Apocalypse, 46 DEPAUL L. REV. 483, 565 (1997) (proposing government disbursement of drugs at public health centers) with Randy Barnett, Bad Trip: Drug Prohibition and the Weaknesses of Public Policy, 103 YALE L.J. 2593, 2627-28 (1994) (book review) (supporting

Virtually all proponents of decriminalization and legalization would maintain prohibitions on use by children.¹⁶

Moves to change the legal status of the currently illegal drugs from marijuana to cocaine and heroin have never captured widespread public support with one exception--the decriminalization of marijuana for personal use. In 1973, a Congressionally authorized commission appointed by President Richard Nixon and chaired by the former Governor of Pennsylvania, Raymond Shafer, recommended such decriminalization. ¹⁷ President Jimmy Carter championed decriminalization in 1977. ¹⁸ Enacted in 11 states during the 1970s by legislation ¹⁹ and implemented in one state by judicial opinion, ²⁰ marijuana decriminalization at one time captured the support of the majority of Americans. ²¹ Today, this majority no longer exists. ²² States have increased penalties for marijuana law violations, ²³ the state court opinion has been reversed by referendum, ²⁴ and President Bill Clinton has repeatedly expressed opposition to any

drug legalization, but criticizing the "horrible but surprisingly common proposal that illicit drugs be distributed by a government monopoly").

¹⁶ See, e.g., Eric Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 416 (1995); Trebach, *supra* note 14, at 128; Galiber, *supra* note 14, at 870. "No person shall sell, deliver or give away . . . any controlled substances to any person, actually or apparently, under age twenty-one years." *Id*. "Any person under the age of twenty-one years who presents . . . any written evidence of age which is false . . . for the purpose of purchasing . . . any controlled substances may be arrested . . ." *Id*.

¹⁷ See National Comm'n on Marijuana and Drug Abuse, Drug Use in America: Problem in Perspective (1973).

¹⁸ See infra note 97 and accompanying text.

¹⁹ See infra notes 90 to 95 and accompanying text.

²⁰ See infra note 96 and accompanying text.

²¹ See David Musto, Faith in the Legal Control of Drugs: Then and Now, 66-Jun N.Y. St. B. J. 14, 16 (1994).

²² See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1996 at 178-80 (1997). Because of the way the survey questions are formulated, it is difficult to determine support for specific reform alternatives, i.e., decriminalization versus various models of legalization. But putting aside the issue of medical marijuana use, surveys consistently reveal that 70 percent to 80 percent of the public opposes liberalizing marijuana laws. See id.

²³ See infra note 141 to 144 and accompanying text.

²⁴ See infra note 115 and accompanying text.

change in marijuana policy.²⁵ Yet decriminalization of marijuana use is still frequently proposed in state legislatures.²⁶ Many who support the eventual legalization of cocaine, heroin and other currently illegal drugs propose decriminalizing marijuana as the first step.²⁷

Proponents of legalization and decriminalization often begin with the premise that marijuana is not a very dangerous drug.²⁸ To the extent that it is dangerous, they argue, current prohibitions are disproportionate to its danger.²⁹ They cite anecdotes of individuals caught with small amounts of marijuana sentenced to long prison sentences or subjected to forfeiture of valuable assets.³⁰ Alcohol and tobacco, they observe, are responsible for far more morbidity and mortality, yet both are legal.³¹ These proponents claim that this differentiation reflects hypocrisy in our legal system and encourages disrespect for the law.³² In any case, say some critics, if the goal of marijuana policy has been to discourage use then it has failed--marijuana is widely available and used.³³ Consequently, we need not much fear increased use in a legalized regime.³⁴ Moreover, enforcement of marijuana laws diverts limited resources from other more pressing

²⁵ See, e.g., Stephen Labaton, Surgeon General Suggests Study of Legalizing Drugs, N.Y. TIMES, December 8, 1993, at A23 (reporting that following Surgeon General Jocelyn Elders's remarks about drug legalization, the White House spokeswoman stated that President Bill Clinton strongly opposes legalizing drugs).

²⁶ See H.B. 87-FN (N.H. 1999) (reducing possession of less than one ounce of marijuana from a misdemeanor to a violation); A.B. 577 (Nev. 1999) (reducing possession of less than 28.5 grams of marijuana to a misdemeanor punishable by a \$100 fine).

²⁷ See, e.g., Ethan Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245

²⁷ See, e.g., Ethan Nadelmann, Drug Prohibition in the United States: Costs, Consequences, and Alternatives, 245 SCI. 939, 945 (1989); Kurt Schmoke, An Argument in Favor of Decriminalization, 18 HOFSTRA L. REV. 501, 524 (1990); Lester Grinspoon & James Bakalar, The War on Drugs--A Peace Proposal, 330 New Eng. J. Med. 357, 359 (1994).

²⁸ See, e.g., Galiber, supra note 14, at 844-45. "[V]ery few people lose control of their habits; almost anyone can stop cold when they want to or have to and . . . for all but a few, the worst consequence of drug use is an arrest." *Id.* ²⁹ See, e.g., NATIONAL ORG. FOR THE REFORM OF MARIJUANA LAWS (NORML), STILL CRAZY AFTER ALL THESE YEARS (1997).

³⁰ See, e.g., Eric Schlosser, More Reefer Madness, ATLANTIC MONTHLY, Apr. 1997, at 90.

³¹ See, e.g., Eric Schlosser, The Politics of Pot: A Government in Denial, ROLLING STONE, March 1999, at 47.

³² See, e.g., Steven Duke & Albert Gross, America's Longest War 106 (1993).

³³ See, e.g., Galiber, supra note 14, at 833 (premising his decriminalization bill in part on his belief of "the futility of using the criminal law to lessen or stop drug use").

³⁴ See, e.g., Trebach, supra note 14, at 103.

crime problems.³⁵ Other reformers are less concerned with the consequences of current marijuana policy and begin from a different perspective: whether attacking current policy from the political left or right, they argue that marijuana use, like other drug use, is protected by the right to privacy and individual freedom.³⁶

Part I of this paper describes American marijuana policy leading up to the current federal and state marijuana laws. Part II reviews the likely consequences of decreased marijuana prohibitions on the extent of use, including a look at the lessons learned from our experience with two legal drugs--tobacco and alcohol. Part III discusses the physical and behavioral consequences of marijuana use, including its effects on health, on the incidence of driving accidents, and on the use of other drugs. Part IV examines the impact that changing the legal status of marijuana will have on the criminal justice system. Part V considers the experience of the Netherlands with its decriminalization of marijuana, since that is the foreign country whose drug policy is most highly regarded by advocates of relaxing marijuana laws.

Part VI concludes that proponents of decriminalization and legalization underestimate the role of the law in discouraging the number of users and frequency of use and misperceive the dangers of marijuana use. Decriminalization, the more widely proposed change, is the policy that will have the least effect on the concerns that animate many drug reformers--burgeoning jail

³⁵ See, e.g., NORML, supra note 29, at Part V.

³⁶ See, e.g., THOMAS SZASZ, OUR RIGHT TO DRUGS (1992); David Boaz, A Drug-Free America -- or a Free America?, 24 U. C. DAVIS L. REV. 617 (1991). A discussion of the philosophical and moral arguments on the extent to which society may prevent individuals from harming themselves is beyond the scope of this paper. In any case, the paper argues that marijuana use has deleterious effects beyond harm to the individual user. Further, in today's interrelated society, the public bears many of the costs of even those harms incurred solely by an individual. Finally, American legal tradition has never recognized a fundamental liberty interest in the use of marijuana. That argument has been consistently rejected by the state and federal courts. See infra note 96. This paper deals with policy options within the present Constitutional framework.

populations, the racially disproportionate impact of current policy, and drug trade-related (as opposed to drug use-related) violence. Instead, as it did in the 1970s, decriminalization would largely give a free pass to affluent and middle class youths to experiment with the drug. More radical proposals to legalize marijuana would lead to more widespread use and consequent damage to health. Given the likely increased use discussed in Part II and the adverse health and behavioral effects detailed in Part III, decriminalization—or any more fundamental change in marijuana policy—risks creating a third legal substance with widespread use and abuse and adverse societal consequences comparable to tobacco and alcohol. Part VI concludes that mandatory sentences for possession of small amounts of marijuana make no sense and that prosecutors and judges should have broad discretion to impose appropriate sanctions. Whether children and teens use marijuana is likely to be determined by parents, teachers, clergy and teens themselves, but that laws prohibiting its possession and use provide a clear signal for society about the dangers of such use and important normative support to parents, friends and others who most intimately influence teen conduct.

Part I

A Legal History of Marijuana

Marijuana, made up of the leaves, stems, and flowering tops of the cannabis plant, is also used as the common name for the whole plant,³⁷ and preparations for use are commonly made

³⁷ Although there are at least two species of cannabis--*Cannabis sativa* and *Cannabis indicia*--courts have held that the phrase "marijuana" and even its definition as *Cannabis sativa L*. in 21 U.S.C. § 802 (1994) covers the male and female plant of any species of cannabis which contains tetrahydrocannabinol. *See, e.g.*, United States v. Walton, 514 F.2d 201 (D.C. Cir. 1975); United States v. Proyect, 989 F.2d 84 (2nd Cir. 1993); United States v. DeLeon, 955 F.2d 1346 (9th Cir. 1992).

tetrahydrocannabinol (THC) and it contains at least 60 cannabinoids.³⁹ Drug preparations from the plant fall into three categories with increasing potency, as measured by the amount of THC they contain: bhang, made from the tops of uncultivated plants with low resin content; ganja, made from the flowering tops and leaves of cultivated plants; and hashish, made from the resin itself.⁴⁰ The potency of marijuana also varies with climate and cultivation.⁴¹ Early settlers in Virginia grew the plant for its fiber, which they used in manufacturing rope.⁴² In the late nineteenth century, cannabis appeared in some patent medicines hawked as a cure for depression, impotence, and a host of other ailments.⁴³ After passage of the Pure Food and Drug Act⁴⁴ in 1906, which mandated the labeling of over-the-counter remedies containing opiates, cannabis or cocaine, the prevalence of cannabis in such medications declined.⁴⁵ Secret hashish clubs existed in large cities across America as early as the 1880s,⁴⁶ but widespread recreational marijuana use began in the Southwest where it was smoked by Mexican farm laborers who had immigrated during the 1920s.⁴⁷

The Marijuana Tax Act

Concern about the spreading use of marijuana grew, animated in part by its association with Mexican immigrants and blacks and fanned by exaggerated newspaper stories linking the

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³⁸ See Wayne Hall & Nadia Solowij, Adverse Effects of Cannabis, 352 LANCET 1611, 1611 (1998).

³⁹ See Institute of Med., Marijuana and Medicine: Assessing the Scientific Basis at I.19 (1999).

⁴⁰ See Lester Grinspoon & James B. Bakalar, *Marijuana* in SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK 199, 200 (Joyce Lowinson et al., eds., 3rd ed. 1997).

⁴¹ See id.

⁴² See Steve Sussman et al., Marijuana Use: Current Issues and Research Directions, 26 J. DRUG ISSUES 695, 697 (1996).

 $^{^{43}}$ See James Inciardi, The War on Drugs II 19 (1992).

⁴⁴ Pub. L. No. 59-384, 34 Stat. 768 (1906).

⁴⁵ See David Musto, *Historical Perspectives* in Substance Abuse: A Comprehensive Textbook, *supra* note 39, at 2.

⁴⁶ See INCIARDI, supra note 43, at 20.

drug to insanity, gruesome murders, and orgies.⁴⁸ This concern spurred states, beginning with those in the Southwest, to ban marijuana use.⁴⁹ State officials urged Congress to include marijuana in the Harrison Act of 1914,⁵⁰ the first federal anti-drug legislation.⁵¹ Having undertaken the prohibition of cocaine and heroin in the Harrison Act, the federal government resisted assuming responsibility for the control of a drug whose presence was felt only in a few states and one that could be grown locally rather than need to be imported.⁵² Nevertheless, as pressure from the states mounted,⁵³ Congress passed the Marijuana Tax Act in 1937.⁵⁴ That Act relied on the power of the federal government to tax, because federal authority under the Interstate Commerce Clause to intrude on the police powers traditionally reserved to the states was still uncertain.⁵⁵ The Act required that every person importing, cultivating, and dealing in marijuana register and pay an occupational tax.⁵⁶ Every marijuana transaction had to be registered or recorded.⁵⁷ The Act subjected transactions involving unregistered individuals and not made for medical use (i.e., virtually all recreational uses) to a \$100 tax, a prohibitively high levy.⁵⁸ The Act punished violations with prison sentences of up to 5 years and a \$2,000 fine.⁵⁹

In states which had already made marijuana use illegal, individuals who registered with the federal government put themselves at risk of state prosecution. Thus, although passed as a revenue bill, the Marijuana Tax Act effectively made marijuana illegal throughout the

⁴⁷ See David Musto, The American Disease 219 (3d. ed. 1999).

⁴⁸ See INCIARDI, supra note 43, at 21-23.

⁴⁹ See Musto, supra note 47, at 218-221; see also JILL Jonnes, Hep-Cats, Narcs, and Pipe Dreams: A History of America's Romance with Illegal Drugs 127-29 (1996).

⁵⁰ Pub. L. No. 63-223, 38 Stat. 785 (1914).

⁵¹ See JONNES, supra note 49, at 128.

⁵² See id.; MUSTO, supra note 47, at 222.

⁵³ See MUSTO, supra note 47, at 220-23.

⁵⁴ Pub. L. No. 75-238, 50 Stat. 551 (1937).

⁵⁵ See Musto, supra note 47, at 222.

⁵⁶ See Pub. L. No. 75-238, § 2, 50 Stat. 551-52.

⁵⁷ See id. at § 6, 50 Stat. 553.

United States.⁶⁰ Once the federal government assumed responsibility for marijuana regulation, the Federal Bureau of Narcotics, headed by Harry Anslinger who had initially rebuffed the entreaties of state officials, threw itself into the campaign with vigor.⁶¹ Commissioner Anslinger denounced marijuana in speeches and articles as an "Assassin of Youth."

Marijuana disappeared from mainstream American society for the next twenty-five years. Its use was relegated mostly to the music scene.⁶³ Public and government concerns with drug use focused mainly on heroin, and led to the first mandatory minimum sentencing laws for drug offenses in 1951.⁶⁴ In 1956, Congress passed the Narcotics Control Act,⁶⁵ which increased the mandatory minimum penalties for violation of the narcotics and marijuana laws.⁶⁶

Explosion in Marijuana Use

In the 1960s, marijuana use began to spread rapidly throughout the population and into the middle class.⁶⁷ At the start of the decade, the number of Americans who had tried marijuana

⁵⁸ See id. at § 7, 50 Stat. 554.

⁵⁹ See id. at § 12, 50 Stat. 556.

⁶⁰ Although Congress enacted the law as a tax act, any notion that the purpose of the Act was to raise revenue, not to prohibit marijuana, seems highly unlikely. Federal officials decided first to prohibit marijuana and only then on how to do this so that their efforts would be upheld by the Supreme Court. As mentioned above, the Interstate Commerce Clause would not support federal marijuana prohibition. Thus the federal government initially considered making marijuana illegal pursuant to its treaty authority, following the example of the Migratory Bird Act upheld in *Missouri v. Holland*, 252 U.S. 416 (1920). *See* MUSTO, *supra* note 47, at 224. But efforts to convince other countries to sign a treaty prohibiting marijuana on which to base the law fell through. *See id.* at 225. Only then did the federal government decide to use a transfer tax mechanism such as that the Court had upheld earlier that year with regard to the National Firearms Act in *Sonzinsky v. United States*, 300 U.S. 506 (1937). *See id.* at 222. In fact, when the transfer tax idea had been first proposed (prior to *Sonzinsky*), Commissioner Anslinger doubted it could succeed. *See id.*

⁶¹ See JONNES, supra note 49, at 128-29.

⁶² See id.

⁶³ See id. at 129.

⁶⁴ See Boggs Act, Pub. L. No. 82-255, 65 Stat. 767 (1951); see also JONNES, supra note 48, at 162; MUSTO, supra note 46, at 230-31.

⁶⁵ Pub. L. No. 84-728, 70 Stat. 567 (1956).

⁶⁶ The Act imposed a 2- to 10-year sentence for first violations, 5- to 20-year sentence for second violations, and 10- to 40-year sentence for third and subsequent violations. *See* Pub. L. No. 84-728, § 103, 70 Stat. 568.

⁶⁷ See JONNES, supra note 49, at 237, 255-60; MUSTO, supra note 47, at 247-48.

numbered a few hundred thousand.⁶⁸ By 1971, they totaled 24 million.⁶⁹ For the first time, marijuana users were not in isolated pockets of society.⁷⁰ Many of these new users were the children of the affluent and middle classes.⁷¹ Children of well-known political figures, including the governor of New Jersey and the Democratic candidate for the governor of New York, were caught with marijuana.⁷² Publications such as *High Times* (established in 1974) celebrated the new marijuana culture.⁷³ Founded in 1971, the National Organization for the Reform of Marijuana Laws, an organization whose acronym--NORML--testifies to its mission, sought to cement the drug's recently acquired position in mainstream America.⁷⁴

In 1970, after the Supreme Court had upheld broad Congressional authority to regulate even intrastate activity, ⁷⁵ Congress reorganized the drug laws in the Comprehensive Drug Abuse Prevention and Control Act. ⁷⁶ This Act repealed mandatory minimum sentences for all drug offenses except those involving continuing criminal enterprises. ⁷⁷ It established the current classification of drugs into five schedules according to their medical usefulness and potential for abuse. ⁷⁸ Congress placed marijuana (along with heroin and lysergic acid diethylamide (LSD)) in Schedule I, meaning that it has a high potential for abuse and no presently accepted medical uses. ⁷⁹ Schedule II included drugs such as cocaine and morphine, which have a high potential for

⁶⁸ See INCIARDI, supra note 43, at 42.

⁶⁹ See Musto, supra note 47, at 248.

⁷⁰ See JONNES, supra note 49, at 237-39, 254-60.

⁷¹ See id.

⁷² See id. at 271.

⁷³ See id. at 311.

⁷⁴ This continues to be its mission. *See* www.norml.org.

⁷⁵ See U.S. CONST. art I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several states. . ."); National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Wickard v. Filburn, 317 U.S. 111 (1942). Federal power to prohibit drugs under its Constitutional grant to regulate interstate commerce has consistently been upheld. See, e.g., United States v. Tisor, 96 F.3d 370 (9th Cir. 1996).

⁷⁶ Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801 et seq. (1994)).

⁷⁷ See id.

⁷⁸ See 21 U.S.C. § 812 (1994).

⁷⁹ See 21 U.S.C. § 812(b), (c) (1994).

abuse, but have some accepted medical uses.⁸⁰ Schedules III (including anabolic steroids), IV (including Librium and Valium), and V (including Robitussin with codeine) list drugs which have increasing medical usefulness and decreasing abuse potential.⁸¹ Thus possession and distribution of marijuana for any reason became illegal under federal law.⁸²

The young new users of the 1960s and 1970s, as well as their parents, believed that the stricter sentences for drug use which had been enacted in the 1950s too severely punished what they viewed as youthful rebellion.⁸³ So Congress decreased the penalties for the use of marijuana in the 1970 Comprehensive Drug Abuse Act. First-time possession violations carried a maximum penalty of one-year probation.⁸⁴ If the violator successfully completed probation the proceedings would be dismissed.⁸⁵ In addition, if the violator were 21 years old or younger, all records of arrest and indictment would be expunged and no record would remain of the drug offense.⁸⁶ While not decriminalized, marijuana possession was made a minor offense. The Act also authorized the creation of the National Commission on Marijuana and Drug Abuse (known as the Shafer Commission after its chairman, former Pennsylvania Governor Raymond Shafer) to investigate the dangers of marijuana use and propose policies for its regulation.⁸⁷ The

⁸⁰ See id.

⁸¹ See id.

⁸² Recently, the medical use of marijuana has become a topic of much debate. While currently illegal under federal law, medical marijuana use would require only moving the drug from Schedule I to Schedule II and obtaining the approval of the Food and Drug Administration for specific uses. This would not affect the legal status of recreational marijuana use. For a discussion of the medical use of marijuana see *infra* notes 276 to 282 and accompanying text.

⁸³ See Jonnes, supra note 49, at 271; see also Albert DiChiara & John Galliher, Dissonance and Contradictions in the Origins of Marijuana Decriminalization, 28 L. & Soc'y Rev. 41 (1994) (arguing that decriminalization resulted from the widespread moral dissonance created when many individuals of high social status were arrested for violating the marijuana laws).

⁸⁴ See 21 U.S.C. § 844(b) (1970) (repealed by Pub. L. No. 98-473, Title II, § 219(a), 98 Stat. 2027 (1984)).

⁸⁵ See id.

⁸⁶ See id.

⁸⁷ See Pub. L. No. 91-513, Tit. II, Part F, § 601, 84 Stat. 1280.

Commission's 1973 recommendation that Congress decriminalize possession of marijuana for personal use reflected society's tolerant attitude toward marijuana use at that time.⁸⁸

States followed the federal lead in reducing sanctions for marijuana use. By the end of the 1970s all states but one had reduced marijuana possession from a felony to a misdemeanor.⁸⁹ In 1973 Oregon decriminalized the possession of small quantities of marijuana. 90 California, 91 Colorado, 92 and Alaska 93 followed in 1975. By 1978 eleven state legislatures representing onethird of the nation's population had decriminalized marijuana,⁹⁴ with individual legislators often invoking horror stories about the consequences of marijuana arrests reminiscent of Commissioner Anslinger's tales of the consequences of marijuana use.⁹⁵ In 1975, the Alaska Supreme Court held that the privacy clause in the state constitution protected possession of marijuana in the home

⁸⁸ See NATIONAL COMM'N ON MARIJUANA & DRUG ABUSE, supra note 17, at 458. "Possession of marijuana for personal use would no longer be an offense, but marijuana possessed in public would remain contraband subject to summary seizure and forfeiture." Id.

⁸⁹ See DiChiara & Galliher, supra note 83, at 45. Nevada remained the only state with felony penalties for possession of marijuana for personal use. *See id.* ⁹⁰ *See* Act of July 22, 1973, ch. 680, 1973 Or. Laws 1521.

⁹¹ See Act of July 9, 1975, ch. 248, 1975 Cal. Stat. 641.

⁹² See Act of July 1, 1975, ch. 115, 1975 Colo. Sess. Laws 433.

⁹³ See Act of Sept. 2, 1975, ch. 110, 1975 Alaska Sess. Laws.

⁹⁴ In addition to the four already mentioned, the other states were Maine, Ohio, Minnesota, Mississippi, New York, North Carolina, and Nebraska. See Act of Mar. 1, 1976, ch. 499, 1975 Me. Laws 1273, 1368; Act of July 1, 1976, No. 300, 1, 1975-1976 Ohio Laws 2311, 2323-24; Act of Mar. 11, 1976, ch. 42, 1976 Minn. Laws 101; Act of July 1, 1977, Ch. 482, 1977 Miss. Laws 922; Act of June 29, 1977, ch. 360, 1977 N.Y. Laws; Act of July 1, 1977, ch. 862, 1977 N.C. Sess. Laws 1178; Act of Apr. 20, 1978, No. 808, 2, 1978 Neb. Laws 817. Strictly speaking, several of these states did not decriminalize marijuana, they "depenalized" it. Possession, though punishable only by a fine, remained a criminal misdemeanor. Alaska, Maine, Mississippi, Nebraska, New York and Oregon went further and decriminalized marijuana possession by making it a civil violation punishable by a fine. Because the punishments under decriminalization and depenalization are virtually identical, decriminalization will be used to refer to the policy of all eleven of these states. For a description of the various decriminalization laws see DiChiara & Galliher, supra note 83, at 48. See also Richard Bonnie, The Meaning of "Decriminalization": A Review of the Law, 10 CONTEMP. DRUG PROBS. 277 (1981).

⁹⁵ One Ohio legislator showed a film to his colleagues in which the parents of an adolescent marijuana smoker call the police to help them prevent their child from using marijuana. The child is arrested for possession and sentenced to prison where he is gang raped and hangs himself. See DiChiara & Galliher, supra note 83, at 51-52. A North Carolina Senator told the story of a young boy imprisoned for marijuana possession and murdered there. See id. at 56.

for personal use, but not public possession of marijuana. In 1977, President Jimmy Carter asked Congress to replace all federal criminal penalties for possession of less than one ounce of marijuana with a \$100 fine. Such a plan would have decriminalized marijuana on the federal level. Throughout this time marijuana use increased, peaking at 22.5 million current (at least monthly) users in 1979. By the end of the 1970s, an estimated 50 million individuals had tried marijuana. One in ten high school seniors smoked pot daily, nearly four in ten were current smokers.

Citizen Concern, New Laws and Decline in Use

In the late 1970s, parents' organizations, alarmed by the surge of marijuana use, began a grassroots movement to stem the tide. Organizations such as Families in Action pushed the state and federal governments for stricter anti-drug policies. First Lady Nancy Reagan joined

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⁹⁶ See Ravin v. State, 537 P.2d 494 (Alaska 1975). The Court found that while individuals did not have a fundamental liberty interest in the use of marijuana, the explicit state constitutional provision granting the right to privacy did protect possession of small amounts of the drug in the home. See id. at 502, 504. Like state legislatures during this time, the Court seemed to be animated at least in part by the punishments meted out to the growing number of otherwise law abiding, middle class marijuana users. The Court pointed out that in 1973 26 million Americans used marijuana and that 81 percent of individuals arrested for marijuana-related crimes had never been previously convicted of a crime. See id. at 505, 508. In Belgarde v. State, 543 P.2d 206 (Alaska 1975), the Court made clear that the privacy provision did not protect public possession of marijuana. See id. at 207-08. No other state court has found a right to the personal possession of marijuana either in or out of the home. See, e.g., State v. Mallan, 950 P.2d 178 (Hawai'i 1998); People v. Shepard, 409 N.E.2d 840 (N.Y. 1980); National Org. for the Reform of Marijuana Laws v. Gain, 100 Cal.App.3d 586, 161 Cal.Rptr. 181 (1979); State v. Kells, 259 N.W.2d 19 (Neb. 1977); see also National Org. for the Reform of Marijuana Laws v. Bell, 488 F.Supp. 123 (D.D.C. 1980); United States v. Maas, 551 F.Supp. 645 (D.N.J. 1982).

⁹⁷ See Musto, supra note 47, at 259-61; Jonnes, supra note 49, at 313. The proposal died in Congress where it met strong opposition. The Carter Administration stopped urging decriminalization following the departure of Dr. Peter Bourne, Special Assistant for Health Issues and the lead official on drug policy reform. His writing a false perscription and allegations of cocaine use at a party prompted Bourne's resignation and left the Administration in no position to appear soft on drugs. See Musto, supra note 47, at 262-63; Jonnes, supra note 49, at 315-18.

⁹⁸ See U.S. DEP'T OF HEALTH & HUMAN SERV'S, supra note 1, at Table 5A.

⁹⁹ See Inciardi, supra note 43, at 43.

¹⁰⁰ See JOHNSTON ET AL.. supra note 4. at Table 5.

¹⁰¹ See id. at Table 4.

¹⁰² See Musto, supra note 47, at 264-67.

¹⁰³ See id.; JONNES, supra note 49, at 391-94.

their efforts with her Just Say No campaign encouraging total abstention from drug use.¹⁰⁴ The cocaine-induced death of basketball star Len Bias in 1986 emblazoned the dangers of drugs on the American consciousness.¹⁰⁵ Beginning that year, the Partnership for a Drug-Free America launched a television, radio, and print media advertising campaign to discourage drug use.¹⁰⁶

With the Comprehensive Crime Control Act of 1984, the federal government passed the first in a series of drug control laws that emphasized the role of law enforcement in preventing drug use. The Act repealed the probation available to first-time marijuana users. This Act was followed by the Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Amendments Act of 1988. Congress introduced mandatory minimum penalties for cultivation, distribution and possession of marijuana based on the quantity of the drug involved, set enhanced sentences for selling marijuana to minors or near schools, and expanded drug-related asset forfeiture laws. States joined in the anti-drug law enforcement campaign by passing similar measures. In 1990, Alaska's voters passed a referendum to overturn their Supreme Court's 1975 decision and the subsequent legislative decriminalization.

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 $^{^{104}}$ See id.

¹⁰⁵ See JONNES, supra note 49, at 334.

¹⁰⁶ See Musto, supra note 47, at 290.

¹⁰⁷ Pub. L. No. 98-473, 98 Stat. 1976 (1984).

¹⁰⁸ See id. at §219(a), 98 Stat. 2027.

¹⁰⁹ Pub. L. No. 99-570, 100 Stat. 3207 (1986).

¹¹⁰ Pub. L. No. 100-690, 102 Stat. 4312 (1988).

¹¹¹ See Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 - 3207-6.

¹¹² See Pub. L. No. 98-473, § 405A, 98 Stat. 2069.

¹¹³ See Pub. L. No. 100-690, § 6071-6080, 102 Stat. 4320-27.

¹¹⁴ See infra notes 143 to 144 and accompanying text.

¹¹⁵ See Initiative Proposal No. 2 (Alaska 1990). Before the referendum, the law punished possession of less than one ounce of marijuana in public with a \$100 fine. See id. Pursuant to Ravin v. State, discussed supra at note 96, possession in the home of up to four ounces of marijuana was legal. See id. The referendum recriminalized both possession in the home and in public. See ALASKA STAT. § 11.71.060 (Michie 1998) (making possession of less than one-half of a pound of marijuana a misdemeanor punishable by up to 90 days in prison). The referendum has been challenged insofar as it attempts to recriminalize possession in the home by overturning Ravin. The state constitutional issue has yet to be settled. See Alaskans for Privacy v. State, No. 3AN-91-1746 (1991); State v. McNeil, No. 1KE-903-947 CR (D. Alaska 1993).

The 1994 Violent Crime Control and Law Enforcement Act¹¹⁶ increased penalties for drug-related gun violence¹¹⁷ and in its "Three Strikes" provision imposed life sentences on individuals convicted of a violent felony if they had been previously convicted either of two violent crimes or a violent and a serious drug crime.¹¹⁸ Stepped up enforcement of the laws paralleled the increasing severity of punishment. Congress did balance punishment of repeat offenders with concerns for low-level drug offenders facing mandatory minimum sentences by allowing judges to bypass the mandatory sentence for non-violent offenders with little or no criminal history.¹¹⁹ The Act also authorized development of substance abuse treatment programs in prisons,¹²⁰ crime prevention programs for at-risk youth,¹²¹ and alternatives to incarceration for young nonviolent offenders.¹²²

Currently federal law prohibits the use and distribution of marijuana. Congress has set penalties for possession, cultivation and distribution of marijuana according to the amount of the drug involved and the criminal record of the offender. For instance, the largest trafficker, an individual convicted for the first time of cultivation, distribution, or possession with intent to distribute, of more than 1000 kilograms of marijuana or 1000 marijuana plants, faces a mandatory minimum sentence of 10 years imprisonment. A second such offender faces 20 years in prison; a third, life imprisonment. The length of the sentences decreases with the quantity of the drug

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¹¹⁶ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

¹¹⁷ See id. at §§ 110501, 110503, 110513, 108 Stat. 2015-16, 2019.

¹¹⁸ See id. at § 70001, 108 Stat. 1982-84.

¹¹⁹ See id. at § 80001, 108 Stat. 1985-86. A judge may avoid applying a mandatory minimum sentence if a defendant has a minimal criminal history, did not use violence or carry a firearm, was not a leader in organizing the crime, cooperated with the government, and the offense did not result in death or serious bodily injury. See id. ¹²⁰ See id. at §§ 32001, 32101, 108 Stat. 1896-99.

¹²¹ See id. at §§ 31501-31505, 108 Stat. 1888-90.

¹²² See id. at §§ 1801-06, 108 Stat. 1819-22.

¹²³ See 21 U.S.C. § 841 (1994). There are also possible fines for each offense.

¹²⁴ See 21 U.S.C. § 841(b)(1)(A) (1994).

 $^{^{125}}$ See id.

involved in the crime. A person convicted of cultivation, distribution, or possession with intent to distribute, of less than 50 kilograms of marijuana faces no more than 5 years in prison.¹²⁶ Possession of marijuana without intent to distribute (i.e., for personal use) triggers no mandatory prison term and is punishable by no more than one year in prison.¹²⁷ Second offenders can receive 15 days to 2 years in prison.¹²⁸

Congress has eliminated suspended sentences and probation for all marijuana offenses.¹²⁹ Sentences are increased in cases of death or serious bodily injury due to use of marijuana.¹³⁰ Twice the maximum penalty is given for drug offenses, including those involving marijuana, within 1000 feet of a school, playground, youth center, or other area where children are likely to congregate,¹³¹ and for sales by adults (over age 18) to minors (under age 21).¹³² Criminal and civil forfeiture statutes,¹³³ as well as laws that target criminal organizations,¹³⁴ buttress these prison terms and fines.

Federal sentencing guidelines narrow the discretion of judges to set the sentence of marijuana law offenders.¹³⁵ Concerned with disparate sentencing for similarly situated defendants and criminals serving much less time than their sentences, Congress set sentences according to the defendant's criminal history and severity of the offense.¹³⁶ The type of crime determines the severity of the offense, with adjustments made for such factors as the harm to the victim, the

¹²⁶ See 21 U.S.C. § 841(b)(1)(D) (1994).

¹²⁷ See 21 U.S.C. § 844(a) (1994).

 $^{^{128}}$ See id.

¹²⁹ See 21 U.S.C. §§ 841(b), 844(a) (1994).

¹³⁰ See, e.g., 21 U.S.C. §841(b)(1)(A) (1994). For a first-time drug violation involving more than 1000 pounds of marijuana, "... if death or serious bodily injury results from use of such substance [the sentence] shall be not less than 20 years" instead of 10 years. *Id*.

¹³¹ See 21 U.S.C. § 860 (1994).

¹³² See 21 U.S.C. § 859 (1994).

¹³³ See 21 U.S.C. § 853 (1994) (criminal forfeiture); 21 U.S.C. § 881 (1994) (civil forfeiture).

¹³⁴ See Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-68 (1994).

quantity of the drug involved, the defendant's role in the crime, and his acceptance of responsibility.¹³⁷ Together with the defendant's criminal history, the severity of the offense establishes a narrow sentence range.¹³⁸ Judicial departures from the range are allowed only in limited circumstances such as substantial assistance (downward departure) or extreme cruelty or resulting death (upward departures).¹³⁹ If a mandatory minimum, which is based only on the quantity of the drug involved, calls for a higher sentence than the existing sentencing guidelines, the judge must impose that sentence.¹⁴⁰

State marijuana laws generally follow the federal model.¹⁴¹ Generally, states use schedules similar to those of the federal government.¹⁴² In all states marijuana distribution, cultivation and possession are illegal. Most states enhance penalties for selling drugs to children,¹⁴³ or near schools and other areas where children gather.¹⁴⁴ Penalties vary, however, especially with respect to possession. Most states treat possession for personal use as a misdemeanor or petty misdemeanor which requires no jail time and is punishable by a maximum of 15 days to one year in prison.¹⁴⁵ Several provide for probation and conditional discharge.¹⁴⁶ In ten states possession

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 $^{^{135}}$ See Frank Saltzburg & Daniel Capra, American Criminal Procedure: Cases And Commentary 1128-32 (4th ed. 1992).

¹³⁶ See U.S. SENTENCING COMM'N, GUIDELINES MANUAL 1 (November 1998).

¹³⁷ See Saltzburg & Capra, supra note 135, at 1130.

¹³⁸ See U.S. SENTENCING COMM'N, supra note 136, at 10.

¹³⁹ See SALTZBURG & CAPRA, supra note 135, at 1131.

¹⁴⁰ See U.S. SENTENCING COMM'N, supra note 136, at 10.

¹⁴¹ See generally HANDBOOK OF DRUG CONTROL IN THE UNITED STATES (James Inciardi, ed. 1990).

¹⁴² See id. at 354-60; see also, e.g., Tex. Health & Safety Code Ann. §§ 481.031-481.036 (West Supp. 1999); Cal. Health & Safety Code §§ 11054-11058 (West Supp. 1999); 28 Pa. Cons. Stat. § 25.72 (1998).

¹⁴³ See, e.g., 720 Ill. Comp. Stat. Ann. 550/7 (West 1993); Va. Code Ann. § 18.2-255 (Michie 1996); Ariz. Rev. Stat. Ann. § 13-3409 (West Supp. 1998).

¹⁴⁴ See, e.g., 720 Ill. Comp. Stat. Ann. 550/5.2 (West 1993); Va. Code Ann. § 18.2-255.2 (Michie 1996); Ariz. Rev. Stat. Ann. § 13-3411 (West Supp. 1998).

¹⁴⁵ See, e.g., N.M. STAT. ANN. § 30-31-23 (Michie 1997) (possession punishable by up to 15 days in jail); N.H. REV. STAT. ANN. §§ 318-B:2, 318-B:26 (1995) (misdemeanor punishable by up to one year in prison).

¹⁴⁶ See, e.g., W. VA. CODE §§ 60A-4-401(c); 60A-4-407 (1997); N.M. STAT. ANN. § 30-31-28 (Michie 1997).

of small amounts of marijuana remains decriminalized and is punished only by a fine.¹⁴⁷ In these states, the quantity allowed for personal use is generally one ounce (nearly 30 grams),¹⁴⁸ enough for 40 to 50 joints.¹⁴⁹

After peaking in the late 1970s, marijuana use declined steadily until the early 1990s. While adolescent marijuana use has risen since 1992, in 1997 such use still stood nearly 40 percent below twenty years ago. Marijuana smoking (at least monthly), among young adults aged 18 to 25, dropped from 36 percent in 1979 to 11 percent by 1992 and rose to 12.8 percent by 1997. Since 1991 overall marijuana use in the country has been hovering between 9.6 million and 11 million current (at least monthly) users, about half the 1979 high. 152

Part II

Relaxing Drug Laws: Effects on Use

The situation in the United States during the 1970s, as well as the nation's experience with alcohol and tobacco, demonstrate that relaxing marijuana laws is almost certain to spark increased use. While it is difficult to tie one or another specific change in drug laws to changes in usage rates, relaxing marijuana laws would, particularly in the long run, result in societal tolerance and acceptance of the drug. Moreover, since the law has a normative as well as punitive function,

151 See U.S. DEP'T OF HEALTH & HUMAN SERV'S, supra note 1, at Table 12.

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¹⁴⁷ See, e.g., Colo. Rev. Stat. § 18-18-406(1) (Supp. 1996) ("Any person who possesses not more than one ounce of marijuana . . . shall be punished by a fine of not more than one hundred dollars."); Cal. Health & Safety Code § 11357 (West 1991)(possession of less than 28.5 grams of marijuana punishable by \$100 fine).

¹⁴⁸ See, e.g., id. But see ME. REV. STAT. ANN. tit. 22, § 2383 (West 1992) (possession of a "usable amount" decriminalized); MINN. STAT. ANN. § 152.027 (West 1998) (possession of "small amount" decriminalized); OHIO REV. CODE ANN. § 2925.11(Banks-Baldwin 1997) (possession of 100 grams decriminalized).

¹⁴⁹ Each joint contains 500 to 750 milligrams of marijuana. *See* Richard Schwartz, *Marijuana: An Overview*, 34 CHEMICAL DEPENDENCY 305, 306 (1987).

¹⁵⁰ See JOHNSTON ET AL., supra note 4, at Table 4.

¹⁵² See U.S. DEP'T OF HEALTH & HUMAN SERV'S, supra note 1, at Table 5A.

decriminalizing marijuana will decrease its perceived harmfulness and marijuana use rises as perception of its harmfulness declines.

Proponents of legal change often argue that changing the legal status of drugs will have little or no effect on their use.¹⁵³ They point out that marijuana is widely available today to both adolescents and adults.¹⁵⁴ They also point to surveys which suggest that most Americans say that they would not use drugs even if use became legal.¹⁵⁵ They propose that more liberal drug policies could be combined with stepped up prevention campaigns to discourage use.¹⁵⁶ Others argue that the "forbidden fruit" allure of illegality contributes to usage rates and that decriminalization or legalization would eliminate this enticement.¹⁵⁷

Much of the argument over the appropriate policy comes down to whether laws have an effect on how many individuals smoke marijuana and how often they do so. If laws have little or no effect, much money and effort have been wasted. If decriminalizing or legalizing marijuana will not increase use, then one need not worry about spreading its deleterious behavioral or physical effects.

Availability

A discussion of the effects of marijuana policy on its use begins with availability. There are three aspects of availability:

Physical, how convenient is access to marijuana.

¹⁵³ See, e.g., Sterling, supra note 16, at 426. "No matter what we do, drug use and abuse will continue." *Id. See also* James Slaughter, *Marijuana Prohibition in the United States: History and Analysis of a Failed Policy*, 21 Col. J.L. & Soc. Probs. 417, 418 (1988).

¹⁵⁴ See, e.g., Schmoke, supra note 27, at 505. "Prohibition has not effectively limited the availability of drugs." *Id*

¹⁵⁵ See Trebach, supra note 14, at 107-09; Grinspoon & Bakalar (NEJM), supra note 27, at 358; Luna, supra note 15, at 558-59.

¹⁵⁶ See, e.g., Steven Jonas, The Drug War: Myth, Reality and Politics, 27 CONN. L. REV. 623, 635 (1995).

¹⁵⁷ See, e.g., Galiber, supra note 14, at 849; Doug Bandow, War on Drugs or War on America?, 3 STAN. L. & POL. REV. 242, 248 (1991).

Cultural and Psychological, the moral and social acceptability and perceived consequences of using marijuana.

Economic, the affordability of marijuana.

Analyzing availability in this manner reveals that decriminalization would make marijuana at least marginally easier to acquire, render it more socially acceptable, reduce the perceived negative consequences of use, and make it slightly less expensive. Outright legalization would greatly increase physical, cultural, psychological and economic availability and the risks resulting from much more widespread use.

Physical. Advocates of decriminalization correctly point out that marijuana is already the most accessible of all illicit drugs. Sixty percent of the population over age 12 reports that it can obtain marijuana "very easily" or "fairly easily." Of 12- to 17-year-olds, just under one-half report they can obtain marijuana within a day, one-third can get it within an hour. As high as these percentages are, they almost certainly would increase after decriminalization. Officially decriminalization would allow only possession for personal use. But it would be difficult in practice to distinguish between a store of marijuana an individual smokes only himself and one shared with friends. Just one ounce of marijuana, the common decriminalization threshold, is enough for 40 to 50 joints, more than enough to share and sell, especially among teens. Thus sanctioning possession of small amounts of the drug will facilitate acquisition by others. Were

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¹⁵⁸ See U.S. DEP'T HEALTH & HUMAN SERV'S, *supra* note 1, at Table 26. Rates among adolescents are equivalent. Of 12- to 17-year-olds, 58 percent say that marijuana is easy to obtain. See *id.* at Table 27. Other studies show similarly high numbers. Monitoring the Future reveals that nearly 90 percent of high school seniors (generally 17- to 18-year-olds) said marijuana was fairly easy or very easy to get. See JOHNSTON ET AL., *supra* note 4, at Figure 11.

¹⁵⁹ See The Nat'l Ctr. on Addiction and Substance Abuse at Columbia Univ. (CASA), Back to School 1998--National Survey of American Attitudes on Substance Abuse IV at 33 (1998).

marijuana completely legalized, any individual could obtain whatever amount of the drug he or she desired.

Cultural and Psychological. Laws define what is acceptable in society, creating not only criminal sanctions and standards of civil conduct, but also serving as educational and normative statements that both shape and institutionalize public and individual attitudes. Today's antidrug attitudes, reflected in laws and measured in opinion polls, are the product of years of strong anti-drug public health messages, as well as individual and family experiences.

Proponents of easing marijuana laws point to polls indicating that very few Americans say they would try drugs even if legal.¹⁶¹ These polls are unconvincing in the face of recent experiences.¹⁶² It is difficult to believe that only 1.1 percent of Americans who have not smoked marijuana would try the drug if legalized; just 20 years ago, when marijuana enforcement waned and political and legal attitudes towards marijuana were permissive, 60 percent more high school seniors smoked marijuana as do now.¹⁶³ The wide fluctuations in marijuana use over the past thirty years, in response to changes in societal attitudes and law enforcement, belie assertions that recent answers to surveys demonstrate use would remain at current levels even after decriminalization.

¹⁶⁰ See Mark Moore, *Drugs: Getting a Fix on the Problem and the Solution*, 8 YALE L. & POL. REV. 8, 33 (1990). "[T]he drug laws are an important educational statement that shapes the public's views of the various drugs. A law does more than create a liability for criminal prosecution; it is a powerful normative statement. . . . [F]or those who have not yet started using drugs, or for those who have not settled into an oppositional stance [toward society], the fact that society has legislated against some drugs may have a useful educational impact." *Id*. ¹⁶¹ *See supra* note 155.

Trebach's analysis of the poll numbers is particularly puzzling. *See* Trebach, *supra* note 14, at 107-09. Of the 65 percent of respondents who had not smoked marijuana, 1.1 percent said they would try the drug if it were legal. *See id.* at 108. Of the 35 percent who had already smoked marijuana, 8.5 percent said they would smoke it if it were legal. *See id.* From this, Trebach concludes that when marijuana is legal the "worst-case scenario seems to be that 9.6 percent of adults might try marijuana." *Id.* It cannot be the case, as Trebach asserts, "90.4 percent of American adults would not try marijuana" if legal. *Id.* According to the poll itself, 35 percent of Americans have tried marijuana despite its illegality. Thus, whatever the proportion of Americans who would try marijuana if legal, it would be greater than 35 percent, the proportion who have tried it while it has been illegal.

163 *See* JOHNSTON ET AL., *supra* note 4, at Table 4.

During the 1970s, the state and federal governments decriminalized and reduced penalties for marijuana possession and society accepted its use. 164 Marijuana use shot up. By the end of the decade, more than one-third of young adults aged 18 to 25 reported smoking marijuana in the past month. ¹⁶⁵ Following the 1975 state Supreme Court ruling and legislative decriminalization in Alaska, marijuana use among adolescents rose rapidly and the age of first use went down until in 1988, 12- to 17-year-olds in Alaska were smoking marijuana at more than twice the national average. 166 While one study showed that when Oregon, Maine and California decriminalized marijuana teenage use did not increase significantly, 167 the surveys underlying that report have been criticized for lack of controls for historical and demographic factors, such as sex, income and education, and for employing vague measurement criteria to estimate prevalence of marijuana use. 168 Moreover, the surveys were conducted just one to three years after state legislatures enacted decriminalization, a period too brief to allow for dissipation of any educational and attitude-forming aspects of stricter marijuana laws. The surveys did not reflect the impact of changing the legal status of marijuana on long-term usage rates and the study failed to recognize that even small annual increases become significant when they accumulate over time.

The impact of a more tolerant attitude toward drug use may best be observed on a national level. In the 1970s, though the federal government and most states did not technically

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¹⁶⁴ See supra notes 83 to 101 and accompanying text.

¹⁶⁵ See U.S. DEP'T HEALTH & HUMAN SERV'S, *supra* note 1, at Table 12. In contrast 12.8 percent had done so in 1997. See id.

¹⁶⁶ See Bernard Segal et al., Center for Alcohol and Addiction Studies, University of Alaska, Patterns of drug use: school survey (1983); Bernard Segal et al., Center for Alcohol and Addiction Studies, University of Alaska, Drug-taking Behavior Among Alaska Youth - 1988: A Follow-Up Study (1989).

¹⁶⁷ See Deborah Maloff, A Review of the Effects of the Decriminalization of Marijuana, 10 CONTEMP. DRUG PROBS. 306 (1981).

¹⁶⁸ See Walter Cuskey, Critique of Marijuana Decriminalization Research, 10 Contemp. Drug Probs. 325 (1981); Walter Cuskey et al., The Effects of Marijuana Decriminalization on Drug Use Patterns: A Literature Review and Research Critique, 7 Contemp. Drug Probs. 491 (1978).

decriminalize marijuana, they reduced penalties¹⁶⁹ and chose to wink at personal use.¹⁷⁰ Nationwide, decriminalization, more lenient laws, and lax enforcement on both the state and federal level opened the way for the explosion in use that peaked in 1979 when 30 million Americans smoked marijuana.¹⁷¹

Since then parental concerns and educational campaigns against marijuana use have helped bring down use, but it will be difficult, if not impossible, to discourage marijuana use if Congress effectively states that marijuana is not harmful enough to make illegal. Such action would take a powerful outside normative and societal support from under parents, teachers, clergy, coaches, friends and others who can influence teen behavior to the good. In the current regulatory climate in which the government bans flammable products, food additives, diet drugs and unsafe toys, Americans have become accustomed to a government which outlaws harmful substances.¹⁷² Legalization, especially a regime that involves a private market, is almost certain to be accompanied by advertising that promotes the pleasure of a marijuana high and plays down the drug's dangers, a practice that might prove Constitutionally difficult to ban.¹⁷³ The recent Supreme Court ruling striking down restrictions on televised gambling advertisements¹⁷⁴ and the aggressive push to promote hard liquor on television signal what could be expected if marijuana possession and distribution were legalized.

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¹⁶⁹ See supra note 89 and accompanying text.

¹⁷⁰ See DiChiara & Galliher, *supra* note 83, at 45 (describing how the stricter marijuana laws were not enforced). More lax federal enforcement can be evidenced in charging and incarceration statistics. The number of federal defendants charged with violation of the drug laws rose sharply with increased use in the first half of the 1970s. Despite continued growth in use in the latter half of the decade, however, the number of defendants charged with such violations fell from 11,000 in 1975 to 6,300 in 1980. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1981 at 476 (1982). The number incarcerated each year fell from 5,200 in 1977 to 3,500 in 1980. *See id.* at 477.

¹⁷¹ See U.S. DEP'T HEALTH & HUMAN SERV'S, supra note 1, at Table 4A.

At least one advocate of legalization would do away not only with the drug laws, but also with regulations on the use of "alcohol, tobacco, laetrile, AZT, [and] saturated fat. . ." *See* Boaz, *supra* note 36, at 628-635.

Repeal of the current marijuana laws would lower the perception of risks and costs of drug use, which would lead to increased use. Use rates reveal a strong relationship between the perception of the risk of a substance and the amount of use. From 1978 to 1992 as the percentage of twelfth graders who believed smoking marijuana occasionally posed a "great risk" increased from 12.4 percent to 40 percent,¹⁷⁵ the percentage of these students using marijuana in the past month dropped from 37 percent to 12 percent.¹⁷⁶ The recent increase in marijuana use among adolescents was accompanied by decreased perception of its harm.¹⁷⁷

Advocates of decriminalization correctly note that public health campaigns have succeeded in discouraging smoking while nicotine use remains legal. But the decline in smoking nicotine cigarettes has been much slower than the decline in smoking marijuana cigarettes and use of other drugs. It took 30 years for nicotine cigarette smoking to decline as much as illegal drug use did in ten. Of special significance, reducing use of legal tobacco among young people has been especially difficult. While current use of marijuana dropped nearly 40 percent from 1978 to 1998, tobacco use remained virtually constant. In a world where the government regulates safety from crib to coffin and from workplace to fireplace, it is difficult to say that government should turn a blind eye and deaf ear to something as harmful as marijuana is (See Part IV, *infra*).

Economic. Decriminalization would only slightly reduce the price of marijuana. While it is generally accepted that the illegality of marijuana increases its price due to the risk involved in

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¹⁷³ See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (striking down state prohibitions on advertising the price of alcoholic beverages as violating the First Amendment's protection of commercial speech).

¹⁷⁴ See Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 119 S.Ct. 1923 (1999).

¹⁷⁵ See Johnston et al., supra note 4, at Table 7.

¹⁷⁶ See id. at Table 4; see also Robert Petersen, Decriminalization of Marijuana--A Brief Overview of the Research Relevant Policy Issues, 10 Contemp. Drug Probs. 265, 267 (1981)(noting that following decriminalization in Oregon, the percentage of nonusers who identified health risks as their reason for not using dropped from 28 percent in 1975 to 7 percent in 1976).

¹⁷⁷ See JOHNSTON ET AL., supra note 4, at Table 7.

¹⁷⁸ See JOHNSTON ET AL., supra note 4, at Table 4.

cultivation and distribution,¹⁷⁹ decriminalization would do little to reduce this risk. Most of the risk would remain--cultivation and distribution as well as possession of large quantities of the drug would still be illegal. When the only risk eliminated is that currently borne by the end user, the price of the drug is not likely to drop much.¹⁸⁰ A regime in which marijuana sales remained officially illegal, but both selling and buying were tolerated under certain conditions (as in the coffe houses of the Netherlands, *infra* Part V), would lead to a price drop reflecting the decreased risk to the seller.

In contrast, legalization would sharply reduce the price of marijuana. Currently an ounce of marijuana costs from \$140 to \$1000, depending on quality.¹⁸¹ Marijuana is not difficult or expensive to cultivate or prepare.¹⁸² It would cost very little to distribute legally.¹⁸³ Because the demand for marijuana is responsive to changes in price (particularly in the long-term), this decrease in price would result in increased use, especially among young people and the poor who are more sensitive than the affluent to the price of marijuana.¹⁸⁴ Indeed, even among alcoholics consumption fluctuates with changes in price.¹⁸⁵

¹⁷⁹ See generally Jonathan Caulkins & Peter Reuter, What Price Data Tell Us About Drug Markets, 28 J. DRUG ISSUES 593, 594-97 (1998). "The extraordinarily high prices for cocaine, heroin, and marijuana are clearly a function of their illegality. . . . They are little more than semi-refined agricultural products like coffee or tea" *Id.* at 602.

¹⁸⁰ cf. Steven Schulhofer, Solving the Drug Enforcement Dilemma: Lessons from Economics, 1994 U. CHI. LEGAL F. 207, 235 (1994). At least one commentator argues that to discourage use most effectively, enforcement policies should focus on users--"attack[ing] seriously [their] willingness to buy"--and not on interdiction, international drug eradication programs or high level traffickers. *Id.* at 235. Using economic analysis, Scholhofer contends that education and treatment should be combined with street-level enforcement. See id. at 232. Pursuit of high level traffickers serves primarily to drive up the monetary price of drugs, which even if decreasing consumption somewhat, also results in increased crime related to drug trafficking and to getting money to buy drugs. Instead, enforcement that focuses on "the smallest buyers and sellers" avoids most of these effects by driving up the non-monetary price of drugs, i.e., the risk to buyers and the difficulty of acquiring drugs. See id. at 232-33.

¹⁸¹ See Caulkins & Reuter, supra note 179, at 594.

¹⁸² See id. at 595.

¹⁸³ See id.

¹⁸⁴ See Michael Grossman, Gary Becker & Kevin Murphy, Rational Addiction and the Effect of Price on Consumption in SEARCHING FOR ALTERNATIVES: DRUG CONTROL POLICY IN THE UNITED STATES 77, 83 (Melvyn Krauss & Edward Lazear, eds. 1992); Michael Grossman et al., A Survey of Economic Models of Addictive

The Lessons of Our Legal Drugs.

Alcohol and tobacco are more widely used and cause more death than any illegal drug, particularly marijuana. 186 Sixty-four million Americans smoke (30 percent of the population over age 12)¹⁸⁷ and 111 million drink (51 percent of the population over age 12).¹⁸⁸ There are about 14 million alcoholics and alcohol abusers. 189 In contrast, 11.1 million Americans currently smoke marijuana. 190 Among young adults (18- to 25-year-olds), 12.8 percent smoked marijuana, 40.6 percent smoked cigarettes, and 58.4 percent drank during the past month. ¹⁹¹ The impact of more widespread use of alcohol and tobacco can be seen in the numbers of deaths associated with each substance--at least 400,000 a year from tobacco and 100,000 a year from alcohol. 192 Despite the deaths due to marijuana's behavioral impact, 193 there are no reported deaths due to marijuana overdoses. 194 In theory, however, if alcohol and marijuana are used together, marijuana can

Behavior, 28 J. DRUG ISSUES 631 (1998). At least one commentator in arguing for legalization, acknowledges such an effect. See Daniel Polsby, Ending the War on Drugs and Children, 31 VAL. U. L. REV. 537, 537-38 (1997)(stating that his prediction that experimental and chronic use among children would increase significantly after legalization follows "straightforwardly from price theory").

¹⁸⁵ See Philip Cook, The Effect of Liquor Taxes on Drinking, Cirrhosis, and Auto Accidents, in ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 256 (Mark Moore & Dean Gerstein, eds. 1981).

¹⁸⁶ See, e.g., DUKE & GROSS, supra note 32 (the book begins by comparing the harmfulness of legal and illegal drugs before arguing for a repeal of current drug laws). Less helpful are arguments that lump together coffee, tea, tobacco, alcohol, marijuana, heroin and cocaine. See Paul Carrington, The Twenty-First Wisdom, 52 WASH. & LEE L. REV. 333 (1994) (proposing a Constitutional amendment that would allow states full latitude in regulating these "mind altering substances").

¹⁸⁷ See U.S. DEP'T HEALTH & HUMAN SERV'S, supra note 1, at Table 5A; Table 5B

¹⁸⁹ See Ninth Special Report to the U.S. Congress on Alcohol and Health, U.S. Dep't Health & Human SERV'S at 21 (1997).

¹⁹⁰ See U.S. DEP'T HEALTH & HUMAN SERV'S, supra note 1, at Table 5A.

¹⁹¹ See id. at Table 8.

¹⁹² See J. Michael McGinnis & William Foege, Actual Causes of Death in the United States, 270 JAMA 2207,

<sup>2208 (1993).

193</sup> See infra notes 232 to 239 and accompanying text. One of the more notorious accidents related to marijuana was the crash of a Conrail train in 1987 which killed 16 and injured 175 individuals. The engineer admitted he smoked marijuana after reporting to work the day of the accident. See Laura Parker, Drugs, Alcohol Widespread in Rail Industry, Ex-Workers Testify, WASH. POST, February 26, 1988 at A19. Concerns over drug- and alcoholrelated accidents prompted the Federal Railroad Administration to promulgate regulations mandating blood tests for drugs and alcohol after accidents. See Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) (holding such tests do not violate the Fourth Amendment).

¹⁹⁴ See Hall & Solowij, supra note 38, at 1612.

contribute to alcohol poisoning when its antiemetic effects suppress the body's reaction to purge excess alcohol by vomiting. In any case, only 20,000 deaths a year are attributable to all illegal drugs. 195

The flaw in this argument of proponents of changing marijuana laws is not the validity of the statistics they use, but the lesson they try to draw from them. ¹⁹⁶ The appropriate lesson is not that American drug law is hypocritical, or that all drugs should be either illegal or legal. 197 Nor is the appropriate lesson that we have been concentrating our efforts on the wrong drugs. Rather, the most important lessons we can draw from our experience with alcohol and tobacco regards what happens when a drug is legal: Legal drugs are easy to obtain; their use becomes acceptable (indeed advertising glamorizes their use); their price is low; and high profits make promotion worthwhile for the sellers. Consequently--inevitably--more people use the drug, and the increased use imposes far greater social and health damage, more deaths and greater economic costs.

History and culture (and sometimes the contemporaneous state of knowledge about health impact) have determined which drugs are legal and which are not. The presence of tobacco and alcohol in American culture dates back to the early days of the founding of this country. In contrast, recreational marijuana use dates back only 80 years; its widespread use began only 35

¹⁹⁵ See McGinnis & Foege, supra note 192, at 2210.

¹⁹⁶ See Boaz, supra note 36, at 631. "If society wants to ban cocaine and marijuana because of these drugs potential for misuse, society should logically also ban alcohol, tobacco and legal drugs." Id.; DUKE & GROSS, supra note 32, at 106. "The use of marijuana, cocaine or heroin cannot be the moral equivalent of murder while the smoking of tobacco and drinking are lawful. The hypocrisy is too transparent." Id.; Galiber, supra note 14, at 840. "The hypocrisy of imposing severe penalties on one form of potentially self-destructive personal behavior while all but ignoring criminal sanction for other forms of the same conduct is not easily justified to those who believe that reason and consistency should be the hallmark of public policy and criminal laws." Id. ¹⁹⁷ See Frank Bowman, III, Playing "21" with Narcotics Enforcement, 52 WASH. & LEE L. REV. 937, 939-44 (1995). "Even accepting [the] characterization of tobacco as a greater evil than hard drugs, it is unclear why the entrenched presence of one great evil obliges us to accept any lesser evil which may thereafter threaten. . . . [G]iven the demonstrated lethality of tobacco and the plethora of substances less lethal than smoking cigarettes, honest application of [the] principle [that all substances less dangerous than tobacco should be treated like tobacco] would require dismantling the Food and Drug Administration right along with the DEA." Id. at 943-44.

years ago. We should heed the warning of our experience with alcohol and tobacco. We do not need to promote a third legal recreational drug.¹⁹⁸

Marijuana Policy and Children

America's experience with alcohol and tobacco reveals the danger to our children of decriminalizing or legalizing marijuana for adults.¹⁹⁹ Many more children use alcohol and tobacco--drugs that are illegal for them, but legal for adults--than use drugs like marijuana that are illegal for all regardless of age. The minimum drinking age in all states is 21;²⁰⁰ the minimum age for purchasing cigarettes is generally 18.²⁰¹ Still, of high school tenth graders (who are 15 to 16 years old), nearly 28 percent have smoked cigarettes and 39 percent have used alcohol in the past month.²⁰² In contrast, 19 percent have smoked marijuana during that time.²⁰³ Among younger students, use of alcohol and nicotine is also substantially higher than marijuana use. Twenty-three percent of eighth graders drank and 19 percent smoked during the past month.²⁰⁴ In contrast, 10 percent of eighth graders have smoked marijuana.²⁰⁵ The lesson to be learned is that age restrictions on the use of substances which are available to the entire population are difficult to

¹⁹⁸ The choice today is not between alcohol, tobacco and marijuana. If it were, then weighing the relative benefits and detriments of the three drugs would be a useful exercise. But alcohol and tobacco are already widely used and firmly imbedded in our culture. So the question is whether we want to add marijuana as a *third* legal drug.

199 See Gregory Loken, *The Importance of Being More than Earnest: Why the Case for Drug Legalization Remains Unproven*, 27 CONN. L. REV. 659, 683-85 (1995). Some decriminalization and legalization proponents acknowledge the deleterious impact such policies would have on children, but still think that society would be better off with such policies. See a.g. Polsby, supported 184 at 537-38. "It seems to me that all arguments for

acknowledge the deleterious impact such policies would have on children, but still think that society would be better off with such policies. *See, e.g.*, Polsby, *supra* note 184, at 537-38. "It seems to me that all arguments for decriminalizing drugs are dismissable out of hand unless they assume that such a reform would result in materially increasing the amount of experimental, and also chronic, use by minors. . . . Categorically, children must not use recreational drugs at all, and if we weaken (let alone abolish) criminal sanctions on adult use, that must undermine that object, and we shall have more of that which (we say) we would like to have none at all." *Id*.

²⁰⁰ See, e.g., N.Y. ALCO. BEV. CONT. LAW § 65(c) (McKinney Supp. 1999); LA. REV. STAT. ANN. § 26:286 (West Supp. 1999).

²⁰¹ See, e.g., Cal. Penal Code § 308 (West Supp. 1999); Conn. Gen. Stat. § 53-344 (1999); Ga. Code Ann. § 56-12-170; 16-12-171 (1996).

²⁰² See JOHNSTON ET AL., supra note 4. Table 1b.

²⁰³ See id.

²⁰⁴ See id.

²⁰⁵ See id.

enforce in a free society such as ours. When drugs are legal for adults, as alcohol and tobacco are today, every adult becomes a potential source, every form of identification falsifiable.²⁰⁶

The comparison of marijuana use rates for adolescents with those for alcohol and tobacco also undermines the argument of proponents of decriminalization and legalization that marijuana's illegality gives it the allure of "forbidden fruit" increasing the likelihood that adolescents will use it.²⁰⁷ While some individuals may smoke marijuana as an act of rebellion because it is illegal, there are as surely others who do not use marijuana because it is against the law.²⁰⁸ In separate studies, 60 to 70 percent of New Jersey and California students reported that fear of getting in trouble with the authorities was one of the main reasons why they did not use drugs.²⁰⁹ But the argument fails for another reason because virtually all proponents of changing the legal status of marijuana assert that it should not be legally available to minors.²¹⁰ Such a legal regime retains the "forbidden fruit" allure for youngsters most susceptible to it and transforms marijuana use into a "badge of adulthood."²¹¹ As the law has done for tobacco smoking and drinking today, instituting

²⁰⁶ See Herbert Kleber, Our Current Approach to Drug Abuse--Progress, Problems, Proposals, 330 New Eng. J. Med. 361, 362-63 (1994).

²⁰⁷ See Galiber, supra note 14, at 849.

²⁰⁸ See Moore, supra note 160, at 25.

²⁰⁹ See Rodney Skager & Gregory Austin, Office of the Attorney General, Fourth Biennial Statewide Survey of Drug & Alcohol Use Among California Students in Grades 7, 9 and 11 (1993); Wayne Fisher, New Jersey Department of Law and Public Safety, Drug & Alcohol Use Among New Jersey High School Students (1993).

²¹⁰ See supra note 16; Juan Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 YALE J. ON REG. 235, 266 (1997). "Second, before any large-scale decriminalization should occur, there is a need for pilot tests of some types of limited decriminalization, probably commencing with marijuana, and obviously not including minors." *Id. See also* NATIONAL ORG. FOR THE REFORM OF MARIJUANA LAWS, PRINCIPLES OF RESPONSIBLE CANNABIS USE (1996). "I. Adults Only. Cannabis consumption is for adults only. It is irresponsible to provide cannabis to children."

²¹¹See John Lawn, *The Issue of Legalizing Illicit Drugs*, 18 HOFSTRA L. REV. 703, 710 (1990) "It stands to reason that children would be confused about the real consequences of drug abuse when drugs are forbidden to them, but are readily available to others only slightly older. If drugs were socially acceptable, it is likely that more children, anxious to act 'grown up,' would yield to peer pressure to use drugs." *Id*.

age-based legal distinctions in the use of marijuana is likely to make marijuana smoking a sign of growing up, an attitude that alcohol and cigarette advertisers have cultivated with deadly skill.

Marijuana as a Substitute Drug

Some proponents of decriminalization claim that a decrease in the use of alcohol will accompany an increase in marijuana use.²¹² Quite the contrary, variations in marijuana usage rates over time indicate that marijuana and alcohol are complements, not substitutes.

From 1975 to 1978, as the percentage of high school seniors who smoked marijuana monthly increased from 27 percent to 37 percent, the percentage who drank increased from 68 percent to 72 percent.²¹³ The drop in marijuana use to 12 percent of seniors by 1992 was accompanied by a drop in those who drank to 51 percent.²¹⁴ The subsequent increase in marijuana use to nearly 24 percent in 1997 was accompanied by a modest increase in alcohol consumption to 53 percent.²¹⁵ Thus alcohol and marijuana use rates have tended to move up and down together. Moreover, many individuals abuse both alcohol and marijuana. More than 65 percent of heavy drinkers aged 12 to 17 have also used marijuana in the past month.²¹⁶ Only 2 percent of non-drinkers did so.²¹⁷ These patterns eviscerate suggestions that increased marijuana use would be offset by decreased alcohol use.

²¹² See Grinspoon & Bakalar (NEJM), supra note 27, at 358; Steven Duke, Drug Prohibition: An Unnatural Disaster, 27 U. Conn. L. Rev. 571, 609-10 (1995). "[A]s difficult as it may be for some to contemplate, even if legalization of the adult market produced a substantial increase in juvenile experimentation with marijuana, heroin, or cocaine, the juveniles themselves, and the rest of society, might still be better off, if that experiment meant less juvenile use of tobacco and alcohol." *Id*.

²¹³ See JOHNSTON ET AL., supra note 4, at Table 4.

²¹⁴ See id.

²¹⁵ See id.

²¹⁶ See U.S. DEP'T HEALTH & HUMAN SERV'S, supra note 1, at Table 36.

²¹⁷ See id. The link between tobacco and marijuana smoking is also strong. Of 12- to 17-year-olds who smoked cigarettes in the past month, 37 percent smoked marijuana. See id. Just 2.4 percent of non-tobacco smokers used marijuana. See id.

Part III

The Health Effects of Marijuana Use

Of course, an explosion in use would be of little consequence if, as many who advocate decriminalization and legalization claim, marijuana were a nearly harmless drug.²¹⁸ But marijuana's harmful effects hit both the user and others in society.

Research has made it clear that marijuana is not the assassin of youth portrayed by Narcotics Commissioner Anslinger and the mid-century anti-marijuana campaign. Research also reveals that marijuana is not the harmless, even beneficial, drug portrayed by many in the 1970s. While not associated with the violence of cocaine or the rapid physical addiction of heroin, marijuana does have serious adverse health, behavioral and psychological consequences: dependence; lung damage; impairment of short-term memory, attention, cognition, and motor skills; and harm to the fetus. In addition to such direct consequences, for many adolescents marijuana arrests social and emotional development and is associated with the later use of other drugs.

Physical Effects. The short-term effects of marijuana are widely accepted. Upon smoking, marijuana enters the lungs where it passes into the circulatory system. Cannabis receptors are concentrated in certain areas of the brain: those regions involved in coordinating and regulating body movements; those involved in learning, memory and stress response; those that integrate the cognitive functions; and the reward center of the brain.²¹⁹ The physical manifestations of use are evidenced soon after smoking marijuana when the user's pulse rate increases, eyes redden, and muscle strength decreases.²²⁰ The effects of the drug on users vary,

²¹⁸ See, e.g., supra note 28; Nadelmann, supra note 27, at 943-44.

²¹⁹ See Institute of Med., supra note 39, at 2.21-2.22.

²²⁰ See Leo Hollister, Health Aspects of Cannabis, PHARMACOLOGICAL REV. 1, 2 (1986).

but generally a marijuana high is characterized by an altered sense of time, visual distortions, difficulty in concentrating and thinking, and a feeling of euphoria.²²¹ Psychosis is rare, but can occur after heavy use.²²² The high lasts two to four hours.²²³ Marijuana smoking may trigger panic attacks, particularly among novice users and after unusually heavy use. 224 The drug remains stored in the fatty tissues of the body for as long as 30 days.²²⁵

Because marijuana depresses violence and aggressiveness, ²²⁶ it is not linked to violent crime.²²⁷ But marijuana does relax inhibition and affect judgment.²²⁸ This effect may explain the finding that teenagers who use marijuana are more likely to have sex, to have sex with multiple partners, and to have unprotected sex, leaving them at risk of pregnancy and sexually transmitted diseases, including AIDS.²²⁹ Judgment impairment may also explain the recent rise in marijuanarelated emergency room visits that has accompanied increased adolescent marijuana use.²³⁰ Between 1994 and 1996, such visits increased 33 percent among adolescents aged 12 to 17.²³¹

Marijuana and Dangerous Driving. Because marijuana use slows reaction time, impairs coordination and decreases attention span, driving and smoking pot are a combustible combination.²³² Various studies have tested for the presence of THC in the blood (where it disappears within a few hours of use) as opposed to the urine (which can register THC weeks

²²¹ See Hall & Solowij, supra note 38, at 1611-12.

²²² See id. at 1614.

²²³ See Grinspoon & Bakalar, supra note 40, at 200.

²²⁴ See Hall & Solowij, supra note 38, at 1612.

²²⁵ See Sussman et al., supra note 42, at 700.

²²⁶ See Hollister, supra note 220, at 7. But see Don Cherek et al., Acute Effects of Marijuana Smoking on Aggressive, Escape and Point-maintained Responding of Male Drug Users, 111 PSYCHOPHARMACOLOGY 163 (1993) (finding that marijuana increased aggressive behavior among individuals with extensive prior drug use). ²²⁷ *See* Sussman et al., *supra* note 42, at 712-13.

²²⁸ See id. at 713.

 $^{^{229}}$ See The Nat'l Ctr. on Addiction and Substance Abuse at Columbia Univ., Substance Abuse and the AMERICAN ADOLESCENT, at 77 (1997) (citing the 1995 Youth Risk Behavior Survey, Centers for Disease Control). ²³⁰ See U.S. Dep't of Health & Human Serv's, Drug Abuse Warning Network, 1996 (1997).

²³¹ See id.

²³² See Grinspoon & Bakalar, supra note 40, at 201.

after use) and have found that up to 37 percent of highway fatalities involve drivers who have recently smoked marijuana.²³³ The often simultaneous presence of alcohol makes it difficult to isolate the role of each substance in the crash.²³⁴ But one study found that 33 percent of individuals stopped for reckless driving who were apparently not impaired by alcohol tested positive for marijuana.²³⁵ An additional 12 percent tested positive for both marijuana and cocaine.²³⁶ The effect of marijuana use on coordination, perception, tracking and vigilance, as well as the results of road and simulator studies, indicate that marijuana seriously impairs the performance required to drive safely.²³⁷

Even at current levels of use, marijuana may cause as many problems as the more widely used drug, alcohol. In one study of alcohol and marijuana use by roadway and non-roadway trauma victims admitted to the emergency room, 35 percent were found to have recently used marijuana and 33 percent alcohol.²³⁸ Increases in marijuana use will be reflected in highway accident and fatality statistics. Only in a small percentage of drinking episodes do drinkers get

²³³ See Allan Williams et al., *Drugs in Fatally Injured Young Male Drivers*, 100 Pub. HEALTH REP. 19 (1985) (among young males in California).
²³⁴ See id. at 19. Furthermore, studying marijuana and highway safety through epidemiological studies is difficult

²³⁴ See id. at 19. Furthermore, studying marijuana and highway safety through epidemiological studies is difficult due to the varying correlation between THC blood levels and impairment in different individuals. See Herbert Moskowitz, Marijuana and Driving, 17 ACCIDENT ANALYSIS & PREVENTION 323, 326 (1985).

²³⁵ See Daniel Brookoff et al., Testing Reckless Drivers for Cocaine and Marijuana, 331 New Eng. J. Med. 518, 518 (1994).

²³⁶ See id.

²³⁷ See Moskowitz, supra note 234, at 342; INSTITUTE OF MED., supra note 39, at 3.31. "[N]o one under the influence of marijuana or THC should drive a vehicle or operate potentially dangerous equipment." *Id.*²³⁸ See Carl Soderstrom et al., Marijuana and Alcohol Use Among 1023 Trauma Patients, 128 ARCHIVES SURGERY 733 (1988). Of all the patients tested, 18.3 percent were positive for marijuana only, 16.1 percent for alcohol only, and 16.5 percent for both. See id. at 734-35. A study five years later by the same researchers at the same trauma center found that the percentage of motorcycle trauma patients testing positive for marijuana remained nearly constant, as did the percentage of alcohol-positive car and motorcycle patients, but that the percentage of car accident patients testing positive for marijuana dropped to one-tenth of the previous total. See Carl Soderstrom et al., Marijuana and Other Drugs Use Among Automobile and Motorcycle Drivers Treated at a Trauma Center, 27 ACCIDENT ANALYSIS & PREVENTION 131 (1995). The researchers could not explain the reasons for the change. See id. at 133. See also Jackie Kirby et al., Comparability of Alcohol & Drug Use in Injured Drivers, 85 S. MED. J. 800 (1992) (finding comparable levels of drug and alcohol use among hospitalized injured drivers).

drunk; with marijuana, getting high is the point. Mixing either--being drunk or getting high--with driving makes the nation's highways dangerous.²³⁹

Marijuana and the Lungs. Marijuana's damage to the lungs is undisputed.²⁴⁰ One marijuana cigarette is the equivalent of four tobacco cigarettes in terms of the amount of tar, five tobacco cigarettes in terms of the amount of carbon monoxide intake, and ten tobacco cigarettes with respect to the amount of damage to the airways.²⁴¹ The long term consequences of regular marijuana smoking are likely to be similar to those of cigarette use: lung and other respiratory cancers;²⁴² chronic bronchitis and cough;²⁴³ and depression of respiratory function.²⁴⁴ Epidemiological evidence of increased lung cancer incidence among marijuana smokers has yet to be gathered because the activity is illegal, most marijuana use has occurred within the past 25 years, and virtually all heavy marijuana users also smoke cigarettes, making it difficult to separate the effects of each of these substances.

Marijuana and Pregnancy. More pregnant women use marijuana than any other illegal drug.²⁴⁵ An estimated 10 percent to 30 percent of pregnant women use marijuana during pregnancy, depending on age, education, socioeconomic status, and marital status.²⁴⁶ Marijuana

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²³⁹ This conclusion is acknowledged even by some proponents of decriminalization and legalization. *See, e.g.*, NORML, *supra* note 210, at 1. The second principle of responsible marijuana use states: "No driving. The responsible cannabis consumer does not operate a motor vehicle or other dangerous machinery impaired by cannabis. . ." *Id.*

²⁴⁰ Compare Lester Grinspoon & James Bakalar, Marijuana as Medicine: A Plea for Reconsideration, 273 JAMA 1876 (1995) (acknowledging marijuana's consequences for the lungs, but favoring its medical use) with James Inciardi, Arguing Against Legalization, in TREBACH & INCIARDI, supra note 14, at 159, 166 (citing marijuana's effects on the lungs in arguing against loosening drug laws).

²⁴¹ See Sussman et al., supra note 42, at 701.

²⁴² See Hall & Solowij, *supra* note 38, at 1613.

²⁴³ See Hollister, supra note 220, at 10; Hall & Solowij, supra note 38, at 1612-13.

²⁴⁴ See Hollister, supra note 220, at 10; Hall & Solowij, supra note 38, at 1612-13.

²⁴⁵ See P.A. Fried, The Ottawa Prenatal Prospective Study (OPPS), 56 LIFE SCI. 2159 (1995).

²⁴⁶ See Marylou Behnke & Fonda Davos Eyler, *The Consequences of Prenatal Substance Use for the Developing Fetus, Newborn, and Young Child,* 28 INT. J. ADDICTIONS 1341,1353 (1993).

smoking by pregnant women has been linked to low birth weight and premature birth,²⁴⁷ though these findings have not been universal.²⁴⁸ Findings of postnatal effects have been more consistent. Infants whose mothers regularly used marijuana during pregnancy have difficulty sleeping and display manifestations of nervous system effects including startles and tremors.²⁴⁹ More serious is the link between prenatal marijuana exposure and a repressed immune system in infants.²⁵⁰ Fetal marijuana exposure and second hand marijuana exposure by young children has been linked to attention difficulties in children.²⁵¹ Among elementary school age children, those who had been exposed in utero to marijuana were more likely to have attention and cognitive problems.²⁵²

Memory and Attention. The marijuana high depresses an individual's short-term memory and ability to concentrate.²⁵³ Although the high generally last only two to four hours, the effects of marijuana on the smoker's short-term memory, ability to pay attention and coordination lasts after the high wears off.²⁵⁴ Marijuana continues to impair the ability to pay attention and memory of heavy users of marijuana even 24 hours after their last use,²⁵⁵ and these cognitive impairments may continue much longer.²⁵⁶ Such effects are especially worrisome when use is concentrated

²⁴⁷ See P.A. Fried, Postnatal Consequences of Maternal Marijuana Use in Humans. 562 ANNALS N.Y. ACADEMY SCI. 123 (1989); Hall & Solowij, supra note 35, at 1613.

²⁴⁸ See Patricia Shiono et al., The Impact of Cocaine and Marijuana Use on Low Birth Weight and Preterm Birth: A Multicenter Study, 172 Am. J. Obstetrics & Gynecology 19 (1995).

²⁴⁹ See Behnke & Eyler, supra note 246, at 1357-58.

²⁵⁰ See id.

²⁵¹ See P.A. Fried, Prenatal Exposure to Marijuana and Tobacco During Infancy, Early and Middle Childhood: Effects and an Attempt at Synthesis, 17 Archives Toxicology-Supp. 233, 244 (1995).

²⁵² See Fried (OPPS), supra note 245, at 2165.

²⁵³ See Hall & Solowij, supra note 38, at 1612.

²⁵⁴ See Harrison Pope et al., The Residual Neuropsychological Effects of Cannabis: The Current Status of the Research, 38 DRUG & ALCOHOL DEPENDENCE 25 (1995).

²⁵⁵ See Harrison Pope & Deborah Yurgelun-Todd, The Residual Cognitive Effects of Heavy Marijuana Use in College Students, 275 JAMA 521 (1996).

²⁵⁶ See Nadia Solowij, Do Cognitive Impairments Recover Following Cessation of Cannabis Use? 56 LIFE SCI. 2119 (1995); Richard Schwartz et al., Short-Term Memory Impairment in Cannabis-Dependent Adolescents, 143 Am. J. DISEASES CHILDREN 1214 (1989).

among students who need these abilities at a time of daily learning and rapid intellectual development.

Dependence. Regular users of marijuana develop a tolerance to the THC, requiring larger doses to achieve the same high.²⁵⁷ Their need to increase the amount of marijuana smoked may increase the likelihood of long term lung damage.²⁵⁸ Physical dependence may develop among heavy users who become more aggressive after they quit.²⁵⁹ Withdrawal symptoms also include irritability, sleeplessness, and appetite changes.²⁶⁰

Psychological dependence on the drug is much more common. In 1996 (the latest year for which data is available), 195,295 individuals entered substance abuse treatment primarily for marijuana abuse and dependence.²⁶¹ Sixty-two percent (120,888) are under the age of 25; 45 percent (87,687) are teens or younger²⁶². Forty percent of abusers entering a marijuana-specific treatment program had never abused any other drug.²⁶³ Of individuals who have ever used marijuana, 9 percent meet the criteria for dependence articulated in the DSM-IIIR psychiatric manual (the standard diagnostic reference),²⁶⁴ as do roughly 20 percent of those who have used

²⁵⁷ See Hall & Solowij, supra note 38, at 1614; Institute of Med., supra note 39, at 2.31-2.32; Robert Millman & Ann Bordwine Beeder, Cannabis, in The American Psychiatric Textbook of Substance Abuse Treatment 91, 96 (Marc Galanter & Herbert Kleber, eds. 1994).

²⁵⁸ Tolerance to the various effects of a drug develops at different rates, and herein lies the danger. *See* INSTITUTE OF MED., *supra* note 39, at 3.8-3.9.

²⁵⁹ See Elena Kouri et al., Changes in Aggressive Behavior During Withdrawal from Long-Term Marijuana Use, 143 PSYCHOPHARMACOLOGY 302, 303 (1999).

²⁶⁰ See Gerhard Wiesbeck et al., An Evaluation of the History of a Marijuana Withdrawal Syndrome in a Large Population, 91 Addiction 1469, 1472 (1996).

²⁶¹ See U.S. Dep't Of Health & Human Serv's, National Admissions to Substance Abuse Treatment Services, The Treatment Episode Data Set (TEDS) 1992-1996 at Table 3.1 (1998).

²⁶² See id.

²⁶³ See Robert Stephens et al., Adult Marijuana Users Seeking Treatment, 61 J. CONSULTING & CLINICAL PSYCHOLOGY 1100, 1102 (1993).

²⁶⁴ See James Anthony et al., Comparative Epidemiology of Dependence on Tobacco, Alcohol, Controlled Substances, and Inhalants: Basic Findings from the National Comorbidity Study, 2 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 244, 251 (1994).

the drug more often. 265 This corresponds with other findings that 8 percent of users and 16 percent of frequent users experience withdrawal symptoms.²⁶⁶

Prevalence of Drug Use and Dependence Among the General Population²⁶⁷

Drug Category	Proportion Who Have Ever Used Different Types of Drugs	Proportion Of Users That Ever Became Dependent
Tobacco	76%	32%
Alcohol	92%	15%
Marijuana (including hashish)	46%	9%
Anxiolytics (including sedatives and hypnotic drugs)	13%	9%
Cocaine	16%	17%
Heroin	2%	23%

Most disturbing is that more teens and children age 19 and younger enter treatment for marijuana abuse and dependence than for abuse and dependence involving any other drug including alcohol. In 1996, nearly as many teens and children were admitted to treatment for marijuana as were admitted for abuse and dependence on all other substances combined. The following table is based on CASA's detailed analysis of data from the U.S. Department of Health and Human Services.

²⁶⁵ See Wayne Hall et al., The Health and Psychological Consequences of Cannabis Use, Monograph Series No.

^{25,} Australian Government Public Service, at 118 (1994). ²⁶⁶ *See* Weisback et al., *supra* note 269, at 1473.

²⁶⁷ Institute Of Med., *supra* note 39, Table 3.4, at 3.16. "The table shows estimates for the proposition of people among the general population who used or became dependent on different types of drugs. The proportion of users that ever became dependent includes anyone who was ever dependent--whether it was for a period of weeks or years--and thus includes more than those who are currently dependent. The diagnosis of drug dependence used in this study was based on DSM-III-R criteria."

Teens and Children Admitted to Treatment for Substance Abuse and Addiction - 1996

SUBSTANCE	NUMBER	PERCENT
Alcohol	21,594	11.9
Alcohol with Secondary	35,069	19.3
Drug		
Smoked Cocaine	5,323	2.9
Non-smoked cocaine	3,801	2.1
Heroin	4,166	2.3
Other Opiates	339	.2
Marijuana	87,687	48.2
Methamphetamine	4,354	2.4
Other Stimulants	1,497	.8
Tranquilizers	143	.1
Sedatives	202	.1
Hallucinogens	1,531	.8
PCP	363	.2
Inhalants	1,113	.6
Other/None Specified	14,602	8.0
Total	181,784	99.9*

Source: United States Department of Health and Human Services, Office of Applied Studies, Substance Abuse and Mental Health Services Administration, Treatment Episode Data Set (TEDS) 1992-1996.

Overcoming marijuana dependence can be difficult. Heavy marijuana users--those who on average smoke several times a day for 90 percent of the past three months--who enter treatment may experience relapse rates similar to those of cigarette smokers, alcoholics and other drug Thirty percent of the users dropped out of treatment, and in the year following treatment only 14 percent did not use marijuana.²⁶⁹

Marijuana Potency. While increases over time in the potency of the average joint have been difficult to measure due to inadequately systematic sampling, few dispute that today more

^{*} Due to Rounding

²⁶⁸ See Robert Stephens et al., Treating Adult Marijuana Dependence: A Test of the Relapse Prevention Model, 62 J. Consulting & Clinical Psychology 92, 98 (1994). ²⁶⁹ See id. at 94, 98.

powerful marijuana is available than had been sold in the past.²⁷⁰ Marijuana with a THC content as high as 30 percent (ten times that of the average joint) has been seized in British Columbia.²⁷¹ This marijuana, cultivated indoors under special growing conditions, trades in the United States pound for pound for cocaine.²⁷² In the Netherlands, de facto decriminalization has fertilized the growth of equally potent marijuana.²⁷³ The higher THC content makes psychotic and other reactions (anxiety, agitation, delusions, amnesia, confusion, and hallucinations) more likely and may raise the risk of traffic accidents.²⁷⁴ Initially, the higher THC content may decrease the amount of marijuana smoked to achieve a high, potentially lessening damage to the lungs.²⁷⁵ In the long run, however, marijuana with higher THC content may more quickly produce dependence and tolerance, again raising the likelihood of respiratory ailments.²⁷⁶

Medical Use of Marijuana. With the passage of referenda allowing for the medical use of marijuana in California and Arizona in 1996, such use has become a topic of much debate. Proponents of medical marijuana have argued that it is effective in alleviating the symptoms of glaucoma, chemotherapy related nausea, AIDS wasting syndrome, and other ailments.²⁷⁷ Some claim that in many cases the presently available prescription drug Marinol, which contains THC, the active ingredient in marijuana, is not as effective as smoked marijuana.²⁷⁸ The safety and

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While advocates of legalization dispute the amount of any increase, they acknowledge the likelihood of some increased potency and the growing availability of high-potency marijuana. *See* LYNN ZIMMER & JOHN MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS 135-41 (1997); Grinspoon & Bakalar (Lowinson), *supra* note 40, at 200. ²⁷¹ *See* Gary Fields, *Potent Marijuana Strain Invigorates Drug Trade*, USA TODAY, Jan. 13, 1999, at 3A.

²⁷² See id.

²⁷³ See infra note 367.

²⁷⁴ See Hall & Solowij, supra note 38, at 1614.

²⁷⁵ See id. But even advocates of legalization concur that marijuana smokers do not decrease the amount they smoke proportionally to the amount of THC in the joint. See ZIMMER & MORGAN, supra note 270, at 139 (indicating that only when the THC increases by more than 100 percent do individuals decrease the amount of marijuana smoked).

²⁷⁶ See Hall & Solowij, supra note 38, at 1614.

²⁷⁷ See Grinspoon & Bakalar, (*Marihuana as Medicine*), supra note 240, at 1875; see generally Lester Grinspoon & James Bakalar, Marihuana, the Forbidden Medicine (1993).

²⁷⁸ See Grinspoon & Bakalar, supra note 240, at 1876.

efficacy of marijuana as medicine should be decided on the basis of scientific research by doctors, scientists, and the Food and Drug Administration (FDA), not political referanda.²⁷⁹ Allowing doctors to prescribe marijuana would require only moving the drug from Schedule I to Schedule II and obtaining approval of the drug's safety and efficacy by the FDA for particular uses.

While many of those who promote medical marijuana also support overall marijuana decriminalization or legalization,²⁸⁰ medical use of the drug need not involve legalization or decriminalization. Opiates (e.g., morphine) and cocaine are available today with a prescription for specified medical uses when presented by a physician, but they remain illegal and all other uses remain criminal.

The Institute of Medicine of the National Academy of Sciences undertook an initial assessment of medical marijuana in its report, *Marijuana and Medicine: Assessing the Science Base*, in early 1999. The report called for increased research and clinical trials on marijuana's risks and purported medical benefits for certain conditions such as nausea suffered by the 15 percent of chemotherapy patients who find current medications ineffective.²⁸¹ But the report found no medical benefit in cases of glaucoma and Alzheimer's Disease.²⁸² Because smoking marijuana is a crude way to ingest the prescribed dose of the drug and delivers harmful substances, the report recommended development of synthetic cannabinoid medications and delivery systems such as inhalers.²⁸³ Whatever the outcome of these studies, the legal status of

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²⁷⁹ See Kleber (NEJM), supra note 206, at 364; Joseph A. Califano, Jr., Marijuana: It's A Hard Drug, WASH. POST, Sep. 30, 1997, at A21; Mitchell Rosenthal & Herbert Kleber, Making Sense of Medical Marijuana, 111 PROCEEDINGS OF THE ASS'N OF AM. PHYSICIANS 159 (1999).

²⁸⁰ See Abbie Crites-Leoni, *Medicinal Use of Marijuana*, 19 J. LEGAL MED. 273, 279 (1998) (arguing that the recent ballot initiatives in California and Arizona led by supporters of marijuana legalization are part of an effort to desensitize the public to the harmfulness of marijuana in order to use the medical marijuana issue as a first step toward legalization).

²⁸¹ See Institute of Med., supra note 39, at ES.4, ES.6, 4.11-4.17.

²⁸² See id. at 4.37-4.38, 4.41.

²⁸³ See id. at ES.5, ES.8-ES.9.

marijuana for general use would not be affected. Unauthorized possession and sale of marijuana, like that of all prescription medications, would remain a crime.

Marijuana and the Later Use of Other Drugs. The role of marijuana in the later use of other drugs such as cocaine and heroin has long been a topic of much controversy. The "gateway theory" posits that marijuana smoking leads to (i.e., is a contributory cause of) the later use of other drugs. Opponents of the gateway theory agree that the correlation between marijuana use and other drug use is strong,²⁸⁴ but they point out that correlation does not necessarily mean causation;²⁸⁵ that the relationship between the use of marijuana and the use of other drugs varies over time;²⁸⁶ that most individuals who smoke marijuana never use other drugs;²⁸⁷ and that independent factors (e.g., peer groups, rebelliousness) may cause both marijuana and other drug use.²⁸⁸

Use of marijuana and other drugs are strongly correlated, especially when compared to other early health studies. For instance, 12- to 17-year-olds who smoke marijuana are 85 times more likely to use cocaine than those who do not.²⁸⁹ The younger children are when they first use marijuana the more likely they are to go on to use other drugs.²⁹⁰ Sixty percent of adolescents who use marijuana before age 15 will later use cocaine.²⁹¹ The statistical relationships remain even after accounting for other problem behaviors, including violence, eating disorders, and poor academic performance. A child who uses marijuana before age 12 is 79 times likelier later to use

²⁸⁴ See, supra. note 270, at 32.

²⁸⁵ See id. at 32.

²⁸⁶ See id. at 33.

²⁸⁷ See Grinspoon & Bakalar, supra note 40, at 201.

²⁸⁸ See id

²⁸⁹ See The Nat'l Ctr. on Addiction & Substance Abuse at Columbia Univ. (CASA), Cigarettes, Alcohol & Marijuana: Gateways to Illicit Drug Use 9 (1994) (analyzing data from the National Household Survey on Drug Abuse).

²⁹⁰ See id. at 21-22.

²⁹¹ See id. at 22.

other illegal drugs than a child similarly situated with respect to all other problem behaviors, but who has not smoked marijuana.²⁹² Among teens who report no other problem behaviors, those who used cigarettes, alcohol and marijunana at least once in the past month are almost 17 times likelier to use another drug like cocaine, heroin or acid.²⁹³ These correlations are many times greater than the initial relationships found between smoking and lung cancer in the 1964 Surgeon General's report (nine to ten times), high cholesterol and heart disease in the Framingham Study (two to four times), and asbestos and lung cancer in the Selikoff study (five times).²⁹⁴ Subsequent research on the progression of lung cancer and heart disease explained the development of the diseases and the roles of smoking, asbestos, and high cholesterol as causal factors.

Even if opponents of the gateway theory are correct that the statistical relationship between marijuana and other drug use has varied over time, this does not disprove the theory. The theory does not purport that marijuana is the sole causal factor in later drug use, just as smoking and asbestos are not the sole causes of lung cancer, nor high cholesterol the only reason individuals develop heart disease. Many other factors make it more likely an individual will use marijuana, including acceptance of use by peer groups and society, low risk aversion, and low perception of harmful consequences.²⁹⁵ Cigarettes and alcohol also have at least a statistical gateway relationship to harder drug use.²⁹⁶ The variations in the later use of other drugs could be the result of changes in any of these other factors. Finally, that most marijuana smokers do not go on to use other drugs does not disprove that marijuana smoking increases the risk of later drug

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²⁹² See Hearings Before the Caucus on International Narcotics Control of the Senate, 104th Cong. (April 25, 1996) (statement of Joseph A. Califano, Jr., President and Chairman, The Nat'l Ctr. on Addiction and Substance Abuse at Columbia Univ.) (analyzing data from Youth Risk Behavior Survey, Centers for Disease Control).

²⁹³ See Califano, supra. note 279, WASH. POST, Sep. 30, 1997 at A21 (based on CASA analysis of data from youth risk behavior survey, Centers for Disease Control).

²⁹⁴ See CASA, supra note 289, at v.

²⁹⁵ See Institute of Med., supra note 39, at 3.12-3.15.

²⁹⁶ See CASA, supra note 289, at 9-11.

use any more than the fact that more than 80 percent of chronic smokers do not develop lung cancer disproves the causative role of tobacco in lung cancer.²⁹⁷

Given the multitude of factors that influence drug use and the as yet unestablished causal link between marijuana and other drug use, the Institute of Medicine's recent report on medical marijuana noted the absence of "conclusive evidence that the drug effects of marijuana are causally linked to the subsequent abuse of other illicit drugs."298 The Institute reached its conclusion in the context of discussing the impact that *medical* use of marijuana would have on the use of other drugs.²⁹⁹ The report recognized that "people who enjoy the effects of marijuana" are, logically, more likely to be willing to try other mood altering drugs than are people who are not willing to try marijuana or dislike its effects. In other words, many of the factors associated with a willingness to use marijuana are, presumably, the same as those associated with the willingness to use other illicit drugs." The report also noted that "most users of other illicit drugs have used marijuana first," that "[i]n the sense that marijuana use typically precedes rather than follows initiation into the use of other illicit drugs, it is indeed a gateway drug," and that one of the most significant predictors of heavy drug use is the intensity of marijuana smoking.³⁰¹ The Institute report concluded that "[a]t present, the data on drug use progression neither support nor refute the suggestion that medical availability would increase drug abuse among medical marijuana users." Since it was not meant to provide an evaluation of the gateway theory apart from the use of medical marijuana, the report omitted much of the statistical evidence linking non-

²⁹⁷ See M.J. Thun et al., *Trends in Tobacco Smoking and Mortality from Cigarette Use in Cancer Prevention Studies, I (1959-69) and II (1982-88)* in Changes in Cigarette-Related Disease Risks And Their Implication For Prevention And Control, NIH NCI Monograph #8, at 305-475 (1997).

²⁹⁸ See Institute of Med., supra note 39, at ES.7.

²⁹⁹ See id. at 3.24. "It does not follow from those data that if marijuana were available by prescription for *medical* use, the pattern of drug use would be the same." *Id*.

³⁰⁰ See id. at 3.22.

³⁰¹ See id. at 3.22, 3.24.

medical marijuana use with other drug use, as well as research uncovering for the first time a potential biochemical mechanism explaining this progression in such circumstances.

Two recent studies begin to provide a psychopharmacological explanation for the tight correlation between marijuana and other drug use.³⁰³ These studies suggest that the pleasurable sensations of using marijuana and the unpleasurable sensations of ceasing to use the drug are caused by the activation of the same brain reward pathways involved in heroin and cocaine addiction.³⁰⁴ All of these drugs, as well as nicotine and alcohol, give their users pleasure by altering dopamine levels in the brain.³⁰⁵ These researchers concluded that marijuana abuse may prepare the brain pathways, increasing the likelihood that users will seek out substances like heroin and cocaine that act in a similar way.³⁰⁶ More research is needed to understand how marijuana affects the brain, the way in which this may lead to use of other drugs, and why certain individuals may be at greater risk than others. The statistical data and the recent biomedical research suggest both that smoking marijuana greatly increases the risk of later use of drugs like heroin and cocaine and a possible mechanism explaining this later use.

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In sum, while some early claims about the harms of marijuana smoking (e.g., violence) have been disproven and others (e.g., lung damage and harm to the fetus) discovered, there is still much that is not known about the effects, especially long-term, of marijuana use.³⁰⁷ Proponents of legal change take comfort in the fact that most long-term effects require regular use and that

³⁰² See id. at 3.23-24.

³⁰³ See Gianluigi Tanda et al., Cannabinoid and Heroin Activation of Mesolimbic Dopamine Transmission by a Common μ₁ Opioid Receptor Mechanism, 276 Sci. 2048 (1997); Friedbert Weiss et al., Activation of Corticotropin-Releasing Factor in the Limbic System During Cannabinoid Withdrawal, 276 Sci. 2050 (1997); see also Ingrid Wickelgren, Marijuana: Harder than Thought? 276 Sci. 1968 (1997).

³⁰⁴ See id.

³⁰⁵ See id.

³⁰⁶ See Tanda et al., supra note 303, at 2049; Rodriguez de Fonseca et al., supra note 303, at 2053.

most individuals who have used marijuana have done so only occasionally.³⁰⁸ But use patterns under current societal and legal sanctions will likely not reflect usage patterns if enforcement of the marijuana laws were relaxed or the drug legalized. 309 As recently as 1979, when enforcement and societal disapproval were both low, more than one in every ten twelfth graders smoked marijuana every day.³¹⁰ Increased prevalence and frequency of use could result in the type and scope of adverse health effects that with respect to alcohol and tobacco it took decades of legal and socially approved use to uncover.

In some ways, marijuana combines the health effects of both those drugs: the intoxication of alcohol with the lung damage of tobacco. In others, it would be adding a third legal drug to the two whose devastating health consequences have only in the past few decades been demonstrated. Our experience with tobacco in particular should stand as a warning of how difficult it would be to reverse the consequences of increased use even after widespread knowledge and acceptance of a drug's dangers.

Part IV

Marijuana and the Criminal Justice System

The number of individuals arrested, convicted and imprisoned for marijuana crimes have varied according to the severity of the laws and the strictness of enforcement. Supporters of making the nation's marijuana policy less punitive point to the rapid increase in marijuana arrests

³⁰⁷ See Hall & Solowij, supra note 38, at 1611.

³⁰⁸ See, e.g., ZIMMER & MORGAN, supra note 270, at 115. "Most marijuana-only smokers in the United States probably do not ingest enough smoke to cause serious lung damage." *Id.*309 See supra Part II.

³¹⁰ See JOHNSTON ET AL., supra note 4, at Table 5.

and incarcerations since 1980.³¹¹ They argue that these individuals, especially those in prisons and jails for possession, waste the nation's resources, filling cells that could be better occupied by violent criminals and taxing law enforcement energies better spent on more serious offenders.³¹² It is in the criminal justice system that proponents of decriminalization and legalization see the greatest chance for savings.

Marijuana Arrests. Focusing on arrests skews perceptions of what decriminalization or legalization would mean for the criminal justice system. Marijuana arrests have increased substantially since 1980 when they totaled 405,000.³¹³ In 1997, state and federal officials made 695,000 arrests for violations of the marijuana laws (of the total 1.6 million arrests for drug law offenses).³¹⁴ Of these individuals, 606,500 (87 percent) were arrested for possession and 88,700 (13 percent) for distribution and cultivation.³¹⁵ Decriminalization would eliminate most of these 606,500 arrests, but the effect on the criminal justice system would be negligible. These arrests represent just 4 percent of the total 15.3 million arrests in 1997.³¹⁶ Even full legalization would eliminate only 4.5 percent of all arrests.³¹⁷

Marijuana Convictions. The arrest figures overstate the impact on the criminal justice system as a whole. Few of these arrests end in felony convictions. In 1994, there were 109,000 convictions in state and federal courts for *all felony drug possession offenses* and an additional 182,000 felony drug trafficking convictions.³¹⁸ Although drug crimes play a proportionately

³¹¹ See, e.g., ZIMMER & MORGAN, supra note 270, at 39-46; Bandow, supra note 157, at 243-45.

³¹² See, e.g., Schlosser (Atlantic Monthly), *supra* note 30, at 91. "In an era when the fear of violence pervades the United States, small-time pot dealers are being given life sentences while violent offenders are being released early, only to commit more crimes." *Id*.

³¹³ See Federal Bureau of Investigations, Crime in the United States, 1980 at 191 (1981).

³¹⁴ See Federal Bureau of Investigations, Uniform Crime Reports, 1997 at 221-22 (1998).

³¹⁵ See id. at 221.

³¹⁶ See id. at 221.

³¹⁷ See id. at 221.

³¹⁸ See Bureau of Justice Statistics, Felony Sentences in the United States, 1994 at 2 (1997).

larger role in the federal system than in that of the states, when it comes to crime control the states dwarf the federal government: 274,000 of the 290,000 felony drug convictions in 1994 occurred in state court.³¹⁹

In federal court, 41.4 percent of felony convictions (16,000) were for drug law violations;³²⁰ 40.9 percent for drug trafficking and 0.5 percent only for possession.³²¹ Of those convicted only of possession, 35 percent were sentenced to probation, 24 percent to a jail term that averaged seven months, and 41 percent to a prison term that averaged 66 months.³²² Thus just 83 individuals convicted of possession of any drug entered federal prison for a term of more than one year.

In state courts, 31.4 percent of felony convictions (274,000) involved drug law violations; 19 percent for trafficking (165,000) and 12.4 percent only for possession (109,000).³²³ Of those convicted only of possession, 34 percent were sentenced to probation, 32 percent to a jail term that averaged four months, and 34 percent to a prison term that averaged 50 months.³²⁴ Furthermore, given that 90 percent of convictions for serious crimes are obtained by a guilty plea, 325 many of these individuals at both the state and federal level likely plead guilty to lesser offenses than those with which they were originally charged.³²⁶ Moreover, for felony convictions such as these, it is likely that significant amounts of drugs are involved.

³¹⁹ See id. at 2.

³²⁰ See id. at 3. The report does not indicate which drug was involved in the crime.

³²¹ See id.

³²² See id. at 5, 8.

³²³ *See id.* at 3.

³²⁴ See id. at 5, 8.

³²⁵ See Frank Miller et al., Criminal Justice Administration 923 (1991). In 1996, 16,600 of the 21,000 defendants charged with drug offenses in federal court (79 percent) plead guilty. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1996 at 462 (1997).

³²⁶ See Bowman, supra note 197, at n.166. "Based on my experience as a prosecutor, I am confident that the overwhelming majority of [those incarcerated solely for possession offenses] fall into one of two categories: (a) They were originally charged with trafficking offenses, but secured simple possession convictions through a plea

Marijuana and Prisons. The perception that the nation's prisons are filled with low level drug offenders who if freed would allow more violent prisoners to be jailed is incorrect.³²⁷ From Justice Department statistics alone it is not possible to determine what portion of these individuals was convicted of marijuana offenses, but more comprehensive analyses indicate the number of non-violent, marijuana possession offenders in state (and federal) prisons is small.

Although better data is needed, the available studies reveal that marijuana offenders are not the source of prison overcrowding. One study found that of the 1.8 million individuals in the nation's prisons and jails, 37,500 (2.1 percent) are incarcerated only for marijuana offenses. Of these, 15,400 (0.85 percent) are serving sentences for marijuana possession. Another study found that only 2.9 percent of state (and federal) inmates are incarcerated for possession of *any* drug and have no history of violent crime. A third study found that only 1.4 percent of state prisoners were non-violent drug offenders with no criminal history, and only 0.4 percent were serving time for marijuana possession. In New York State, 86 percent of prisoners incarcerated for drug crimes were drug traffickers. Moreover, of the remaining 14 percent incarcerated for possession, three-quarters were arrested for selling drugs, but were convicted of (likely plead

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bargain or (b) they were charged in jurisdictions with relatively mild drug problems under the stringent provisions of 21 U.S.C. § 844(a) (1994), which prescribes a minimum mandatory sentence of five years for mere possession of more than five grams of crack cocaine. The remaining balance were probably caught with the drugs in some exclusively federal enclave like a federal prison."

³²⁷ See Bowman, supra note 197, at 977. "[S]ignificant incarceration for the mere possession of personal-use quantities of narcotics is very rare, certainly for first offenders." *Id. See also* Polsby, supra note 184, at 542-43 (arguing in favor of legalization, but stating that "[d]espite well-publicized declarations to the contrary, there is very little worthwhile evidence that the current prison population of drug offenders contains any appreciable fraction of temperamentally inert flower children, ensnared by happenstance in the war on drugs").

³²⁸ See Chuck Thomas, Marijuana Arrests and Incarceration in the United States, Drug Policy Analysis Bulletin, June 1999, at 5.

³²⁹ See id.

³³⁰ See The Nat'l Ctr. on Addiction and Substance Abuse at Columbia Univ., Behind Bars: Substance Abuse And America's Prison Population, at 49 (1998).

³³¹ See Robert Peterson, The Success of Tough Drug Enforcement 19 (1996).

³³² See New York State Division of Criminal Justice Services, Internal Analysis of Data from Information Systems Maintained by Division of Criminal Justice Services (1998) (available at CASA).

down to) possession.³³³ Finally, many possession convictions involve large amounts of marijuana. These figures make it very unlikely that decriminalizing marijuana would have any discernible effect on the nation's prison population.³³⁴

Decriminalization and the Criminal Justice System

Decriminalization of personal possession of marijuana would likely decrease the number of arrests, though even here the outcome is uncertain. While marijuana does not have the same psychopharmacological link to violence as alcohol, virtually every occasion of marijuana use, unlike those of alcohol use, results in intoxication. There are 1.5 million arrests for driving while drunk each year, almost the same number as all drug law arrests and more than twice the number of marijuana law arrests.³³⁵ There are an additional 735,000 arrests for public drunkenness and 636,000 arrests for violations of the liquor laws. 336 If the nation's experience with alcohol is any indication, were marijuana use decriminalized the decrease in the number of arrests for marijuana law violations could be easily offset by the rise in other marijuana related arrests (e.g., driving under the influence) as use of the drug increased. In any case, the heaviest costs to the criminal justice system come not from arrests, but from incarceration where holding the prisoner for a year can cost \$20,000 or more.³³⁷ Here, decriminalization would have little effect, because very few individuals are currently imprisoned for possession. Any increase in the number of users (and therefore in the number of traffickers to supply these users) would quickly undo any savings from the reduced number of prisoners incarcerated for marijuana possession. Moreover,

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³³³ See id

³³⁴ Given these numbers, it is unlikely that many of the 16,000 low-level drug offenders in federal prison reported by the Justice Department are imprisoned for marijuana possession offenses. *See* U.S. DEP'T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORY, 54 BNA 2101 (1994).

³³⁵ See Federal Bureau of Investigations (UCR), supra note 314 at 222.

³³⁶ See id.

³³⁷ See U.S. DEP'T OF JUSTICE (BNA), supra note 334, at 2102.

decriminalization (by removing sanctions only for personal possession) would maintain an illegal market for the drug.³³⁸ In the end, because the number of prisoners would decrease only minimally, decriminalization would do little to decrease criminal justice expenditures or improve our ability to keep violent criminals incarcerated.

Legalization and the Criminal Justice System

Legalization of marijuana would result not only in fewer arrests, but also in fewer individuals incarcerated for marijuana law offenses. Legalization would also allow the government to stop spending money on marijuana interdiction and international control. Yet the savings would be quite limited. Under virtually all scenarios adolescent purchase and use would be illegal. Because marijuana use is concentrated in this population, a significant portion of illegal use and distribution would continue.³³⁹ Much of the predicted savings from legalization for adults presupposes that individuals who traffic in marijuana would no longer commit crimes if marijuana were legal—that they would either assume a position in the now legal distribution of marijuana or would be legally employed in another part of the economy.³⁴⁰ This is not likely. Some marijuana traffickers would try their hand at other illegal activity. To the extent that this occurred, they would eventually be arrested and imprisoned, diminishing these expected savings to the criminal justice system from legalization.³⁴¹

Thus, those aspects of current policy which most trouble proponents of decriminalization and legalization will not be changed much, if at all, if their policies were adopted. The nation

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³³⁸ See Moore, supra note 160, at 16. "The more limited legalization regimes provide some protections against the threat of explosive increases in narcotics use fueled by the newly created legitimate markets, but only at the price of maintaining conditions favorable to a continuation of the black market." *Id*.

³³⁹ See Thomas Scorza, Legalizing Drugs Is Not the Answer, 17 HUMAN RIGHTS 25, 27 (1990).

³⁴⁰ See Moore, supra note 160, at 22. "[I]t is by no means clear that people with a talent for violence will stop using that talent for economic gains simply because one important opportunity disappears." *Id*.

³⁴¹ See generally James Jacobs, Imagining Drug Legalization, 101 Public Interest 28 (1990).

need not embrace such radical measures in order to avoid incarcerating occasional low level offenders whose mandatory minimum punishments seem disproportionate to their crime. There are other reforms of the criminal justice system that would get the job done without incurring the risk of making marijuana more socially acceptable and readily available to America's teens. Providing wide prosecutorial and judicial discretion for low level offenders (such as that included in the 1994 Crime Act), limiting the offenses which qualify for three strikes provisions, supporting prosecutors and judges with experts in substance abuse and public health, and increased use of drug courts would be enough to get this job done.

Nor need the nation embrace legalization or decriminalization to modify civil forfeiture laws if they have disproportionately punished individuals with small amounts of marijuana; reform proposals which do not involve changing the legal status of marijuana are currently making their way through Congress. While the current drug laws may lead to individual instances of unfairness, these sympathetic stories cannot carry the weight of overturning a century's drug policy, particularly when other more targeted policy changes can help relieve them. Looking only at the criminal justice system ignores the effects of legalization on use, public and personal health, and social services.

Part V

The Experience of the Netherlands

The Dutch experience is the foreign drug policy most frequently cited by supporters of decriminalization and legalization as a model the United States should consider.³⁴³ Since 1976,

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³⁴² See Stephen Labaton, House Passes Bill Making It Harder To Seize Property, N.Y. TIMES, June 25, 1999, at A1

A1. ³⁴³ *See, e.g.*, Ethan Nadelmann, *Europe's Drug Prescription*, ROLLING STONE, Jan. 1995, at 38.

Dutch drug policy has distinguished between "drugs presenting unacceptable risks," such as heroin and cocaine, and "cannabis products." The rationale for such a policy is twofold: (1) marijuana is not as harmful as the other illegal drugs and should be treated differently; and (2) separation of marijuana from the market and culture of other illegal drugs should prevent marijuana smokers from getting involved in those other drugs.³⁴⁵ In effect, the Dutch seem to some extent to mimic with marijuana the present American treatment of alcohol and tobacco. In 1976 the Netherlands reduced possession of less than one ounce of marijuana to a misdemeanor punishable by up to one month in prison and/or a fine.³⁴⁶ While categorization as a misdemeanor and the possible prison sentence prevent labeling this policy one of decriminalization, the Dutch policy of nonenforcement has de facto decriminalized possession of small amounts of marijuana.³⁴⁷ Because decriminalization itself does not eliminate the illegal market for the drug, the Dutch devised a way to allow marijuana to be sold openly at "coffee shops" throughout the Netherlands. These "coffee shops" sell different varieties of marijuana to customers age 18 and over who can either smoke the marijuana there or take it out. Advertising marijuana and the sale of hard drugs are forbidden.³⁴⁸ The number of coffee shops in Amsterdam grew from 20 in 1980 to 300 in 1990.³⁴⁹ Today, there are 1500 such coffeehouses throughout the Netherlands.³⁵⁰

The decriminalization of marijuana, together with official tolerance for business establishments which sell marijuana, resulted in the commercialization of the marijuana

 $^{^{344}}$ See Henk Jan van Vliet, The Uneasy Decriminalization: A Perspective on Dutch Drug Policy, 18 Hofstra L. Rev. 717, 724 (1990).

³⁴⁵ See id. at 724-25. But see Marcel de Kort, The Dutch Cannabis Debate, 1968-1976, 24 J. DRUG ISSUES 423 (1994) (arguing that de facto decriminalization resulted from an absence of policy and the acceptance of already existing circumstances rather than from "rational, well-considered action").

³⁴⁶ See van Vliet, supra note 344, at 731.

³⁴⁷ See id.

³⁴⁸ See id. at 735-36.

³⁴⁹ See id. at 735.

³⁵⁰ See Larry Collins, Holland's Half-Baked Drug Experiment, 78 FOREIGN AFFAIRS 82, 87 (1999).

business.³⁵¹ Dutch citizen concern about the jump in the number of coffee shops--and pressures from other European countries--led the Netherlands in 1995 to commit to reduce the number of coffee shops and cut the quantity of marijuana sold from 30 grams (one ounce) to 5 grams per customer.³⁵²

The results of Dutch policy have been difficult to assess in part because of the lack of regular use surveys prior to 1984. Estimates of marijuana use among the entire population vary widely. Official government estimates place current use at 675,000 individuals, or 5 percent of the population (over age 12), about the same as in the United States. A University of Amsterdam survey estimates current use at 323,000 individuals (2.5 percent of the population over age 12).

Supporters of the policy acknowledge that adolescent marijuana use has increased since the introduction of de facto decriminalization.³⁵⁵ Surveys show that adolescent marijuana use changed little from 1976 to 1984, but has jumped sharply since then. The percentage of Dutch youth aged 18 to 20 who ever used marijuana increased from 15 percent in 1984 to 44 percent in 1996.³⁵⁶ Past month marijuana smoking rose from 8.5 percent to 18.5 percent over the same time.³⁵⁷ Use rates among 16- and 17-year-olds show similar increases.³⁵⁸ Even after the recent increases in American marijuana use, lifetime use among high school seniors has dropped from 55

³⁵¹ See van Vliet, supra note 344, at 734-35.

³⁵² See Ethan Nadelmann et al., *International Perspectives* in SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK 22, 32 (Joyce Lowenson et al., eds., 3rd ed. 1997).
³⁵³ See Centre for Drugs Research (CEDRO), University of Amsterdam, *National Estimates of Drug Use in the*

³⁵³ See Centre for Drugs Research (CEDRO), University of Amsterdam, National Estimates of Drug Use in the Netherlands, Press Release, Jan. 5, 1999, at 1.

³⁵⁴ See id.

³⁵⁵ See Nadelmann, supra note 352, at 32.

³⁵⁶ See Robert MacCoun & Peter Reuter, Interpreting Dutch Cannabis Policy: Reasoning by Analogy in the Legalization Debate, 278 Sci. 47, 50 (1997).

³⁵⁷ See id.

³⁵⁸ See id.

percent in 1984 to 45 percent in 1996³⁵⁹ and past month use among high school seniors has fallen from 25 percent to 22 percent during that time.³⁶⁰ Thus after remaining below American marijuana use rates for many years, adolescent marijuana use in the Netherlands now rivals that in the United States.

Due to a lack of studies of conduct prior to the change in policy, it is impossible to measure whether Dutch decriminalization has weakened the link between marijuana and the later use of other drugs. In 1996, 22 percent of Dutch marijuana users used cocaine. The comparable percentage in the United States is 17. But even this comparison is not revealing because of the many cultural and social factors that influence drug use. A more telling comparison would be between the percentage of marijuana users in the Netherlands who went on to use cocaine or heroin before 1976 versus the percentage who do so today. 363

Dutch policy has produced unintended consequences.

First, the Netherlands has become the port of call for Europeans interested in purchasing and trafficking drugs.³⁶⁴ This has angered other European nations whose protests contributed to the decision in 1995 to tighten up on the coffee shops.³⁶⁵ Cutting the amount that can be purchased at coffee shops from 30 grams to 5 grams made it more difficult to purchase marijuana legally and then distribute it illegally in or out of the country.

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³⁵⁹ See JOHNSTON ET AL., supra note 4, at Table 2.

³⁶⁰ See id at Table 4.

³⁶¹ See MacCoun & Reuter, supra note 356, at 50.

³⁶² See CASA, supra note 289, at Chart 4.

³⁶³ Indeed any comparison using cocaine use is problematic because cocaine use was not prevalent in Europe during the 1970s and is still less prevalent in Europe than in the United States. Thus heroin use rates would provide a clearer picture of the whether the decriminalization has broken the link between marijuana and other drugs.

³⁶⁴ See Collins, supra note 350, at 84.

³⁶⁵ See Nadelmann, supra note 352, at 32.

Second, the de facto legality of the coffee shops together with the continued interdiction of imported marijuana has sparked domestic cultivation.³⁶⁶ Much of this cultivation is indoors in carefully controlled conditions that produce marijuana with up to 35 percent THC content, ten times the potency of the average American joint.³⁶⁷ This Nederweit crop totals 100 tons per year, more than half of which is exported, putting the Netherlands neck and neck with Morocco as the main supplier of marijuana to Europe.³⁶⁸

Thus Dutch marijuana use increased, but not until several years after the change in drug policy. This pattern is consistent with the idea that a primary barrier to use is legally reinforced societal disapproval. ³⁶⁹ Laws set social norms, and shifts in attitudes will lag behind changes in policy. As the experience of the Netherlands suggests, after decriminalization the previous normative lessons of the laws weaken over time, especially as a new generation that has never lived with the law's disapproval comes of age. Over time, societal attitudes grow more tolerant and use increases. ³⁷⁰ The policy shows that both increased physical and psychological availability represented by the spread of coffee shops and the normative message of a law of decriminalization correspond with increased use.

³⁶⁶ See Collins, supra note 350, at 86-91.

³⁶⁷ See id. at 86.

 $^{^{368}}$ See id. at 89.

³⁶⁹ MacCoun and Reuter tie the delayed increase in marijuana use to the increased number of coffee shops and the commercialization of marijuana that gradually developed from the non-enforcement of the marijuana possession laws begun in 1976. *See* MacCoun & Reuter, *supra* note 356, at 50. It is theoretically possible as some legalization advocates suggest to loosen the marijuana laws, but prevent commercialization by restricting advertising. The Dutch experience, however, demonstrates that it is practically difficult to curtail attempts to expand sales and compete for consumers once attitudes toward a drug shift and the system provides economic incentives for legal businesses to increase profits.

³⁷⁰ The Dutch experience with adolescent marijuana use lends additional support to the argument that surveys suggesting that few Americans state any interest in trying drugs after legalization have little relevance to how many Americans will use drugs when legal. The laws have helped to shape these attitudes and when the attitudes weaken, use will increase.

Part VI

Conclusion

For parents today, marijuana smoking by their children should set off an alarm. Not only is the drug harmful in and of itself, but its powerful statistical link to later drug use puts a marijuana-using child at risk of great future danger. As our experience with tobacco demonstrates, waiting until a biomedical mechanism is deciphered could cost parents and their children years of pain and suffering and ruin lives. Researchers established the statistical connection between smoking and lung cancer years before discovering the causitive mechanism, allowing tobacco companies for decades to claim that there was no proof smoking caused cancer. The ruined lives of many young Americans could be the consequence of mistaking absence of proof for proof of absence. Russian roulette is not a game parents should let their children play with marijuana.

Decriminalization or legalization would lead to the increased use of marijuana in a society that already struggles to deal with the damage done by the present legal drugs--alcohol and tobacco. Use of these legal drugs is widespread and acceptable; they account for more than half a million deaths a year. Promoting social acceptance of marijuana use through legal tolerance would establish it as a third legal drug whose long-term health effects are only beginning to be understood. Today, for the vast majority of smokers, marijuana use is a youthful phase. In a legalized or decriminalized tomorrow it could become, like tobacco and alcohol, a long-term part of user's lifestyles. The health and behavioral consequences of marijuana today may be far different if the number, frequency and length of use increase following the enactment of a more lenient marijuana policy.

Touted by its proponents as the most acceptable of all suggestions to weaken drug laws, decriminalization would do very little to ameliorate those conditions which prompt advocates to push for wide-ranging changes in drug laws. By maintaining an illegal market for the drug, decriminalization would not reduce the crime and violence associated with the drug trade. Even legalization would accomplish little because marijuana trafficking rarely involves the turf wars between distributors that exist in the cocaine and crack markets and helped skyrocket the murder rate in the mid-1980s.

Decriminalization or legalization is not a necessary answer to concerns that civil forfeiture laws have been used to punish less culpable marijuana users disproportionately. Nor is either the answer to burgeoning prison populations or to complaints that mandatory minimum sentences may punish low level users and dealers excessively. There are less drastic changes in marijuana policy, such as eliminating mandatory sentences for drug abusers and addicts and providing inprison treatment to all who need it, that can allay the concerns of drug reformers while maintaining the deterrent effect of legal sanction. The low-level, non-violent criminal safety valve to the mandatory minimum sentences included in the 1994 Violent Crime Control Act is another example. Reducing the prison population does not require reducing the number of crimes by repealing criminal laws. It does require treatment for the drug and alcohol abuse problems plaguing many prisoners and closely related to their recidivism.

Motivating drug addicts and alcoholics to enter treatment is no easy task. That's why mandatory sentences are counterproductive where alcohol and drug abusers and addicts are involved. This is especially true where such an individual is required to serve the entire sentence and where young offenders are involved. The carrot of early release can be an important incentive to getting an inmate to enter treatment and stay with it. The stick of parole, with its overhanging

threat of a return to prison, can be just what's needed to get a recently released individual to continue treatment and aftercare. Requiring an individual to serve the entire sentence eliminates the possibility of early release and any parole period.

Calls for decriminalization and legalization are not born of any new evidence regarding the nature of addiction, or the pharmacological and public health effects of marijuana use. Nor do they reflect strong public sentiment in favor of such policies. Rather they are products of underestimating both marijuana's harmfulness and the efficacy of current policy in curtailing use, as well as perceived law enforcement excesses of current drug policies. Any determination that marijuana may have medicinal value should prompt no change in laws prohibiting the drug's general use, as has been the case with opiates and cocaine.

In the final analysis, decriminalizing or legalizing marijuana would increase use and its consequent detrimental health and societal effects. Acknowledging that drug use, like poverty or racism, will never be completely eradicated, does not require concluding that we should stop trying. What we must do is ensure that the reforms we propose fit the problems we perceive. Prevention, treatment and research are needed to ensure that even if we cannot achieve a 100 percent drug-free America, we can at least minimize the numbers of users and the consequences of their use and maintain a drug policy founded on the belief that drug use can be prevented and drug abuse treated.

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