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THE NEED FOR CHANGE: AN ECONOMIC ANALYSIS OF MARIJUANA POLICY

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The Controlled Substances Act was enacted in 1970. Since that time, billions of dollars have been spent enforcing marijuana prohibition and millions of individuals have been arrested. Despite these efforts, there has been little to no success in controlling the availability of marijuana. Federal and state efforts to reduce marijuana production and use through prohibition have been ineffective, and those efforts have been far less than equitably applied across economic and racial divisions. Given the costs associated with prohibition and the meager results obtained thus far, it is time to rethink the national policy of prohibition and consider abandoning the nearly forty-year-old model.

Thirteen states have decriminalized possession of small amounts of marijuana for personal use, and many more states have greatly reduced the penalties for possession. Decriminalization carries with it many of the same societal costs associated with total prohibition and does nothing to dismantle illegal trafficking operations. Legalization, on the other hand, would eliminate the criminal supply network and would also remove the direct and collateral sanctions that currently fall so harshly upon minority and low-income marijuana users. This Note explores legalization of marijuana within a system of regulation and taxation. It compares the efficiency, fairness, and political and administrative feasibility of a policy of legalization to both federal prohibition and state-level decriminalization. The purpose of this Note is not to conclusively determine that legalization is the best policy, but to demonstrate that it is a viable alternative deserving of serious consideration in any marijuana policy debate.

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*We therefore urge the country to commence an open and honest debate about marijuana prohibition. . . . At a minimum, this debate will force advocates of current policy to show that prohibition has benefits sufficient to justify the cost to taxpayers, foregone tax revenues, and numerous ancillary consequences that result from marijuana prohibition.*¹

I. INTRODUCTION

Attitudes toward marijuana use and marijuana prohibition are changing. Although the federal government, through the Controlled Substances Act (CSA), has classified marijuana as a Schedule I substance—the highest of five levels of control²—efforts at the state, local, and federal levels are changing the legal landscape of personal marijuana use. Two recently introduced congressional measures would remove any federal penalties “for the possession of marijuana for personal use, or for the not-for-profit transfer between adults of marijuana for personal use” and would reclassify marijuana as a Schedule II substance.³ Thirteen states have already passed laws decriminalizing possession of small amounts of marijuana, treating first-time possession of small amounts like a minor traffic violation, and many more states have greatly reduced the penalties

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¹ ProhibitionCosts.org, An Open Letter to the President, Congress, Governors, and State Legislatures, <http://www.prohibitioncosts.org/endorsers.html> (last visited Feb. 27, 2009) (signed by Nobel Laureate Milton Friedman and over five hundred economists). These economists “believe such a debate will favor a regime in which marijuana is legal but taxed and regulated like other goods.” *Id.*

² See 21 U.S.C. § 812(a)–(c) (2006) (providing a comprehensive list of controlled substances grouped by level of control, from Schedule I (highest) to Schedule V (lowest)).

³ Act to Remove Federal Penalties for the Personal Use of Marijuana by Responsible Adults, H.R. 5843, 110th Cong. (2008) (removing federal penalties for both possession of one hundred grams or less of marijuana and not-for-profit transfer between adults of an ounce or less); Medical Marijuana Patient Protection Act, H.R. 5842, 110th Cong. (2008) (moving marijuana from Schedule I to Schedule II of the CSA and providing “for the medical use of marijuana in accordance with the laws of the various States”).

for possession.⁴ In addition, more and more municipalities, including several large metropolitan areas, have voted to make enforcement of the laws prohibiting possession of small amounts of marijuana the very lowest priority for their law enforcement officials.⁵

The laws addressing the use of medical marijuana are also being eased. As a Schedule I substance, marijuana is considered to have “no currently accepted medical use in treatment in the United States” and, under the CSA, is not allowed to be prescribed by medical practitioners.⁶ In contradiction of this federal statute, thirteen states have removed criminal sanctions from medical use, and currently thirty-one states and the District of Columbia have, either by legislation or voter initiative, some form of law recognizing the value of medical marijuana.⁷ While it is true that

⁴ See David Abel, *Marijuana Law Advocates Seek Wider Change*, BOSTON GLOBE, Nov. 8, 2008, at B3, available at LEXIS, News Library, BLOBE File (noting that Massachusetts joins Arizona, California, Colorado, Maine, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, and Oregon in having passed laws decriminalizing marijuana, making “getting caught with less than an ounce of marijuana punishable by a civil fine of \$100”); see also Rosalie Liccardo Pacula et al., *Risks and Prices: The Role of User Sanctions in Marijuana Markets* 5 (Nat’l Bureau of Econ. Research, Working Paper No. 13415, 2007), available at <http://www.nber.org/papers/w13415.pdf> (noting that in addition to states that “are generally recognized as having ‘decriminalized’ possession of small amounts of marijuana, fifteen states have actually eliminated criminal sanctions associated with it and another twenty-six states have conditional discharge provisions for first time offenders”).

For the purposes of this Note, decriminalization refers to a policy of removing criminal penalties for possession of small amounts of marijuana but retaining criminal sanctions against trafficking.

The definition of the term *small amount* can vary from jurisdiction to jurisdiction but most often refers to an amount of marijuana with a total weight less than one ounce. See, e.g., Abel, *supra*; Valerie Richardson, *Denver Makes Pot Possession Lowest Priority*, WASH. TIMES, Nov. 8, 2007, at A9, available at LEXIS, News Library, WTIMES File. The federal bill, introduced by Rep. Barney Frank, would decriminalize possession of 3.5 ounces or less. Abel, *supra*.

⁵ See Richardson, *supra* note 4 (noting that passage of pro-marijuana initiative in 2007 made Denver “the 10th community in the nation,” joining such cities as San Francisco, Oakland, and Seattle, “to place low-level . . . possession at the bottom of its law-enforcement priorities”). This was the second pro-marijuana initiative approved by Denver voters in the past three years. *Id.* Ironically, the first initiative, in 2005, resulted in an increase in marijuana arrests. *Id.* The difference between the two measures, according to Mason Tvert, executive director of the group behind both initiatives, is that the 2005 measure was an amendment to an existing ordinance. “This time, we actually created an affirmative law telling the city to take specific action, and they’ll be violating the law if they ignore it,” Mr. Tvert said. “The voters have made it clear they don’t want people arrested for marijuana possession.” *Id.*

Since the passage of the pro-marijuana initiative in 2007, Denver’s city attorney has adopted a new rule allowing “[a]dults cited for possessing less than an ounce of marijuana” to pay their citations through the mail instead of having to appear in court. Felisa Cardona, *Marijuana-Fine Process Eased for Adults*, DENVER POST, May 30, 2008, at B3, available at LEXIS, News Library, DPOST File.

⁶ 21 U.S.C. § 812(b)(1)(B) (2006); see also *Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (“The CSA designates marijuana as contraband for any purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses.”).

In *Raich*, the Court held that enforcement of the prohibition on possession and cultivation of medical marijuana fell within the federal commerce powers even where such activity was purely intrastate and undertaken “in accordance with state laws.” *Raich*, 545 U.S. at 28–29.

⁷ MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS 1 (2008), available at http://www.mpp.org/assets/pdfs/download-materials/SBSR_NOV2008.pdf; Glenn Kessler, *California Voters Narrowly Approve Same-Sex Marriage Ban*, WASH. POST, Nov. 6, 2008, at A44, available at LEXIS, News Library, WPOST File (noting that in the 2008 election “Massachusetts

federal prohibition trumps any state or local measure,⁸ in defiance of federal prohibition,⁹ an increasing number of state and local governments are creating laws that allow for the personal use of marijuana—medically, recreationally, or both.

The Controlled Substances Act was enacted in 1970.¹⁰ Since that time, billions of dollars have been spent enforcing marijuana prohibition at the local, state, and federal levels.¹¹ Despite this expenditure, there has been little to no success in controlling the availability of marijuana.¹² Given these facts, combined with a growing tolerance of recreational and medical marijuana use, it is time to rethink the national policy of prohibition and consider abandoning the nearly forty-year-old model.

Marijuana trails only alcohol and tobacco as the most popular recreational drug in America.¹³ The Office of National Drug Control Policy (ONDCP) estimates that one hundred million Americans (over forty percent of the population) have tried marijuana in their lifetimes and that nearly fifteen million (almost six percent of the population) used marijuana in the past month.¹⁴ What is the goal of the current federal policy

voters decriminalized possession of small amounts of the drug, eliminating criminal penalties for people caught with an ounce or less of marijuana” and “Michigan joined 12 other states in allowing the use of marijuana by very ill patients to relieve pain, nausea, appetite loss and other symptoms”).

⁸ See *Raich*, 545 U.S. at 29 (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”); John Coté, *FBI Seizes 50 Pounds of Pot, Hash in Raids*, S.F. CHRON., Aug. 30, 2007, available at LEXIS, News Library, SFCHRN File (“California approved medical use of marijuana more than a decade ago [sic], but it is still illegal under federal law.”).

The Court in *Raich*, while expressing sympathy and understanding for California’s efforts to allow for the legal use of medical marijuana by its citizens, found it beyond doubt “that federal power over commerce is ‘superior to that of the States to provide for the welfare or necessities of their inhabitants,’ however legitimate or dire those necessities may be.” *Raich*, 545 U.S. at 9, 27–29 & nn.37–38 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)).

⁹ See Press Release, Office of the Attorney General, State of Cal., Attorney General Lockyer Issues Statement On US Supreme Court’s Medical Marijuana Ruling (June 6, 2005), available at <http://ag.ca.gov/newsalerts/release.php?id=546> (“Today’s ruling shows the vast philosophical difference between the federal government and Californians on the rights of patients to have access to the medicine they need to survive and lead healthier lives. Taking medicine on the recommendation of a doctor for a legitimate illness should not be a crime.”).

¹⁰ Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. § 812 (2006)).

¹¹ See *infra* Part II.

¹² See *infra* Part II.A.1; see also U.S. GEN. ACCOUNTING OFFICE, DRUG CONTROL: OBSERVATIONS ON ELEMENTS OF THE FEDERAL DRUG CONTROL STRATEGY, NO. GAO/GGD-97-42, at 4 (1997), available at <http://www.gao.gov/archive/1997/gg97042.pdf> [hereinafter GAO DRUG CONTROL] (“Despite some successes, United States and host countries’ efforts have not materially reduced the availability of drugs in the United States . . .”).

¹³ NORML.org, About Marijuana, http://www.norml.org/index.cfm?Group_ID=7305 (last visited Feb. 28, 2009).

The National Organization for the Reform of Marijuana Laws (NORML) is a nonprofit, public-interest lobby that “supports the removal of all criminal penalties for the private possession and responsible use of marijuana by adults, including the cultivation for personal use, and the casual nonprofit transfers of small amounts.” NORML.com, FAQ’s, http://norml.org/index.cfm?Group_ID=3418 (last visited Feb. 28, 2009) [hereinafter NORML FAQ’s].

¹⁴ OFFICE OF NAT’L DRUG CONTROL POL’Y, EXECUTIVE OFFICE OF THE PRESIDENT, MARIJUANA FACTS & FIGURES: EXTENT OF USE, <http://www.whitehousedrugpolicy.gov/drugfact/marijuana/>

prohibiting all use of marijuana? Is it to make criminals of those individuals?¹⁵ Or is the goal to educate the public about potential risks associated with using marijuana and to direct efforts toward deterring use, especially among the young? The purpose of this Note is to show that the goals of education and deterrence could be more effectively pursued through a policy of full legalization, regulation, and taxation of marijuana than through the current policy of marijuana prohibition.¹⁶

Those opposed to any relaxation of the marijuana laws maintain that marijuana is extremely harmful and addictive, with no medically therapeutic use.¹⁷ However, decades of evidence show that the harmful and addictive properties have been greatly exaggerated.¹⁸ This is perhaps

marijuana_ff.html (last visited Feb. 28, 2009). In comparison, the Centers for Disease Control and Prevention estimates current alcohol use at 60.8% of adults and current cigarette use at 20.8% of adults. CTNS FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2008, at 305 tbl.68 (2009), available at <http://www.cdc.gov/nchs/data/hs/hs08.pdf>; CTNS FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., SMOKING & TOBACCO USE, http://www.cdc.gov/tobacco/data_statistics/tables/adult/table_2.htm (last visited Feb. 28, 2009).

¹⁵ See *Frontline: Busted: America's War on Marijuana* (interview with Professor Mark Kleiman conducted Winter 1997–1998) (PBS television broadcast), <http://www.pbs.org/wgbh/pages/frontline/shows/dope/interviews/kleiman.html> (last visited Feb. 28, 2009) [hereinafter Kleiman Interview] (“Marijuana is the most widely-used illicit drug, and the illicit drug most likely to be used by respectable folks . . . There are millions of employed, hard-working and productive Americans who are, by the definition of our current law, illicit-drug users. And so when people go on TV and say drug users are bad people and we should shoot them all, they’re referring to a lot of people they know.”); WashingtonWatch.com, H.R. 5843, The Act to Remove Federal Penalties for the Personal Use of Marijuana by Responsible Adults, http://www.washingtonwatch.com/bills/show/110_HR_5843.html (last visited Feb. 28, 2009) (“So long as the users aren’t harming anyone, it is extremely offensive to brand them as criminals and force them to live in fear.”).

¹⁶ See NORML FAQ’s, *supra* note 13 (“In recent years, we have significantly reduced the prevalence of drunk driving and tobacco smoking. We have not achieved this by prohibiting the use of alcohol and tobacco or by targeting and arresting adults who use alcohol and tobacco responsibly, but through honest educational campaigns.”).

¹⁷ See NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., RESEARCH REPORT SERIES: MARIJUANA ABUSE 5 (2005), available at <http://www.drugabuse.gov/PDF/RRMarijuana.pdf> [hereinafter NIDA RESEARCH REPORT] (describing potential health risks associated with marijuana use, including increased risk of lung disease and some cancers); Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, U.S. Dep’t of Justice, to Rep. John Conyers, Chairman, House Comm. on the Judiciary 2–3 (July 25, 2008), available at <http://judiciary.house.gov/hearings/pdf/Nelson080725.pdf> (claiming “there are no data from adequate and well-controlled clinical trials to support any of the claimed therapeutic uses for smoked marijuana”).

¹⁸ See MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 256 (1992) (“[M]illions of persons who started smoking marijuana as college students in the late 1960s, some of whom have been taking the drug more or less regularly ever since, have suffered neither obvious immediate damage nor dramatic aftereffects. . . . [I]f occasional marijuana smoking over [decades] carried substantial health risks, the evidence should have started to come in by now.”); Sid Kirchheimer, *Heavy Marijuana Use Doesn’t Damage Brain: Analysis of Studies Finds Little Effect from Long-Term Use*, WEBMD, July 1, 2003, <http://www.webmd.com/mental-health/news/20030701/heavy-marijuana-use-doesnt-damage-brain> (citing results of fifteen different studies, conducted over periods of three months to thirteen years, involving 700 regular marijuana users and 484 non-users, that showed “[l]ong-term and even daily marijuana use doesn’t appear to cause permanent brain damage”). “[R]esearchers found only a ‘very small’ impairment in memory and learning among long-term marijuana users. Otherwise, scores on thinking tests were similar to those

most evident when marijuana is looked at in comparison with other substances, including legally available alcohol and tobacco, which are more addictive.¹⁹ In addition, a report by the Institute of Medicine shows that marijuana has therapeutic value for a number of medical conditions,²⁰ and support for medical marijuana is growing throughout the medical community.²¹

The increasingly tolerant attitude toward marijuana may be attributed in part to changes in what we thought we knew. Commonly held misconceptions about marijuana have been refuted.²² One such misconception is that marijuana is a gateway drug—that marijuana use alone leads to the use of “harder drugs.”²³ It is, however, not marijuana use that leads to harder drugs,²⁴ but the method of acquisition.²⁵ As long as

who don't smoke marijuana . . . [R]esearchers say impairments were less than what is typically found from using alcohol or other drugs.” *Id.*

¹⁹ See DIV. OF NEUROSCIENCE & BEHAVIORAL HEALTH, INST. OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 98 (Janet E. Joy et al. eds., 1999) [hereinafter INST. OF MEDICINE] (noting that “few marijuana users develop dependence,” marijuana users “appear to be less likely to [develop dependence] than users of other drugs (including alcohol and nicotine), and marijuana dependence appears to be less severe than dependence on other drugs”); Kleiman Interview, *supra* note 15 (“[C]annabis is the most widely used illicit drug, precisely because its negative impact on most users tends to be much smaller than the impact of cocaine or methamphetamine.”).

²⁰ See INST. OF MEDICINE, *supra* note 19, at 177 (“For patients such as those with AIDS or who are undergoing chemotherapy, and who suffer simultaneously from severe pain, nausea, and appetite loss, [marijuana-derived] drugs might offer broad-spectrum relief not found in any other single medication.”); see also *Scientists Are High on Idea that Marijuana Reduces Memory Impairment*, RESEARCH NEWS, Nov. 19, 2008, <http://researchnews.osu.edu/archive/endocan.htm> (reporting on research at Ohio State University indicating specific elements of marijuana could “help prevent or delay the onset of Alzheimer’s disease”). *But cf.* INST. OF MEDICINE, *supra* note 19, at 179 (cautioning that smoking marijuana should only be used for short-term treatment or for terminally ill patients and strongly urges research to develop a non-smoked rapid-onset delivery system).

²¹ See MARIJUANA POLICY PROJECT, *supra* note 7, at app. P (providing a “Partial List of Organizations with Favorable Positions on Medical Marijuana,” including many state medical associations, as well as the American Medical Association, which supports medical marijuana research and endorses a “physician’s right to discuss marijuana therapy with a patient”).

²² See 1 OFFICE ON DRUGS & CRIME, UNITED NATIONS, 2006 WORLD DRUG REPORT: ANALYSIS 156 (2006), available at http://www.unodc.org/pdf/WDR_2006/wdr2006_volume1.pdf [hereinafter U.N. WORLD DRUG REPORT] (“It is true that much of the early material on cannabis is now considered inaccurate, and that a series of studies in a range of countries have exonerated cannabis of many of the charges levelled against it.”); KLEIMAN, *supra* note 18, at 253–64 (providing examples of misconceptions that have been refuted such as “substantial health risks” and “vastly increased potency”).

²³ See DRUG POLICY RESEARCH CTR., RAND, RESEARCH BRIEF: USING MARIJUANA MAY NOT RAISE THE RISK OF USING HARDER DRUGS (2002), available at http://www.rand.org/pubs/research_briefs/RB6010/RB6010.pdf (“[T]he harms of marijuana use can no longer be viewed as necessarily including an expansion of hard-drug use and its associated harms.”); KLEIMAN, *supra* note 18, at 259–61 (“The gateway hypothesis is not the only plausible relationship between marijuana use and the use of other drugs.”).

²⁴ See INST. OF MEDICINE, *supra* note 19, at 99–101 (“In the sense that marijuana use typically precedes rather than follows initiation into the use of other illicit drugs, it is indeed a gateway drug. However, it does not appear to be a gateway drug to the extent that it is the *cause* or even that it is the most significant predictor of serious drug abuse; that is, care must be take not to attribute cause to association.”).

marijuana remains illegal, the only way to acquire it for recreational use is by purchasing it from someone willing to commit a crime by selling it. Such individuals often provide access to harder drugs.²⁶ The government now warns that “[u]sing marijuana puts children and teens in contact with people who are users and sellers of other drugs,” and this contact increases the “risk that a marijuana user will be exposed to and urged to try more drugs.”²⁷

Research has shed new light on marijuana. Sixty percent of states endorse some form of medical marijuana protection, and there is a growing reluctance to criminalize possession for personal recreational use.²⁸ Why then is there still such strong continuing resistance to legalization? The answer, of course, is that marijuana is far from harmless.²⁹ While less addictive than other substances, both legal and illegal, with which it is often grouped, marijuana is still an addictive substance—though much less so than alcohol and tobacco.³⁰ Those who oppose legalization are concerned that relaxing prohibition could lead to increased use, especially among children.³¹ In fact, the primary focus of much opposition is that

²⁵ See KLEIMAN, *supra* note 18, at 261 (noting that although heavy marijuana users in a 1970s study were at an increased risk of becoming heroin users, it was not marijuana use but association with drug sellers that led to the increased risk).

²⁶ See *id.* at 261 (noting that in a study of adolescents “heavy marijuana use appeared to generate involvement in drug selling, either as a way of paying for the marijuana consumed or simply by association with drug sellers, and drug selling in turn gave adolescents access to heroin and to the money to buy it”). “This suggests that marijuana was a gateway for these adolescents only because it was illicit.” *Id.* at 261–62.

²⁷ NAT’L INS. OF HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERVS., MARIJUANA: FACTS FOR TEENS 10–11 (2008), available at http://www.drugabuse.gov/PDF/TEENS_Marijuana_brochure.pdf (responding to the question, “Does marijuana lead to the use of other drugs?”).

²⁸ Felisa Cardona, *Election 2007: Marijuana Enforcement: Denver Puts Pot Busts on Cops’ Back Burner*, DENVER POST, Nov. 7, 2007, at B5, available at LEXIS, News Library, DPOST File (quoting a Marijuana Policy Project spokesman as saying, “These sorts of measures in cities and towns across the country have an unbroken winning streak, and it’s looking like that streak is continuing, and that’s a sign that voters around the country don’t want police time and effort wasted on small-time marijuana enforcement.”).

²⁹ KLEIMAN, *supra* note 18, at 254; see INST. OF MEDICINE, *supra* note 19, at 126 (“Marijuana is not a completely benign substance. It is a powerful drug with a variety of effects.”).

³⁰ See INST. OF MEDICINE, *supra* note 19, at 94–95 (“Compared to most other drugs . . . , dependence among marijuana users is relatively rare.”); KLEIMAN, *supra* note 18, 41–42 (noting that capture ratios of marijuana, crack and powder cocaine, alcohol, and tobacco, are all well above ten percent, with marijuana’s being lowest at just under fourteen percent, alcohol over seventeen percent, and tobacco the outlier at fifty-nine percent). The capture ratio of a substance is “the proportion of [its] users who go on to compulsive use.” *Id.* at 41.

³¹ See INST. OF MEDICINE, *supra* note 19, at 126 (“[T]here is the broad social concern that sanctioning the medical use of marijuana might lead to an increase in its use among the general population.”); Robert Robb, Opinion, *It’s Time to Consider Legalizing Marijuana*, ARIZ. REPUBLIC, Oct. 5, 2007, at 7, available at LEXIS, News Library, ARIZRP File (“Despite the claims of incautious legalization advocates, usage would undoubtedly go up as prices dropped, product became more available and convenient, and risks disappeared.”); Jerry Seper, *DEA Raids Medical Marijuana Centers*, WASH. TIMES, Jan. 19, 2007, at A9, available at LEXIS, News Library, WTIMES File (noting that DEA agents justify raiding medical marijuana distribution centers in California because, as one DEA special agent claims, the “establishments are nothing more than drug-trafficking organizations bringing criminal activities to our neighborhoods and drugs near our children and schools”).

legalization would send the wrong message to children and would encourage them to try marijuana by making it more readily available.³² Those who support an end to prohibition argue that a policy of legalization may actually help deter use, especially underage use.³³ In light of the ongoing debate on prohibition, and with opposition to marijuana from a purely moral standpoint starting to recede,³⁴ the time has come to reconsider this country's policy on marijuana under a more objective framework.

The prohibition of drugs is a public policy matter, and the decision to legalize marijuana would require a radical change in that policy. To evaluate whether such a change in policy is desirable, it is necessary to examine the benefits and costs of both the current prohibition policy and a policy of legalization utilizing regulation and taxation. Public policy most often involves the allocation of resources, and conversely, "[a]ll resource allocation decisions are shaped by public policy."³⁵ Microeconomic policy analysis involves the study of these allocative choices made by the government and provides a means of evaluating alternatives.³⁶ The extent to which the current system of marijuana prohibition has been successful in preventing abuse of the substance must be weighed against any benefits derived from removing the criminal sanctions associated with recreational and medical use. In microeconomic policy analysis, the evaluation criteria are not limited to efficiency but include equity and fairness, political feasibility, and administrative feasibility.³⁷ Such an analysis can be used to evaluate alternative public policies for marijuana and determine whether the resources currently dedicated to achieving goals through prohibition could be more effectively utilized to achieve those same goals through an alternative policy of legalization and regulation. This Note demonstrates through such an analysis that a public policy of legalization and regulation

³² See Teen Drug Abuse: Marijuana Use Among Teens, <http://www.teendrugabuse.us/marijuana.html> (last visited Mar. 1, 2009) ("Teens get a mixed message about marijuana, but the message needs to be clear. Marijuana is an illegal substance that affects teens in many harmful ways.").

³³ See Rob Kampia, *If Tobacco Regulation Works, Why Not Regulate Marijuana?*, ALTERNET, Dec. 24, 2007, <http://www.alternet.org/story/71504/> (noting that, while marijuana use is up across all age groups, cigarette smoking has declined, especially among teenagers, perhaps in response to increased enforcement of laws prohibiting sales of cigarettes to minors). Rob Kampia is the founder and executive director of the Marijuana Policy Project. ProCon.org, Medical Marijuana, <http://medicalmarijuana.procon.org/viewsource.asp?ID=1669> (last visited Mar. 1, 2009).

³⁴ See RUDOLPH J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 152 (2004) ("One of the first places to focus official attention is on the spreading incredulity of government-created moral panic."); Steven E. Landsburg, Op-Ed., *What to Expect When You're Free Trading*, N.Y. TIMES, Jan. 16, 2008, at A23, available at LEXIS, News Library, NYT File ("Public policy should not be designed to advance moral instincts that we . . . reject every day of our lives.").

³⁵ LEE S. FRIEDMAN, THE MICROECONOMICS OF PUBLIC POLICY ANALYSIS 3, 6 (2002).

³⁶ *Id.* at 4.

³⁷ *Id.* at 13.

of the sale and distribution of marijuana is preferable to the current policy of prohibition.

Part II of this Note examines the current public policy and evaluates the various methods of enforcement and prevention used in the prohibition of marijuana. The costs and benefits, as well as the successes and failures, of those methods are analyzed.³⁸ Prohibition and legalization represent opposite ends of a broad spectrum of possible marijuana policies. Along that spectrum lie any number of systems involving some degree of decriminalization while prohibiting trafficking, such as allowing medical use only, allowing possession of various quantities for personal use, or allowing cultivation and possession for personal use. One point along that spectrum is the system currently evolving in this country—decriminalizing possession of small amounts of marijuana for personal use while maintaining criminal sanctions for sale and distribution. Strict prohibition is still the law, at least at the federal level; yet prohibition is at best an inconsistent policy at state and local levels—in terms of both regulation and enforcement—with states and localities having varying degrees of prohibition and decriminalization.³⁹ This evolving system shares many of the characteristics of prohibition, but there are differences. In light of the growing support for decriminalizing possession for personal use, Part III evaluates those differences.

Part IV explores legalization of marijuana within a system of regulation and taxation.⁴⁰ This Note evaluates the probable effects of such regulation and taxation.⁴¹ The benefits derived from removing the criminal sanctions associated with the distribution and possession of marijuana are weighed against any social costs associated with a possible increase in marijuana use resulting from the removal of those sanctions.

This Note concludes by summarizing the efficiency, fairness, and political and administrative feasibility of the proposed policy of legalization, comparing that policy to both federal prohibition and the

³⁸ Marijuana is not the only drug subject to prohibition. In many instances, reported data encompasses more than one prohibited drug, and facts and figures pertaining only to marijuana are not available. Where such information is not readily available, the data is extrapolated and estimated as it pertains to marijuana only.

³⁹ NORML.org, State by State Laws, http://www.norml.org/index.cfm?Group_ID=4516 (last visited Mar. 1, 2009) (follow each state link to table outlining that state's various marijuana penalties).

⁴⁰ The government can exert a great deal of influence over behavior through regulation and taxation. See FRIEDMAN, *supra* note 35, at 7 (detailing a wide range of areas and behaviors influenced by government regulation and taxation); Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 24 (2006) (including regulation of private sector activity as one of three goals of taxation). “[I]f the goal of the government is to deter consumption of certain items (for example, alcohol, tobacco or gasoline), excise taxes on these items are the most effective way of achieving this aim . . .” *Id.*

⁴¹ See J. David Hawkins et al., *Preventing Substance Abuse*, 19 CRIME & JUSTICE 343, 344–45 (1995) (noting that research into the effects high taxes and other restrictions have on reduction of alcohol consumption “suggest[s] that legal regulation remains an important tool in drug abuse prevention for ‘legal’ drugs”).

currently evolving system of state and local decriminalization, and ultimately determining that legalization is a viable alternative deserving of serious consideration in any marijuana policy debate. Public policy must conform to existing law, and a radical change in public policy concerning marijuana would necessitate an equally radical change in the law, but “in the long run, the law should conform to good policy.”⁴²

II. PROHIBITION: THE FEDERAL MARIJUANA POLICY

The laws prohibiting marijuana and the system administering that prohibition have been in place for over thirty-five years;⁴³ therefore, the administration and political feasibility of prohibition do not require a great deal of analysis here. The more important criteria regarding prohibition are the efficiency and fairness of the system.⁴⁴ Are prohibition’s goals of reducing the production and use of marijuana being effectively pursued? How efficiently have the resources invested in prohibition been utilized? How equitably are the programs and methods of deterrence and enforcement being administered? This Part demonstrates that the efficacy of federal and state efforts to reduce marijuana production and use through prohibition has been poor and that the administration of those efforts has been far less than equitably applied across economic and racial divisions.

Over the last four decades, the federal government has committed billions of budgetary dollars to the prohibition of illegal drugs, and the annual budget for prohibition grows every year.⁴⁵ For 2009, the President

⁴² FRIEDMAN, *supra* note 35, at 15.

⁴³ The Comprehensive Drug Abuse Prevention and Control Act of 1970, enacted on October 27, 1970, established five schedules of controlled substances and included marijuana among those substances subject to the strictest control. Pub. L. No. 91-513, § 202(a)–(c), 84 Stat. 1236, 1247–49 (codified at 21 U.S.C. § 812(a)–(c) (2006)). See DRUG ENFORCEMENT ADMINISTRATION: A TRADITION OF EXCELLENCE 1973–2003, at 4 (2003), available at http://www.usdoj.gov/dea/pubs/history/history_part1.pdf [hereinafter DEA HISTORY] (“[T]he Drug Enforcement Administration (DEA) was created in 1973 to deal with America’s growing drug problem.”).

⁴⁴ Efficiency can be thought of “as using resources to maximize the value to the economy’s members of the goods and services produced.” FRIEDMAN, *supra* note 35, at 30–31.

Of the criteria, fairness is particularly important if, as many claim, prohibition is enforced with great disparity across racial lines. See, e.g., Erik Eckholm, *Reports Find Persistent Racial Gap in Drug Arrests*, N.Y. TIMES, May 6, 2008, at A21, available at LEXIS, News Library, NYT File (reporting that “large disparities persist in the rate at which blacks and whites are arrested and imprisoned for drug offenses, even though the two races use illegal drugs at roughly equal rates”). Although blacks make up only one-eighth of the population, one-third of those arrested for drug violations in 2006 were black, and a report from the Human Rights Watch indicates that in 2003 “blacks constituted 53.5 percent of all who entered prison for a drug conviction.” *Id.* Black men “are nearly 12 times as likely to be imprisoned for drug convictions as adult white men.” *Id.* While these figures include arrests for all illegal drugs offenses, more than eighty percent of these arrests “were for possession of banned substances, rather than for their sale or manufacture,” and the latest FBI data indicates that “[4] in 10 of all drug arrests were for marijuana possession.” *Id.* The racial disparity in marijuana prohibition is addressed more thoroughly below. See *infra* Part II.B.

⁴⁵ See OFFICE OF NAT’L DRUG CONTROL POL’Y, EXECUTIVE OFFICE OF THE PRESIDENT, NAT’L DRUG CONTROL STRATEGY: FY 2009 BUDGET SUMMARY 13 tbl.3 (2008), available at <http://www.whitehousedrugpolicy.gov/publications/policy/09budget/fy09budget.pdf> [hereinafter ONDCP BUDGET].

requested a national drug control budget of \$14.1 billion, a 3.4% increase over the drug control budget enacted for 2008.⁴⁶ Of course, spending for marijuana prohibition represents only a portion of the budgetary total for control of all illegal drugs. This Part addresses that portion of the total drug control budget directed toward prohibition of marijuana and examines how effective the efforts supported by this funding have been in achieving the goals of prohibition.

The federal government does not break down budgetary expenditures by specific drug; therefore, it is necessary to estimate the amount spent targeting marijuana alone. The Office of National Drug Control Policy (ONDCP) reports that in 2007 the final amount committed by the federal government to the national drug control policy was \$13.8 billion.⁴⁷ *The Budgetary Implications of Marijuana Prohibition*, a report funded by the Marijuana Policy Project, estimates that in 2002 nineteen percent of the total amount budgeted by the federal government for all illegal drug prohibition was devoted to marijuana prohibition.⁴⁸ Assuming this percentage has not changed appreciably, this translates to \$2.6 billion committed to marijuana prohibition at the federal level in 2007. These figures do not include expenditures at the state and local levels. The same report estimates total state and local expenditures for marijuana prohibition at \$5.3 billion for 2003.⁴⁹ Even assuming that figure has remained constant year-to-year, the estimate for total current expenditures for prohibition of marijuana alone, at all government levels, is approximately \$8 billion per year.⁵⁰

The Drug Enforcement Administration (DEA) is the agency charged with managing and coordinating the drug prohibition activities of agencies

(indicating annual drug control funding ranging from \$10.8 billion to \$13.8 billion for FYs 2002–2007, with the final budget of each year exceeding that of the previous year).

⁴⁶ *Id.* at 1.

⁴⁷ *Id.* at 13 tbl.3.

⁴⁸ See Daniel Egan & Jeffrey A. Miron, *The Budgetary Implications of Marijuana Prohibition*, in POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION 17, 25 & tbl.2.3 (Mitch Earleywine ed., 2007) (estimating percentage of FY 2002 budget devoted to marijuana prohibition based on marijuana arrests and convictions as percentage of total DEA drug arrests and convictions, with adjustments for revenue received from seizures and fines). For a complete explanation of the estimating process used to arrive at the nineteen percent figure, see *id.* at 24–25 & 35 nn.16–21.

The Marijuana Policy Project (MPP) is a lobbying organization that believes “the greatest harm associated with marijuana is prison,” and therefore “focus[es] on removing criminal penalties for marijuana use, with a particular emphasis on making marijuana medically available to seriously ill people who have the approval of their doctors.” MPP.org, <http://www.mpp.org/about/> (last visited Mar. 1, 2009).

⁴⁹ Egan & Miron, *supra* note 48, at 24 (estimating figure for FY 2003 based on percentage of states’ arrests, convictions, and incarcerations attributable to marijuana in 2000 (with adjustments for revenue received from seizures and fines) and adjusting for inflation). For a complete explanation of how this figure was calculated, see *id.* at 18–24.

⁵⁰ Because enforcement activities vary considerably at the state and local levels, see *supra* notes 4–5 and accompanying text, this Note focuses on how effectively the federal expenditures are being put to use.

at the federal level; coordinating and cooperating with enforcement officials at the federal, state, and local levels; and at the international level, acting as liaison with the United Nations and Interpol on matters relating to international drug control programs.⁵¹ The DEA is only one of many federal programs included in the national drug control strategy,⁵² but it accounts for one-seventh of the total federal drug control budget.⁵³ As the administrative agency spearheading the federal government's drug control strategy, the DEA's success or failure in achieving its goals can be seen as a strong indicator of the success or failure of the federal government's overall drug policy. As the following section shows, despite spending billions of dollars a year to reduce marijuana production and use, the DEA, and its fellow federal, state, and international agencies, have had little to no effect on either.

A. Efficiency and Effectiveness

The DEA's stated mission is to "enforce the controlled substances laws and regulations of the United States" and bring to justice those organizations "involved in the growing, manufacture, or distribution of controlled substances" in the United States.⁵⁴ "Another mission of the DEA is to discourage drug use among the U.S. population by sharing information about the risks of drug use and the effects of drugs on society."⁵⁵ Enforcement represents efforts to reduce the supply of illegal drugs, whereas education and prevention programs are directed at reducing the demand.⁵⁶ Currently, the federal government spends almost twice as much on enforcement as it does on education and prevention.⁵⁷ The following sections will show that the DEA's missions are not succeeding, and that neither the supply nor the demand for marijuana is being reduced in proportion to the money being spent.

⁵¹ DEA Mission Statement, <http://www.usdoj.gov/dea/agency/mission.htm> (last visited Mar. 1, 2009).

⁵² The Department of Justice (DOJ) is one of twelve government agencies included in the national drug control strategy, and the DEA is one of four DOJ programs within that strategy. ONDCP BUDGET, *supra* note 45, at 12 tbl.2 (agencies receiving drug control funding).

⁵³ *See id.* (noting DEA allocations for 2007, 2008 (enacted), and 2009 (requested) budgets represent 14.2% of 2007 budget and 15.4% of both 2008 and 2009 budgets).

⁵⁴ DEA Mission Statement, *supra* note 51.

⁵⁵ *Just Think Twice: A Guide to Using the Just Think Twice Website for Middle and High School Students 1* (Teacher's Guide), available at http://www.justthinktwice.com/pdf/just_think_twice_guide_hi.pdf ("The *Just Think Twice* teacher's guide was developed . . . under a contract from the Drug Enforcement Administration (DEA).").

⁵⁶ ONDCP BUDGET, *supra* note 45, at 1.

⁵⁷ The ONDCP reports that, in 2007, of the \$13.8 billion committed by the federal government to support the DEA's missions, sixty-five percent was devoted to supporting the DEA's enforcement mission, with the remaining thirty-five percent going to discourage drug use through education and prevention programs. *Id.* at 13 tbl.3; *cf. id.* at 1 (referring to the sixty-five percent of the budget directed to enforcement as *augmenting* the thirty-five percent allocated to prevention).

1. *Enforcement*⁵⁸

As previously noted, the missions of the DEA include both enforcement of “the controlled substances laws and regulations of the United States” and discouraging drug use through education.⁵⁹ In 2007, just under \$2 billion of the total \$13.8 billion budget was allocated directly to the DEA, with only \$3.2 million (less than one-quarter of one percent) of that allocation going to drug use prevention.⁶⁰ Thus, it is abundantly clear that the primary focus within the agency itself is enforcement of the drug prohibition laws aimed at reducing the supply of illegal drugs.⁶¹ By the government’s own assessment,⁶² the DEA is failing to make an impact on that supply.

In its most recent assessment, the Office of Management and Budget (OMB)⁶³ assigned the DEA an overall rating of “adequate,” scoring the agency one hundred percent for its purpose, but only twenty-six percent for results.⁶⁴ “The 2004 assessment found that [the] DEA was unable to demonstrate progress in reducing the availability of illegal drugs in the United States.”⁶⁵ The assessment found that there was a lack of specificity of targets and timeframes for achieving strategic goals and objectives and that “DEA managers were not held accountable for achieving results.”⁶⁶ The DEA is the “principle agency responsible for enforcing the Nation’s drug laws,” charged with preventing and deterring the manufacture and

⁵⁸ This section addresses federal enforcement efforts aimed at reducing the availability of marijuana by targeting both foreign and domestic production. State and local efforts to reduce availability by targeting individual users are addressed below in Part II.B.

⁵⁹ See *supra* text accompanying notes 51, 55.

⁶⁰ See ONDCP BUDGET, *supra* note 45, at 91.

⁶¹ See *id.* (noting that “Intelligence” and “Investigations” together comprise over eighty percent of the DEA budget).

⁶² The Program Assessment Rating Tool (PART) was developed by the White House Office of Management and Budget (OMB) to assess and improve the performance of federal programs. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, ASSESSING PROGRAM PERFORMANCE, <http://www.whitehouse.gov/omb/part/> (last visited Mar. 1, 2009). “It is used to evaluate a program’s purpose, design, planning, management, results, and accountability to determine its overall effectiveness.” OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE PROGRAM ASSESSMENT RATING TOOL (PART), <http://www.whitehouse.gov/omb/expectmore/part.html> (last visited Mar. 1, 2009).

For a comprehensive spreadsheet of PART assessments for all government programs, access either the Excel or PDF file hyperlink available at <http://www.whitehouse.gov/omb/part/index.html>.

⁶³ The “OMB’s predominant mission is to assist the President in overseeing the preparation of the federal budget and to supervise its administration in Executive Branch agencies. . . . OMB evaluates the effectiveness of agency programs, policies, and procedures, assesses competing funding demands among agencies, and sets funding priorities.” OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB’S MISSION, <http://www.whitehouse.gov/omb/organization/role.aspx> (last visited Mar. 1, 2009).

⁶⁴ OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, PROGRAM ASSESSMENT RATING TOOL: PROGRAM SUMMARIES 254 (2005), available at http://www.whitehouse.gov/omb/budget/fy2005/pdf/ap_cd_rom/part.pdf [hereinafter PART SUMMARIES].

⁶⁵ *Id.*

⁶⁶ *Id.*

distribution of controlled substances, but by the federal government's own assessment standards, it is failing to produce a noticeable reduction in illegal drug availability.⁶⁷

The OMB's assessment addresses the failure of DEA efforts to reduce the supply of all illegal drugs, including marijuana. The evidence regarding the effect the DEA is having upon the supply of marijuana specifically is just as discouraging. Over a million kilograms of marijuana were intercepted along the southwest border in 2007.⁶⁸ Mexico alone produces more than ten times that amount, "primarily for export to the United States."⁶⁹ And although a significant amount of marijuana enters the country from outside operations, the problem is no longer simply stopping drug trafficking organizations from smuggling marijuana across the nation's borders, but preventing them from maintaining their entire operations within the borders.

The National Drug Intelligence Center (NDIC) reports that there has been a sharp rise in domestic production of marijuana since 2000, and especially so after the increase in border security following the events of September 11, 2001.⁷⁰ The "[r]ising law enforcement pressure . . . has not yet stemmed the increase in domestic cannabis cultivation," and factors such as "direct access to local drug markets . . . and higher profit margins for domestically grown marijuana . . . have contributed to a continued increase in domestic cannabis cultivation."⁷¹ An estimated seven million plants⁷² were eradicated domestically in 2007.⁷³ This eradication amount is

⁶⁷ *Id.* "Clearly what we have been doing has not worked." Mark Lander, *Clinton Says Demand for Illegal Drugs in the U.S. 'Fuels the Drug Trade' in Mexico*, N.Y. TIMES, Mar. 26, 2009, at A6, available at LEXIS, News Library, NYT File (quoting Secretary of State Hillary Rodham Clinton in a "discussion of America's fitful war on drugs" during a March 2009 visit to Mexico).

⁶⁸ NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2009, at 21 (2008), available at <http://www.usdoj.gov/ndic/pubs31/31379/31379p.pdf> [hereinafter DEP'T OF JUSTICE, THREAT ASSESSMENT].

⁶⁹ *Id.* at 22 (noting potential Mexican production of 15,500 metric tons, or over fifteen million kilograms, for 2007); see Solomon Moore, *Border Proves No Obstacle for Mexican Cartels*, N.Y. TIMES, Feb. 2, 2009, at A1, available at LEXIS, News Library, NYT File (reporting that "[d]espite huge enforcement actions on both sides of the Southwest border, the Mexican marijuana trade is more robust—and brazen—than ever" and that "Mexican drug cartels routinely transported industrial-size loads of marijuana [across the border] in 2008").

⁷⁰ NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, DOMESTIC CANNABIS CULTIVATION ASSESSMENT 2007, at 1–2 (2007), available at <http://www.usdoj.gov/ndic/pubs22/22486/22486p/22486p.pdf> [hereinafter DEP'T OF JUSTICE, CANNABIS CULTIVATION]. This is attributed to the fact that more and more foreign drug trafficking organizations (DTOs) are relocating their operations into the United States "to reduce the risk of marijuana seizure or loss during cross-border transport, gain direct access to local drug markets, and achieve higher profit margins for domestically produced marijuana" than otherwise possible. *Id.* at 1.

⁷¹ *Id.* at 2.

⁷² The equivalent of 3.1 million kilograms, assuming each plant yields one pound, with 448 grams per pound. *Id.* at 13.

⁷³ See DEP'T OF JUSTICE, THREAT ASSESSMENT, *supra* note 68, at 19 fig.13, 20 fig.14 (including 6.6 million outdoor plants and nearly half a million indoor plants).

an increase of over one million plants from the previous year.⁷⁴ Nevertheless, the NDIC estimates that the amount eradicated domestically accounts for only thirty to fifty percent of the total domestically grown marijuana, with the remaining fifty to seventy percent escaping eradication.⁷⁵

Considerably more than half of the marijuana intended for U.S. consumption, whether produced domestically or brought across the borders, is reaching the U.S. illegal drug market. Despite the billions spent on DEA-coordinated efforts to reduce the supply, “[m]arijuana continues to be the most widely used and readily available drug in the United States and it is the only major drug of abuse grown within U.S. borders.”⁷⁶

2. Education and Prevention: The Impact on Underage Use

As noted above, thirty-five percent of the total federal drug control budget goes toward discouraging drug use through education and prevention programs,⁷⁷ and considerable effort is directed at preventing underage drug use.⁷⁸ Substance abuse among teenagers is a very real and very serious concern, and every effort should be made to prevent and deter underage use.⁷⁹ However, education and prevention programs that

⁷⁴ *Id.* at 20 fig.14.

⁷⁵ DEP’T OF JUSTICE, CANNABIS CULTIVATION, *supra* note 70, at 13. The eradication represents efforts by the DEA Domestic Cannabis Eradication/Suppression Program (DCE/SP), the Forest Service, and the Department of Interior. *Id.* at 13. The DCE/SP, initiated in 1979, is “the only nationwide law enforcement program that exclusively targets Drug Trafficking Organizations (DTO) involved in [domestic] cannabis cultivation.” DEA, U.S. Dep’t of Justice, Domestic Cannabis Eradication/Suppression Program, <http://www.usdoj.gov/dea/programs/marijuana.htm> (last visited Mar. 6, 2009). An unintended consequence of DCE/SP has been that “publicity about program successes such as arrests and seizures . . . promote market participation. News about seizures of marijuana plots and grow rooms widely advertises the high prices and profit potential associated with the cultivation of high quality marijuana.” Jon Gettman, *Marijuana Production in the United States (2006)*, BULL. CANNABIS REFORM, Dec. 2006, at 16, http://www.drugscience.org/Archive/bcr2/bcr2_index.html (follow “Entire Report” pdf hyperlink).

⁷⁶ ONDCP BUDGET, *supra* note 45, at 104; *see* Moore, *supra* note 69 (“[E]nforcement officials say they see no discernible reduction in the domestic supply.”).

⁷⁷ *See supra* note 57.

⁷⁸ Of the \$14.1 billion requested for national drug control for 2009, \$1.5 billion (just over ten percent) is earmarked for educational and outreach programs aimed specifically at preventing initiation into drug use, most notably underage drug use. *See* ONDCP BUDGET, *supra* note 45, at 2–3 (describing education and outreach programs aimed at preventing drug use in children). In addition to these programs, \$3.4 billion is dedicated “to drug intervention and treatment efforts . . . to help drug users in need” across all age groups. *Id.* at 3–4.

⁷⁹ *See* OFFICE OF NAT’L DRUG CONTROL POL’Y, EXECUTIVE OFFICE OF THE PRESIDENT, MARIJUANA FACTS & FIGURES: HEALTH EFFECTS, http://www.whitehousedrugpolicy.gov/drugfact/marijuana/marijuana_ff.html (last visited Mar. 6, 2009) [hereinafter MARIJUANA HEALTH EFFECTS] (reporting on research indicating that high school seniors who smoked marijuana more than seven times a week scored significantly lower on standardized tests than nonsmokers although the two groups had scored equally well when in fourth grade); Alain Joffe et al., *Legalization of Marijuana: Potential Impact on Youth*, 113 PEDIATRICS e632, e632–33 (2004), available at <http://pediatrics.aappublications.org/cgi/reprint/113/6/e632> (noting consequences of acute and long-term use in adolescents can include “negative effects on short-term memory, concentration, attention span, motivation, and problem solving, which clearly interfere with learning”).

consistently fail to achieve results should be abandoned and replaced with programs proven to be more effective.⁸⁰

The ready availability of marijuana is especially troubling with respect to underage use.⁸¹ The most recent survey by Monitoring the Future⁸²

⁸⁰ The Government Accountability Office (GAO) has reported on the establishment and effectiveness of at least two such programs:

(1) In 1997, in response to an illegal drug problem that persisted despite “the federal government’s [annual] investment in the war on drugs [of] over \$15 billion,” the GAO recommended two approaches to preventing drug use in school-age children. GAO DRUG CONTROL, *supra* note 12, at 1. “The first approach emphasizes drug resistance skills, generic problem-solving/decisionmaking training, and modification of attitudes and norms that encourage drug use (the psychosocial approach). The second approach involves the coordinated use of multiple societal institutions, such as family, community, and schools, for delivering prevention programs (the comprehensive approach).” *Id.* at 3.

The most notable program using both of these approaches is the Drug Abuse Resistance Education (DARE) program. U.S. GEN. ACCOUNTING OFFICE, YOUTH ILLICIT DRUG USE PREVENTION: DARE LONG-TERM EVALUATIONS AND FEDERAL EFFORTS TO IDENTIFY EFFECTIVE PROGRAMS, NO. GAO-03-172R, at 1 (2003), *available at* <http://www.gao.gov/new.items/d03172r.pdf>. This non-government program is in over three-quarters of the nation’s school districts and is partially funded by the federal government. *Id.* at 1, 4. In 2003, the GAO reported that “six evaluations, conducted at intervals ranging from 2 to 10 years after the fifth or sixth grade students were initially surveyed, suggest[] that DARE had no statistically significant long-term effect on preventing illicit drug use,” and five evaluations found no significant differences in students’ attitudes about illicit drug use “between DARE and non-DARE students over the long term.” *Id.* at 5. Two of the evaluations, looking at short-term effects, “found no significant differences in illicit drug use between the intervention and control groups within a year after completing the DARE lessons.” *Id.* at 7. In the short-term, the DARE students did show “stronger negative attitudes about illicit drug use and improved peer pressure resistance skills and self-esteem about illicit drug use,” but “[t]hese positive effects diminished over time.” *Id.*

(2) The National Youth Anti-Drug Media Campaign was created by Congress in 1998. Office of Nat’l Drug Control Pol’y, Executive Office of the President, National Youth Anti-Drug Media Campaign, <http://www.mediacampaign.org/about.html> (last visited Mar. 6, 2009) [hereinafter Anti-Drug Media Campaign]. “Unprecedented in size and scope, the Campaign is the most visible symbol of the Federal government’s commitment to youth drug prevention.” TheAntiDrug.com, <http://www.theantidrug.com/NEWS/media-campaign-news.aspx> (last visited Mar. 6, 2009). Although the Anti-Drug Media Campaign claims to have been effective in reducing teenage marijuana use, Anti-Drug Media Campaign, *supra*, in 2006 the GAO reported the results of a “well-designed and executed multiyear study of the impact of the ONDCP anti-drug media campaign on teen . . . drug use,” which “provide[d] no evidence that the campaign had a positive effect in relation to teen drug use;” in fact, the study indicated the campaign had unfavorable effects. GOV’T ACCOUNTABILITY OFFICE, ONDCP MEDIA CAMPAIGN: CONTRACTOR’S NATIONAL EVALUATION DID NOT FIND THAT THE YOUTH ANTI-DRUG MEDIA CAMPAIGN WAS EFFECTIVE IN REDUCING YOUTH DRUG USE, NO. GAO-06-818, at 6, 42 (2006), *available at* <http://www.gao.gov/new.items/d06818.pdf> [hereinafter GAO MEDIA CAMPAIGN EVALUATION] (noting that “greater exposure to the campaign was associated with weaker anti-drug norms and increases in the perceptions that others use marijuana”). In addition to this GAO report, the most recent PART assessments, *see supra* note 62, rated the Youth Anti-Drug Media Campaign “Results Not Demonstrated”—the lowest possible rating, indicating that programs are not performing—and scored the program six percent for results. PART SUMMARIES, *supra* note 64, at 414; *see* ExpectMore.gov, About Us, <http://www.whitehouse.gov/omb/expectmore/about.html> (detailing PART ratings).

⁸¹ *See* 1 LLOYD D. JOHNSTON ET AL., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2007, at 397 (2008), *available at* http://www.monitoringthefuture.org/pubs/monographs/vol1_2007.pdf (“[Young people’s] drug use is influenced by the availability of the . . . drugs.”).

⁸² Monitoring the Future is an ongoing study of the behaviors and attitudes of American students and young adults, which is conducted by research scientists at the University of Michigan’s Institute for

reveals that eighty-four percent of twelfth grade students report that marijuana is “fairly” or “very” easy to obtain.⁸³ This percentage has not changed significantly since the survey was first taken in 1975.⁸⁴ “By this measure, marijuana has been almost universally available to American 12th graders . . . over the past 32 years”—the same period of time the current drug policy has been in effect.⁸⁵ While it can arguably be asserted that underage usage rates for marijuana absent the thirty-two years of prohibition might have approached those currently seen in legally available but age-restricted alcohol, it is difficult to envision that marijuana would have been more readily available to young people than it has been with prohibition in place.⁸⁶ Enforcement efforts aimed at prohibiting all marijuana use have proven ineffective in reducing the availability of marijuana to teenagers. But as discussed below, considerable progress can be made in reducing underage use of a substance by targeting the availability to potential underage users specifically.

As with the enforcement budget, expenditures for education and prevention of drug use are not broken down by targeted substance. However, as the most prevalently used illegal substance among high school students,⁸⁷ it can be assumed that marijuana receives a respectable share of the attention,⁸⁸ as well as a commensurate amount of the funding.⁸⁹ Usage rates, on the other hand, are broken down by substance.⁹⁰ Because the purpose of prevention and education programs is to reduce demand, especially among underage users, how the usage rates change over time can provide insight into the effectiveness of programs in reducing the demand for specific substances.

Figure 1 illustrates the lifetime usage rates for alcohol, tobacco,

Social Research and funded by the National Institute on Drug Abuse, one of the National Institutes of Health. *Id.* at 1.

⁸³ *See id.* at 409 (varying between eighty-three and ninety percent over the past thirty-two years). In addition, thirty-seven percent of eighth graders and sixty-nine percent of tenth graders said marijuana would be “fairly easy” or “very easy” to obtain. *Id.* at 408.

⁸⁴ *Id.* at 409.

⁸⁵ *Id.*; *see* DEA HISTORY, *supra* note 43, at 4 (“[T]he Drug Enforcement Administration (DEA) was created in 1973 to deal with America’s growing drug problem.”).

⁸⁶ *See* JOHNSTON ET AL., *supra* note 81, at 106 tbl.4-2 (reporting underage usage rates for alcohol approximately twice that of marijuana across all categories and age groups).

⁸⁷ *See id.* at 208 tbl.5-5a (indicating underage rate of use for marijuana is consistently greater than rate of use for all other illicit drugs combined).

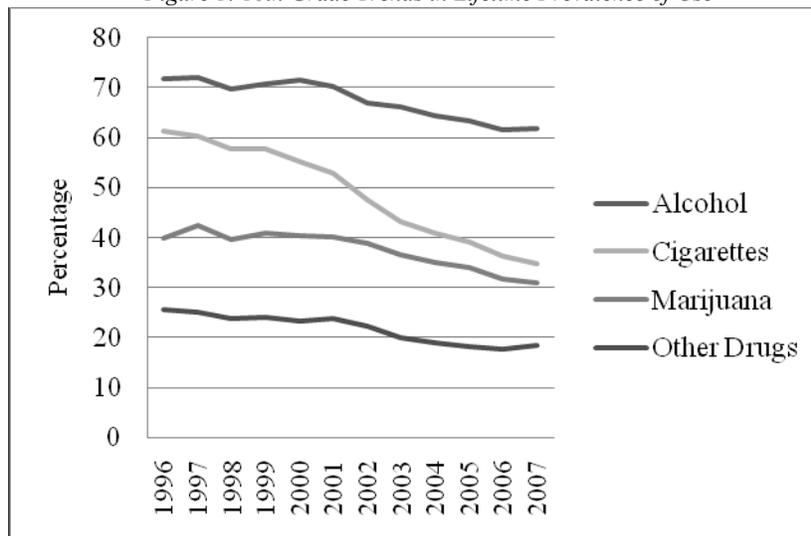
⁸⁸ *See, e.g.*, Robert Hornik et al., *Effects of the National Youth Anti-Drug Media Campaign on Youths*, 98 AM. J. PUB. HEALTH 2229, 2229 (2008) (noting Youth Anti-Drug Media Campaign focus on marijuana, including introduction of Marijuana Initiative in 2002).

⁸⁹ *See, e.g.*, GAO MEDIA CAMPAIGN EVALUATION, *supra* note 80, at 1, 42 (noting that Youth Anti-Drug Media Campaign, with an annual budget of more than \$100 million, redirected its campaign, beginning in 2002, to concentrate on anti-marijuana messages).

⁹⁰ *See* JOHNSTON ET AL., *supra* note 81, at 1, 3–4 (listing eleven separate classes of drugs, including alcohol and tobacco, initially included in the Monitoring the Future study, and noting the number of subclasses added since the study began over thirty years ago).

marijuana, and other drugs for one underage group.⁹¹ As can be seen from this graph, the use of all substances for this age group has declined over the past ten years.⁹²

Figure 1: 10th Grade Trends in Lifetime Prevalence of Use⁹³



Two important details in Figure 1 should be noted. First, the decline in marijuana use parallels the decreases seen in the use of alcohol and other drugs. Despite the focus placed upon reducing the use of marijuana in children, the decline in underage use of marijuana is not markedly different from that of alcohol or other drugs.⁹⁴ Second, there has been a significant

⁹¹ Tenth grade students were chosen for this graph as representative of high school students. Monitoring the Future gathers information on eighth and twelfth grade students as well. *Id.* at 1. The data for these students reflects higher percentage rates for twelfth graders and lower rates for eighth graders across all substances, but both grade levels show similar declines in usage over the same time period as that shown here for tenth graders. *Id.* at 39, 39 & 42–43 tbl.2-1.

⁹² These decreases may “reflect an ongoing cultural shift among teens and their attitudes about smoking and substance abuse.” Press Release, Nat’l Inst. on Drug Abuse, U.S. Dep’t of Health & Human Servs., NIDA Survey Shows a Decline in Smoking and Illicit Drug Use Among Eighth Graders (Dec. 11, 2007), available at <http://www.nida.nih.gov/newsroom/07/NR12-11.html> [hereinafter NIDA Survey] (“Over the last decade, there has been a large science-based effort throughout the public health community to drive down the rates of smoking, illicit drug, and alcohol use among teens These [Monitoring the Future] results show us we are definitely seeing a decline in substance abuse among our youngest and most vulnerable teens, and we are committed to continuing our efforts.”) (quoting Dr. Elias A. Zerhouni, NIH Director).

⁹³ This graph represents data gathered by Monitoring the Future on the lifetime use of various substances by students in tenth grade. JOHNSTON ET AL., *supra* note 81, at 208, 208 & 210 tbl.5-5a.

⁹⁴ *But see* NIDA Survey, *supra* note 92 (“[I]n the past decade, there has been a slow downward trend in overall illicit drug use driven by gradual declines in marijuana smoking.”).

decrease in cigarette smoking among teens over the same time period.⁹⁵ This decline in use is attributed to a decrease in the availability of cigarettes, “very likely as a result of increased enforcement of laws prohibiting sale [of cigarettes] to minors.”⁹⁶

Age-indiscriminate prohibition of marijuana has not reduced the availability of marijuana to children.⁹⁷ The focus on marijuana in education and prevention programs has not produced a noticeable reduction in marijuana use by children. Continued funding of these programs under the banner of preventing underage marijuana use, when they have been ineffective in that regard, makes little sense.⁹⁸ However, it appears that it is possible to effectuate a positive response in children through education coupled with prohibition that targets them exclusively. Stricter enforcement of the laws prohibiting the sale of cigarettes specifically to minors is credited with reducing the availability and thereby the use of cigarettes among teenagers. The progress with underage cigarette use provides one alternative approach to reducing underage marijuana use by demonstrating what can be achieved through a system of legalization and regulation. While there is no way of knowing if similar results could be attained if marijuana were also legally available and restricted by age, the cigarette data indicates that we might not be any worse off.⁹⁹

⁹⁵ See Press Release, Monitoring the Future, Teen Smoking Resumes Decline 1 (Dec. 11, 2007), available at http://www.monitoringthefuture.org/pressreleases/07cigpr_complete.pdf [hereinafter Teen Smoking Press Release] (“The number of U.S. teens who smoke [cigarettes] has shown significant declines in recent years, particularly among those in their early teens.”).

⁹⁶ JOHNSTON ET AL., *supra* note 81, at 414; see Teen Smoking Press Release, *supra* note 95, at 3 (reporting that “[i]t would appear that the efforts of many states and communities to get retail outlets to stop selling to underage smokers is having some success”). There has been an accompanying decrease in the *perceived* availability of cigarettes, also “quite likely reflecting the impact of new regulations and related enforcement efforts aimed at reducing the sale of cigarettes to children.” JOHNSTON ET AL., *supra* 81, at 30.

⁹⁷ With no strong incentive to differentiate between the ages of their customers, drug dealers do not discriminate by age. See Kambia, *supra* note 33 (“Have you ever seen a marijuana dealer with a ‘We Card’ sign?”).

For a perspective on the overall problem of reducing marijuana availability, see Pacula et al., *supra* note 4, at 8 (“[I]t seems clear that marijuana markets function differently than that of cocaine and heroin markets. . . . [O]pen air markets and purchases from strangers are generally rare as compared to other drugs, suggesting that standard street methods of drug enforcement (undercover buys and patrolling the streets) might not be as effective at deterring marijuana transactions.”) (citations omitted). The vast majority of marijuana transactions take place between friends. *Id.* at 7–8.

⁹⁸ See, e.g., GAO MEDIA CAMPAIGN EVALUATION, *supra* note 80, at 1, 42 (noting program funding of over \$100 million and “concentration on anti-marijuana messages”); *id.* at 6 (noting that “greater exposure to the [National Youth Anti-Drug Media Campaign] was associated with weaker anti-drug norms and increases in the perceptions that others use marijuana”).

⁹⁹ In many categories surveyed, the usage rates for cigarettes have fallen to very near those of marijuana. See JOHNSTON ET AL., *supra* note 81, at 204, 204–05 tbl.5-3; 208, 208 & 210 tbl.5-5a; 217, 217 & 219 tbl.5-5c (reporting results for various grade levels over several timeframes). In one category, the usage rate for cigarettes in 2007 was *below* that of marijuana, 14.0% and 14.2% respectively. *Id.* at 217, 217 & 219 tbl.5-5c (reporting trends in 30-day prevalence of use in tenth graders).

B. Fairness and Equity

Given the costs associated with prohibition and the meager results obtained thus far, there is ample evidence to conclude that we are wasting our money. This section will show that the situation is far worse than merely a waste of resources.¹⁰⁰ Drug policy in general, and marijuana policy in particular, falls most harshly and most unfairly on racial minorities and the poor. Prohibition is not only ineffective, but highly inequitable as well.

The racial disparity associated with overall drug enforcement is a serious issue.¹⁰¹ Blacks are arrested for drug abuse violations at a rate that is alarmingly inconsistent with the percentage of the overall population they represent.¹⁰² Although the Supreme Court has declared that there is

¹⁰⁰ Marijuana arrests account for 47.4% of all drug arrests, with possession accounting for 42.1% and sale/manufacturing accounting for 5.3%. FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2007: PERSONS ARRESTED, <http://www.fbi.gov/ucr/cius2007/arrests/index.html> (last visited Mar. 7, 2009). This means that of the 1,841,182 individuals arrested in 2007 for drug abuse violations, 775,138 were arrested for marijuana possession. FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2007: PERSONS ARRESTED tbl.29, http://www.fbi.gov/ucr/cius2007/data/table_29.html (last visited Mar. 7, 2009). These figures account only for arrests.

It is often difficult to determine what percentage of possession *convictions* may be for simple possession because in many cases there are aggravating factors, such as a plea to a lesser charge of possession or a repeat offense. See OFFICE OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFFICE OF THE PRESIDENT, WHO'S REALLY IN PRISON FOR MARIJUANA? 15, available at http://www.whitehouse.gov/publications/whos_in_prison_for_marij/whos_in_prison_for_marij.pdf (noting other factors include concurrent sentences for other offenses, criminal history, committing violation while on parole, committing violation in designated drug-free zone). But it is estimated that between ten and twenty-five percent of the persons in prison for a marijuana offense can be classified as low-level, or simple possession, offenders. See Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, HARM REDUCTON J., Feb. 2006, at 3, available at <http://www.harmreductionjournal.com/content/pdf/1477-7517-3-6.pdf> ("One in four persons in prison for a marijuana offense . . . can be classified as a low-level offender."); JustThinkTwice.com, Facts & Fiction, <http://www.justthinktwice.com/factfiction/ourjailsarefull.cfm> (last visited Mar. 7, 2009) ("According to the U.S. sentencing commission, of all drug defendants sentenced in federal court for marijuana offenses in 2003, only 10.3 percent . . . were sentenced for simple possession.").

¹⁰¹ See HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 2 (2008), available at <http://www.hrw.org/reports/2008/us0508/us0508webwcover.pdf> ("Ostensibly color-blind, the US drug war has been and continues to be waged overwhelmingly against black Americans."); Graham Boyd, *The Drug War Is the New Jim Crow*, NACLA REPORT ON THE AMERICAS, July–Aug. 2001, at 18, 21 ("The drug war claims morality and protection of children as its goals, while turning a blind eye to the racial injustice it promotes. . . . We will one day understand that the war on drugs was a war on people and communities.").

¹⁰² Making up only thirteen percent of the U.S. population, blacks accounted for thirty-three percent of those arrested for drug violations in 2006. Eckholm, *supra* note 44. (In 2007, blacks accounted for thirty-five percent of those arrested. *Infra* note 109.) Blacks and whites overall use illicit drugs at roughly the same rates. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES tbl.1.19B (2008), <http://www.oas.samhsa.gov/NSDUH/2k7NSDUH/tabs/Sect1peTabs1to46.htm> (last visited Mar. 8, 2009) [hereinafter SAMHSA DRUG USE TABLES] (reporting higher overall drug use percentage rates for whites for lifetime use and slightly higher rates for blacks for previous year and previous month use). "Even if we were to double the 13 percent estimate of the number of blacks who may be drug offenders, the arrest figure is still disproportionately large." HUMAN RIGHTS WATCH, *supra* note 101, at 45. This disproportion is not attributable to any difference in the rate at which blacks and whites traffic in illicit drugs. See *id.* at 43 (noting that while

no constitutional right to be free from the disparate impact of facially neutral policies,¹⁰³ there is widespread concern that the enforcement of facially neutral drug laws is anything but neutral.¹⁰⁴ This concern is especially warranted with the enforcement of marijuana possession laws,¹⁰⁵ where the figures relating to black arrests are particularly disturbing.¹⁰⁶

“[t]here is relatively little research on the demographics of drug sellers as such,” what data “is available suggests . . . that low-level drug sellers have a similar racial profile to drug users”). Nor can the wide disparity in arrest rates between blacks and whites be fully explained by race neutral factors such as higher drug use rates, higher arrest rates, and larger black populations in urban areas. *Id.* at 45–47; *see id.* at 46 (“Practical policing factors have played a role as well: drug transactions in poor minority neighborhoods are more likely to be in public spaces and between strangers, making it easier to undertake arrests . . . than it is in the bars, clubs, and private homes where drug dealing by whites is more likely to occur.”).

¹⁰³ *See* *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (“The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system”); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”).

¹⁰⁴ *See* *Boyd*, *supra* note 101, at 18–22 (detailing the negative impact the drug war has had on the black population and comparing it to slavery, Jim Crow, and apartheid); Eckholm, *supra* note 44 (noting that both then-Senator Barack Obama and then-Senator Hillary Clinton “strongly condemned the racial disparities in [drug] arrests and incarceration during their [2008 presidential] campaigns”). *But see* Heather Mac Donald, *Is the Criminal-Justice System Racist?*, CITY J., Spring 2008, at 12, 12, available at LEXIS, News Library, CITYJR File (arguing that while the “race industry and its elite enablers take it as self-evident that high black incarceration rates result from discrimination . . . [t]he black incarceration rate is overwhelmingly a function of black crime”).

¹⁰⁵ It is argued that increased enforcement of low-level misdemeanor laws like marijuana possession helps to reduce overall crime, but research has failed to support this argument. Jim Dwyer, *On Arrests, Demographics, and Marijuana*, N.Y. TIMES, Apr. 30, 2008, at B1, available at LEXIS, News Library, NYT File; *see, e.g.*, Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000*, 6 CRIMINOLOGY & PUB. POL’Y, 165, 165–66 (2007) (finding “no good evidence that the [misdemeanor marijuana possession] arrests [in New York City] are associated with reductions in serious violent or property crimes in the city” and instead finding that “New York City’s marijuana policing strategy seems likely to simply divert scarce police resources away from more effective approaches that research suggests are capable of reducing real crime”). Police officers interviewed in New York and other cities call these possession arrests “a waste of time,” noting that arresting and booking possession arrests keep them “off the street unable to engage in other police work” and that time spent “searching for and arresting people possessing small amounts of marijuana” means narcotics squads “are not available for other crime-fighting work.” HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, *MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997–2007*, at 49 (2008), available at http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf. “New York City’s marijuana possession arrests were *not* of people arrested for more serious crimes who were then found to be possessing marijuana. In these arrests, marijuana possession was always the highest charge and often the only one.” *Id.* at 5.

¹⁰⁶ *See, e.g.*, Dwyer, *supra* note 105 (“[B]etween 1998 and 2007, the police [in New York City] arrested 374,900 people whose most serious crime was the lowest-level misdemeanor marijuana offense. . . . [Eighty-three] percent of those charged in these cases were black or Latino Blacks accounted for 52 percent of the arrests, twice their share of the city’s population. Whites, who are about 35 percent of the population, were only 15 percent of those charged—even though federal surveys show that whites are more likely than blacks or Latinos to use pot.”); Jon Gettman, *Marijuana Arrests in Massachusetts*, BULL. CANNABIS REFORM, Oct. 2008, at 15–16, available at http://www.drugscience.org/Archive/bcr6/bcr6_index.html (follow .pdf hyperlink) (reporting possession arrest rate for blacks in Massachusetts at nearly four times that of whites).

There are roughly six times as many whites as blacks in this country.¹⁰⁷ Both races use marijuana at approximately the same rates, which means that six times as many whites as blacks use marijuana,¹⁰⁸ yet blacks make up a disproportionate percentage of those arrested for possession.¹⁰⁹ This fact is most worrisome given that blacks are also convicted and sentenced at higher rates.¹¹⁰ From arrest to conviction, there is little doubt that marijuana prohibition unduly impacts minorities.

Arrest and conviction for a marijuana offense are often not the worst punishments.¹¹¹ Efforts have been made to reduce the harshness of sentences for marijuana offenses,¹¹² but there is a wide range of collateral sanctions that are triggered by any conviction, whether felony or misdemeanor.¹¹³ Some collateral sanctions attach at arrest, whether or not there is a subsequent conviction.¹¹⁴ These sanctions can include: loss of professional licenses, barriers to employment opportunities, “loss of educational aid, driver’s license suspension, and bars on adoption, voting and jury service.”¹¹⁵ Collateral sanctions have a greater impact on the poor and on racial minorities. Under federal law, anyone convicted of a felony

¹⁰⁷ U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, THE 2009 STATISTICAL ABSTRACT 9 tbl.6, available at <http://www.census.gov/compendia/statab/2009edition.html> (follow Population hyperlink).

¹⁰⁸ HUMAN RIGHTS WATCH, *supra* note 101, at 41–42; see SAMHSA DRUG USE TABLES, *supra* note 102, at tbl.1.24B (reporting higher percentage rates for whites for lifetime marijuana use and slightly higher rates for blacks for previous year and previous month marijuana use).

¹⁰⁹ The FBI reports that blacks account for thirty-five percent of those arrested for all drug abuse violations. FBI, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2007: PERSONS ARRESTED tbl.43, http://www.fbi.gov/ucr/cius2007/data/table_43.html (last visited Mar. 8, 2009). Applying the same thirty-five percent figure for overall drug arrests to marijuana possession arrests would mean that of the more than 775,000 arrests for marijuana possession in 2007, see *supra* note 100, more than 270,000 of those arrested were black.

Compare Eckholm, *supra* note 44 (reporting on the theory that “it made sense for police to focus more on fighting visible drug dealing in low-income urban areas, largely involving members of minorities, than on hidden use in suburban homes, more often by whites, because the urban street trade is more associated with violence and other crimes and impairs the quality of life”), with King & Mauer, *supra* note 100, at 15 (arguing that “[s]uch strategies result in substantially increased numbers of low-level marijuana arrests, with little evidence that they are actually effective in suppressing other criminal behaviors”).

¹¹⁰ See HUMAN RIGHTS WATCH, *supra* note 101, at 48–49 (detailing factors that lead to harsher arrest rates and sentencing for blacks); Harcourt & Ludwig, *supra* note 105, at 165 (noting that in New York City blacks arrested for marijuana use are twice as likely to be convicted as whites and four times as likely to be sentenced to extra jail time).

¹¹¹ “[M]any marijuana offenders are surprised to find that the sentence actually imposed by the judge pales in comparison to the severity and long-lasting social and legal consequences that follow from conviction.” RICHARD GLEN BOIRE, CTR. FOR COGNITIVE LIBERTY & ETHICS, LIFE SENTENCES: THE COLLATERAL SANCTIONS ASSOCIATED WITH MARIJUANA OFFENSES 5 (2007), available at http://www.cognitiveliberty.org/pdf/col_sanc_pdfs/report_narrative.pdf. The legal research for this report was funded by the Marijuana Policy Project.

¹¹² See *supra* notes 4–5 and accompanying text.

¹¹³ BOIRE, *supra* note 111, at 4; see *id.* at 4–5 (“A person convicted of growing marijuana (a felony in most states) is often subjected to the same, and sometimes greater, collateral sanctions as a person convicted of murder, rape, or robbery.”).

¹¹⁴ See *id.* at 8, 16 (noting that an arrest can result in a bar from public housing and a denial of employment).

¹¹⁵ *Id.* at 2.

“which has as an element the possession, use, or distribution of a controlled substance . . . shall not be eligible” for food stamps or “assistance under any State program funded under . . . title IV of the Social Security Act.”¹¹⁶ The duration of the loss of assistance can be limited by state law, but the federal statute sets no limit, meaning the ban on assistance can be a lifetime ban.¹¹⁷ In addition, *any* marijuana conviction can lead to eviction from public housing.¹¹⁸ These collateral sanctions do not discriminate. Those individuals convicted of low-level possession are subject to many of the same collateral sanctions as those convicted for dealing in large quantities.¹¹⁹ The loss of public assistance, or any sanction that interferes with the ability to work or to drive, can have a more burdensome impact on low-income and minority individuals.

The ban on public assistance is not the only collateral sanction that may target low-income and minority individuals more harshly. Students convicted of *any* offense, under either state or federal law, “involving the possession or sale of a controlled substance” while they are receiving any federal student aid under the Higher Education Act (HEA) lose their eligibility “to receive any grant, loan, or work assistance” for at least a year; in the case of a second conviction for selling, eligibility for aid is lost for life.¹²⁰ This is a softening of the original provision, which was amended to include only those drug convictions that occur “while a student is enrolled and receiving federal financial aid.”¹²¹ Prior to being amended, the loss of student aid applied to any conviction, either before or during

¹¹⁶ 21 U.S.C. § 862a(a) (2006). The assistance affected includes the “[p]rogram of temporary assistance for needy families.” *Id.* § 862a(b).

¹¹⁷ *Id.* § 862a(d)(1)(A)–(B). All but twelve states have limited the ban, some opting out completely, but seven states have extended the federal plan by banning or limiting assistance for those with only misdemeanor marijuana convictions. BOIRE, *supra* note 111, at 9. “Only felony drug offenses result in this ban [on assistance]; not robbery, not kidnapping, not even murder.” *Id.* at 8–9.

¹¹⁸ Public housing leases are required to include a provision that “any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” 42 U.S.C. § 1437d(l)(6) (2000). A conviction is not necessary for eviction to take place; eviction is possible even in instances where the tenant had no knowledge of the activity. The Supreme Court has held that “[s]ection 1437d(l)(6) requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.” *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 128, 136 (2002) (upholding eviction of tenants whose grandsons were caught smoking marijuana in parking lot of apartment complex).

¹¹⁹ See BOIRE, *supra* note 111, at 4–5 (noting that in most cases sanctions are triggered automatically by conviction and “apply regardless of the specifics of the offense”).

¹²⁰ 20 U.S.C. § 1091(r)(1) (2006). This loss of eligibility for student aid applies only to drug convictions; no other crime carries this penalty. BOIRE, *supra* note 111, at 10. According to Rep. Barney Frank, “[s]omeone who commits murder or armed robbery is not automatically barred from financial aid eligibility, . . . but if you have even one non-violent drug conviction you can’t get any aid for a year, with longer bans for people with additional convictions.” Press Release, Rep. Barney Frank, Coalition Files Bill to Repeal Ban on Federal Financial Aid to Students with Drug Convictions (Feb. 28, 2001), available at http://www.house.gov/frank/student_aid01.html.

¹²¹ BOIRE, *supra* note 111, at 10.

college.¹²² According to the Government Accountability Office (GAO), every year an estimated 17,000 to 20,000 lose access to Pell Grants and 29,000 to 41,000 lose access to student loans.¹²³ This law may “primarily affect[] low-income students and exempt[] the wealthy, who don’t need aid to attend college,” and target young blacks, “who are disproportionately prosecuted for drug offenses and already less likely to complete college.”¹²⁴ This law raises the possibility that mere youthful indiscretions¹²⁵ could prevent low-income or minority individuals from ever reaping the benefits of a college education.¹²⁶

Marijuana prohibition has proven to be too costly, both financially and socially. Despite the fact that billions of dollars are spent every year to prevent marijuana consumption, the best available data suggests that the expenditures are simply not buying much. It is unlikely that increased funding or stronger penalties will solve the problem. Federal and state efforts to reduce marijuana production and use through prohibition have been ineffective, and those efforts have been far less than equitably applied across economic and racial divisions. Those members of our society most in need are denied access to vital public assistance programs, in many instances for an offense that in an increasing number of jurisdictions is a low level enforcement priority.¹²⁷ Marijuana prohibition is causing too much harm—completely out of proportion to the purported harm it is

¹²² *Id.*

¹²³ U.S. GOV’T ACCOUNTABILITY OFFICE, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS, NO. GAO-05-238, at 12 (2005), available at <http://www.gao.gov/new.items/d05238.pdf> [hereinafter GAO DRUG OFFENDERS]. These figures do not take into account “those individuals who may not have sought financial aid out of fear that their prior drug convictions would preclude them from receiving money.” Press Release, ACLU, ACLU Renews Call for End to “Drug Question” for Financial Aid Applicants: Unwise Measure Blocks Qualified Students from Higher Education (Mar. 10, 2005), available at <http://www.aclu.org/drugpolicy/gen/10784prs20050310.html>.

These figures include those convicted for any illicit substance offense, but given the high percentage of drug convictions attributed to marijuana, coupled with the fact that this law applies even to misdemeanor convictions, it can be assumed that marijuana offenses account for a significant portion of those affected.

¹²⁴ Editorial, *Marijuana and College Aid*, N.Y. TIMES, Nov. 2, 2007, at A26, available at LEXIS, News Library, NYT File.

¹²⁵ See, e.g., *id.* (“The law applies even to offenses so minor that they are normally punished by probation, a small fine or community service.”); Seema Mehta, *Groups Fight Rule on Aid to Students*, L.A. TIMES, May 15, 2006, at B1, available at LEXIS, News Library, LAT File (noting that one twenty-five-year-old student lost financial aid following a misdemeanor conviction for possession of a pipe containing marijuana residue, for which the only court-ordered sanction was a fine).

¹²⁶ The GAO states that the benefits of higher education go beyond an increase in earnings potential and include “becom[ing] better mothers, fathers, children, voters, and citizens.” GAO DRUG OFFENDERS, *supra* note 123, at 59–60. *But see id.* at 60 (“[T]hese studies do not comment on whether the loss of federal education assistance (as occurs for drug offenders through the provisions of the HEA) contributes to individuals’ not completing postsecondary education, or whether those individuals who are denied federal education assistance generate the necessary funding to attend institutions of higher education in other ways.”).

¹²⁷ See *supra* notes 4–5 and accompanying text.

preventing.¹²⁸ Since it is unlikely that any other prohibition strategy for curtailing consumption would be more effective than the current model, there is a strong case that the entire enterprise is futile, and a good argument for abandoning it.

III. STATE DECRIMINALIZATION IN THE SHADOW OF FEDERAL PROHIBITION

Having evaluated the ineffectiveness, as well as the inequity and inefficiency, of the efforts to reduce supply and demand that are fueled by the federal policy of marijuana prohibition, it is necessary to examine the system of decriminalization that is evolving across the country at state and local levels. It is difficult to assess the political and administrative feasibility of decriminalization. Politically, the system in this country is constantly changing. Every new election and legislative session brings changes to the laws pertaining to recreational and medical marijuana use.¹²⁹ As states and municipalities adopt a more liberal attitude toward marijuana use while the federal government maintains a policy of prohibition,¹³⁰ the system becomes increasingly difficult to administer.¹³¹

Decriminalization of marijuana is a wholly unsatisfactory compromise between strict prohibition and legalization.¹³² Decriminalization carries with it many of the same societal costs associated with total prohibition¹³³ and retains almost every negative aspect associated with prohibition.¹³⁴

¹²⁸ The concentration on marijuana prohibition has been at the expense of enforcing the prohibition of more harmful substances. See Ben Wallace-Wells, *How America Lost the War on Drugs*, ROLLING STONE, Dec. 13, 2007, http://www.rollingstone.com/politics/story/17438347/how_america_lost_the_war_on_drugs/8 (“By the summer of 2005, the drug czar’s failures were beginning to spill out into the open. For four years, while he focused obsessively on pot, [ONDCP Director John] Walters had done virtually nothing about meth[amphetamines], which [were] rapidly devastating the red states that had elected his boss.”).

¹²⁹ See MARIJUANA POLICY PROJECT, *supra* note 7, at app. L (listing twenty-seven states that considered a total of fifty-two bills during the 2007 and 2008 legislative sessions); Kessler, *supra* note 7 (noting that in 2008 “Massachusetts voters decriminalized possession of small amounts of the drug, eliminating criminal penalties for people caught with an ounce or less of marijuana” and “Michigan joined 12 other states in allowing the use of marijuana by very ill patients to relieve pain, nausea, appetite loss and other symptoms”).

¹³⁰ See *supra* notes 4–5 and accompanying text.

¹³¹ See Michael Booth, “Possession Is OK, But As Soon As You Introduce the Idea of Individuals Growing . . .”: America’s Complex Pot Compromise, DENVER POST, Sept. 18, 2007, at A1, available at LEXIS, News Library, DPOST File (“Take one swift glance at a U.S. map coded to reflect the widely varying marijuana laws in each state, and drug policy seems to range from irrational to incoherent.”). Differences between state and local marijuana provisions add to this difficulty. See Richardson, *supra* note 4 (noting that the Denver measure making marijuana possession the “lowest law-enforcement priority” was “superseded by state and federal laws banning marijuana possession”).

¹³² See KLEIMAN, *supra* note 18, at 268 (positing that decriminalization can be seen as a compromise between maintaining prohibition and adopting full legalization).

¹³³ See *supra* text accompanying notes 111–14 (noting that collateral sanctions may attach to either arrest or conviction and to both misdemeanor and felony charges).

¹³⁴ The one positive aspect is that the budgetary costs associated with enforcement are undoubtedly less under decriminalization. See, e.g., JEFFREY A. MIRON, THE EFFECT OF MARIJUANA

Decriminalization as it currently exists removes the criminal sanctions for possession of marijuana for personal use¹³⁵ without providing for a non-criminal method of obtaining it,¹³⁶ therefore, all trafficking remains illegal.¹³⁷ The enforcement and deterrence efforts aimed at trafficking remain the same as under strict prohibition,¹³⁸ which means that the racial and economic disparities associated with these methods are also retained.

DECriminalization ON THE BUDGETS OF MASSACHUSETTS GOVERNMENTS, WITH A DISCUSSION OF DECriminalization'S EFFECT ON MARIJUANA USE 1 (2002), http://www.changetheclimate.org/bu-study/mass_budget.pdf (estimating a savings of approximately \$24.3 million in law enforcement resources for Massachusetts).

¹³⁵ Decriminalization may create a false sense of security by only theoretically removing the harsh sanctions for possession while in practice maintaining the status quo of prohibition. See, e.g., LEVINE & SMALL, *supra* note 105, at 38–43 (describing methods New York City police use to trick those guilty of simple possession, which has been only a ticketable offense since 1977, into revealing marijuana, thereby making them guilty of having marijuana in public, a misdemeanor for which they are arrested, handcuffed, and taken to a police station); Richardson, *supra* note 4 (explaining that a second voter initiative mandating that Denver officials take specific action to make possession lowest enforcement priority was necessary after the first initiative resulted in an increase in marijuana arrests). Despite Denver's voters twice telling city officials that they wanted possession arrests to be the lowest enforcement priority, the city admits that both measures have been ignored and there has been no change in policy. Posting of Mike Nizza to The Lede Blog, Denver Officials Ignore Marijuana Votes, <http://thelede.blogs.nytimes.com/2008/03/06/denver-officials-ignore-marijuana-votes/> (Mar. 6, 2008, 9:13 EST).

Possession arrests have increased annually, notwithstanding decriminalization and other efforts to reduce sanctions. See NORML, *Marijuana Arrests for Year 2007: 872,721 Tops Record High—Five Percent Increase Over 2006*, http://norml.org/index.cfm?Group_ID=7698, Sept. 15, 2008 (last visited Mar. 8, 2009) (noting that possession accounts for eighty-nine percent of marijuana arrests and “there has been a dramatic 195 percent increase in marijuana arrests in the last 15 years”); *supra* note 4 (noting that more than forty states have either decriminalized or reduced sanctions for possession).

Arrest, even without conviction, can cause ongoing harm. See, e.g., David Abel, *Questions and Answers: Voters Back Marijuana Law Change*, BOSTON GLOBE, Nov. 5, 2008, at B1, available at LEXIS, News Library, BGLOBE File (noting that while opponents of the Massachusetts decriminalization provision argue that “most people arrested for marijuana possession have their records cleared within six months . . . the state's Criminal History Systems Board said that marijuana possession arrests and convictions are records that remain visible to employers, even when the charges are dismissed”). “The records of arrests alone are visible to schools, law enforcement agencies, nursing homes, camps, and most companies employing someone who works with children or the elderly can see arrest records.” *Id.*

¹³⁶ This Part focuses on decriminalization as it currently exists in the United States. Other forms of decriminalization could allow for non-criminal acquisition, such as limited cultivation for personal use or not-for-profit transfers of small amounts of marijuana between individuals. See Act to Remove Federal Penalties for the Personal Use of Marijuana by Responsible Adults, H.R. 5843, 110th Cong. (2008) (removing federal penalties for not-for-profit transfer between adults of an ounce or less); KLEIMAN, *supra* note 18, at 279 (positing that cultivation for personal use would remove marijuana from the criminal justice system).

¹³⁷ See Booth, *supra* note 131 (“In a growing number of states and large cities, possessing and smoking a little pot is either a minor offense or no crime at all, while growing or distributing the drug still gets you in big trouble.”). Anyone who sells marijuana is still considered a criminal, including those who sell to friends and family. The most recent data from the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration indicates that more than eighty percent of marijuana is bought from friends and family. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE NSDUH REPORT: HOW AND WHERE YOUNG ADULTS OBTAIN MARIJUANA fig.2 (2006), <http://www.oas.samhsa.gov/2k6/MJsource/MJsource.htm> (last visited Mar. 8, 2009).

¹³⁸ See KLEIMAN, *supra* note 18, at 268 (noting that “decriminalization means leaving production and distribution of the drug entirely illegal”).

In addition, because decriminalization offers no new methods of deterring underage use, there is no positive impact on the underage usage rates attributable to decriminalization.¹³⁹

Although experience with decriminalization has shown it does not have an appreciable effect on overall usage rates,¹⁴⁰ any increase in demand associated with an easing of possession sanctions is still supplied “entirely by the black market.”¹⁴¹ Removing the criminal sanctions for personal use does not “dismantle the destructive and dangerous criminal supply networks that have taken deep root” in our own backyard.¹⁴² Not only does decriminalization do nothing to remove the criminal networks, it may increase their profits.¹⁴³ “Thus, decriminalization is likely to prove to be the worst of all possible policies when it comes to the drug-dealing aspect of the marijuana problem.”¹⁴⁴

Thirteen states have now adopted some form of decriminalization,¹⁴⁵ but without decriminalization of marijuana at the federal level, this simply creates a system that puts state and local drug measures easing the restrictions on marijuana at odds with federal laws prohibiting all marijuana use.¹⁴⁶ Decriminalization at the federal level that mirrors decriminalization at the state level would only eliminate the conflict currently existing between federal law and state and local measures.¹⁴⁷ Federal decriminalization would produce no additional positive impact on the usage rates among young people, would do nothing to dismantle illegal trafficking operations, and would maintain many of the racial and

¹³⁹ See Joffe et al., *supra* note 79, at e634–36 (theorizing that decriminalization could lead to increased underage use).

¹⁴⁰ See INST. OF MEDICINE, *supra* note 19, at 104 (finding “there is little evidence that decriminalization of marijuana use necessarily leads to a substantial increase in marijuana use”).

¹⁴¹ KLEIMAN, *supra* note 18, at 269.

¹⁴² Robb, *supra* note 31; see *supra* notes 68–76 and accompanying text (discussing supply networks in the United States).

¹⁴³ Pacula et al., *supra* note 4, at 4.

¹⁴⁴ KLEIMAN, *supra* note 18, at 269.

¹⁴⁵ These states include: Arizona, California, Colorado, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, and Oregon. See *supra* note 4 and accompanying text.

¹⁴⁶ *Gonzales v. Raich*, 545 U.S. 1, 28–29 (2005) (noting that under the Supremacy Clause federal law trumps state laws permitting possession for personal use).

¹⁴⁷ A federal measure decriminalizing possession would not eliminate all conflict between state and federal law because it “would end federal prosecution of such crimes, but it would not supersede state laws.” Abel, *supra* note 4. This is particularly notable given that the currently proposed federal measure would decriminalize possession of 3.5 ounces or less, whereas many state decriminalization measures only allow possession of one ounce or less. See *id.* (reporting that Massachusetts became the thirteenth state to decriminalize possession of “less than an ounce of marijuana”).

Conflicts can also exist between state and local law when municipalities adopt measures that are less severe than state sanctions. See Booth, *supra* note 131 (“Denver’s possession penalties were wiped off the books, but city police say they must—and want to—enforce the state law”); Nizza, *supra* note 135 (noting that the continued increase in possession arrests in Denver despite passage of two voter initiatives reflects charges made for state-level violations and not violations of city ordinance).

economic disparities associated with prohibition.¹⁴⁸

For those opposed to strict prohibition, decriminalization of personal use may be viewed as a positive step.¹⁴⁹ However, because in many ways decriminalization is no better policy than prohibition, decriminalization as it currently exists, whether at the state or federal level, is unsuitable as a long-term solution.

IV. LEGALIZATION & REGULATION

There is certainly no consensus among American voters that recreational use of marijuana should be legalized,¹⁵⁰ but given the growing reluctance to impose criminal sanctions for personal recreational use, coupled with the support for legalized medical marijuana,¹⁵¹ marijuana legalization merits serious consideration.¹⁵²

Legalizing marijuana would eliminate the “destructive and dangerous criminal supply networks” of the marijuana black market.¹⁵³ It would also remove the direct and collateral sanctions that currently fall so harshly upon minority and low-income marijuana users. Putting an end to government prohibition of marijuana would eliminate the need for both the

¹⁴⁸ A federal decriminalization bill has been introduced, but it is unlikely to be passed anytime soon. See Abel, *supra* note 4 (reporting that sponsor of measure, Rep. Barney Frank, believes “it will take a lot more time before enough of his fellow lawmakers want to take a stand on the issue”).

¹⁴⁹ *But see id.* (noting that decriminalization may make it harder to get advocates behind push for legalization).

¹⁵⁰ See Joseph Carroll, *Who Supports Marijuana Legalization?*, GALLUP, Nov. 1, 2005, <http://www.gallup.com/poll/19561/Who-Supports-Marijuana-Legalization.aspx> (reporting Gallup poll results showing support for marijuana legalization increasing from twelve percent in 1969 to thirty-six percent in 2005).

¹⁵¹ *Supra* text accompanying note 7.

¹⁵² It may be only a matter of time before some state or local electorate votes not to decriminalize possession but to mandate taxation and regulation of the sale of marijuana to adults. Several legalization initiatives have been on state ballots in past elections. In 2007, a legalization initiative on the ballot in a town in Idaho received forty-six percent of the vote. StopTheDrugWar.org, *Marijuana: Three of Four Reform Initiatives Pass in Hailey, Idaho*, DRUG WAR CHRON., Nov. 9, 2007, http://stopthedrugwar.org/chronicle/509/marijuana_initiatives_pass_hailey_idaho (reporting that regulation and taxation mandate was the only marijuana reform initiative that failed to pass, losing 674–573).

See Dean E. Murphy, *Defying Bush Administration, Voters in California Back \$3 Billion for Stem Cell Research*, N.Y. TIMES, Nov. 4, 2004, at P10 (noting that fifty-seven percent of Alaskan voters rejected legalizing marijuana use for those over twenty-one); StopTheDrugWar.org, *Election 2006: Initiatives Defeated in Colorado and Nevada, But Hundreds of Thousands Voted to Legalize Marijuana*, DRUG WAR CHRON., Nov. 10, 2006, http://stopthedrugwar.org/chronicle/461/marijuana_legalization_initiatives_defeated_colorado_nevada (noting legalization initiatives were defeated in Colorado and Nevada in 2006, with Nevada initiative receiving forty-four percent of vote, an increase of five percent over 2002 election results).

“Stop the Drug War is an international organization working for an end to drug prohibition worldwide and for interim policy reform in the United States drug laws and criminal justice system.” StopTheDrugWar.org, <http://stopthedrugwar.org> (last visited Apr. 18, 2009).

¹⁵³ Robb, *supra* note 31; KLEIMAN, *supra* note 18, at 270.

billions of dollars and the countless man-hours¹⁵⁴ spent annually on what has proven to be a futile effort to appreciably reduce the availability of marijuana.¹⁵⁵ This Part considers a policy of legalization that would replace government prohibition with government regulation and taxation.¹⁵⁶ Two possible means of regulation are discussed briefly, but the primary focus is on the fundamental differences between legalization of marijuana and both prohibition and decriminalization.

Marijuana is by far the most widely used illicit drug in the United States.¹⁵⁷ While those opposed to legalization point to the potential physical harms associated with smoking marijuana,¹⁵⁸ one of the strongest arguments in support of legalization is that “arrest and criminal justice processing is for many users the most substantial risk of using

¹⁵⁴ A report by NORML estimates that “[e]very time a marijuana arrest occurs—even the most trivial arrest—at least two police officers are taken off the street for several hours to prepare the paperwork and process the defendant.” NORML, *NORML REPORT ON SIXTY YEARS OF MARIJUANA PROHIBITION IN THE U.S.* 9 (2003), available at http://norml.org/pdf_files/NORML_Report_Sixty_Years_US_Prohibition.pdf. Even assuming “that all the approximately 600,000 marijuana arrests reported in 1995 were simple cases involving no prior use of police time or resources and taking no more than two hours [and two police officers] to process, then marijuana prohibition costs law enforcement a minimum of 2,400,000 man hours annually.” *Id.*

¹⁵⁵ NORML posits that “there is no evidence that government is interested in calculating the precise cost of marijuana prohibition because it does not want to have to justify these costs to the American public” and argues that “[i]t is wasteful and disadvantageous to spend billions of otherwise limited federal dollars on a failed and ineffective public policy at the expense of already underfunded social programs.” *Id.*

¹⁵⁶ Replacing prohibition with a system of regulation and taxation would potentially bring in billions in tax revenue. See Dan Mitchell, *Legitimizing Marijuana*, N.Y. TIMES, May 31, 2008, at C5, available at LEXIS, News Library, NYT File (reporting that California’s medical marijuana industry is “a full-fledged industry . . . taking in about \$2 billion a year and generating \$100 million in state sales taxes”).

¹⁵⁷ The U.S. Department of Health and Human Services estimates that forty percent of the population has used marijuana in their lifetime, ten percent have used it in the past year, and six percent in the past month. SAMHSA DRUG USE TABLES, *supra* note 102, at tbl.1.12B. By comparison, the percentages of use in the past month for cocaine, including crack cocaine, and for hallucinogens, such as LSD and ecstasy, are one percent and four-tenths of a percent of the population, respectively. *Id.* at tbl.1.1B. The percentages for heroin and other illicit drugs are less than those for hallucinogens. *Id.*

The marijuana figures are usage rates for the population aged twelve and older. For many adult age groups, the lifetime usage rates are over fifty percent, and the past year and month rates are more than twice the total population usage rates. *Id.* at tbl.1.12B.

¹⁵⁸ The government warns that the “detrimental health effects” of marijuana can include impaired memory, panic attacks, and a potential to promote lung cancer. MARIJUANA HEALTH EFFECTS, *supra* note 79; INST. OF MEDICINE, *supra* note 19, at 119 (noting that “cellular, genetic, and human studies all suggest that marijuana smoke is an important risk factor for the development of respiratory cancer” but that “[m]ore definitive evidence that habitual marijuana smoking leads or does not lead to respiratory cancer” requires further study). *But see id.* at 119, 127 (reporting that “[t]here is no conclusive evidence that marijuana causes cancer in humans, including cancers usually related to tobacco use” and finding a “distinctive” but “mild and short lived” “marijuana withdrawal syndrome”); Kirchheimer, *supra* note 18 (citing results of fifteen different studies, conducted over periods of three months to thirteen years, involving 700 regular marijuana users and 484 non-users, that “found only a ‘very small’ impairment in memory and learning among long-term marijuana users,” and otherwise finding “scores on thinking tests . . . similar to those who don’t smoke marijuana”).

marijuana.”¹⁵⁹ The success of the initiatives decriminalizing possession for personal use reflects a growing reluctance to make criminals out of everyone who uses marijuana,¹⁶⁰ however, the reality is that, notwithstanding those initiatives, every thirty-seven seconds someone is arrested for a marijuana offense.¹⁶¹ From this perspective, legalization is the best means for removing the most harmful element of marijuana use.

Legalization of marijuana would represent a radical change in policy, but consideration of such a change is warranted because of the dismal showing of the prohibition policy in meeting its goals. Billions of dollars, millions of arrests, and nearly forty years of prohibition have not made marijuana go away.¹⁶² Instead, “the drug has grown in popularity at a rate outpacing all others while simultaneously enriching those willing to break the law.”¹⁶³ Legalization takes an entirely different approach. Legalization represents the “if you can’t beat ‘em, join ‘em” attitude. Having failed to effectively exert control over marijuana availability and marijuana use from the outside through prohibition, legalization exerts control from the inside—replacing government prohibition of marijuana with government regulation.

A. *Effects of Marijuana Legalization*

The regulatory systems of alcohol and tobacco are frequently suggested as models for regulating marijuana.¹⁶⁴ Presumably as with alcohol and tobacco, marijuana would be sold to the general adult

¹⁵⁹ KLEIMAN, *supra* note 18, at 268; *see supra* text accompanying notes 115–20 (detailing direct and collateral sanctions attached to marijuana offenses); *cf. Joffe et al., supra* note 79, at e636 (noting that alcohol and tobacco cause far more health-related harms to society than marijuana); Kirchheimer, *supra* note 18 (reporting research results that indicate impairments from marijuana use “were less than what is typically found from using alcohol or other drugs”).

Legalization could also reduce potential physical harm. *See KLEIMAN, supra* note 18, 270–71 (positing that “legalization of marijuana use might also lead to a lower rate of damage per use incident as a result of changes in the norms and customs surrounding marijuana smoking: away from profound intoxication . . . and toward use at carefully controlled times and places”).

¹⁶⁰ *See Robb, supra* note 31 (“Decriminalization for recreational drug use has been a safe haven for those who believe that locking up people strictly for drug use is wrong . . .”).

¹⁶¹ *See* FBI, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2007: PERSONS ARRESTED, <http://www.fbi.gov/ucr/cius2007/arrests/index.html> (last visited Mar. 9, 2009) (approximately 1.8 million arrests for drug abuse violations, 47.4% of which were for marijuana offenses). In November 2008, “law enforcement officials [made] their 20 millionth marijuana arrest.” Paul Armentano, *20 Million Arrests, and Counting*, IN THESE TIMES, Oct. 2008, at 16, 16, available at LEXIS, News Library, ITT File.

¹⁶² *See Gettman, supra* note 75, at 18 (positing that the increase in marijuana production and “its proliferation to every part of the country demonstrate that marijuana has become a pervasive and ineradicable part of our national economy”).

¹⁶³ U.N. WORLD DRUG REPORT, *supra* note 22, at 155.

¹⁶⁴ *See, e.g.,* Robin Room, *In Thinking About Cannabis Policy, What Can Be Learned from Alcohol and Tobacco?*, in 1 European Monitoring Ctr. for Drugs & Drug Addiction, *A Cannabis Reader: Global Issues and Local Experiences* 119 (Sharon Rödnér Sznitman et al. eds., 2008), available at <http://www.emcdda.europa.eu/publications/monographs/cannabis> (follow Volume 1 pdf hyperlink); Gettman, *supra* note 75, at 18.

population, with restrictions prohibiting underage use the only real limitations in place. A more restrictive “personal license” system is suggested by Professor Mark Kleiman, which would also impose age limit restrictions, but in addition would impose annual per user quantity limits on purchases.¹⁶⁵ These are just two examples of possible regulatory systems. Legalization of marijuana could take many forms, with varying degrees of regulatory control. This section focuses on legalization of marijuana as an overall policy and how it differs from prohibition, not on the regulatory parameters of any particular legalization system. This section examines from a legalization standpoint issues already addressed with respect to prohibition.

The obvious distinctions between legalization and prohibition are budgetary ones. Production, distribution, and possession of marijuana are all illegal under the Controlled Substances Act.¹⁶⁶ Whereas decriminalization only eases the sanctions against possession, legalization would remove the criminal sanctions from all elements of the marijuana industry. Regardless of the level of regulation necessary for a legalization policy, removal of all sanctions represents an immediate savings of the billions of budgetary dollars and millions of man-hours expended every year enforcing prohibition.¹⁶⁷ In addition to eliminating the budgetary expenditures of prohibition, legalizing the production and distribution of marijuana would bring in tax revenues. Marijuana production and distribution already constitute a significant market,¹⁶⁸ with the United States marijuana market estimated to have a value of over \$10 billion.¹⁶⁹

¹⁶⁵ KLEIMAN, *supra* note 18, at 277–79. Mark Kleiman is “Professor of Public Policy in the UCLA School of Public Affairs. He teaches courses on methods of policy analysis and on drug abuse and crime control policy.” UCLA.edu, <http://www.spa.ucla.edu/dept.cfm?d=ps&s=faculty&f=faculty1.cfm&id=137> (last visited Feb. 28, 2009).

¹⁶⁶ 21 U.S.C. § 841(a) (2006).

¹⁶⁷ See KLEIMAN, *supra* note 18, at 271 (positing that post-legalization enforcement of taxation and regulation “would be a small fraction” of the current spending on prohibition).

¹⁶⁸ One report by a marijuana public policy analyst claims that “American marijuana farmers grew 22.3 million pounds of marijuana in 2006 with a value of \$35.8 billion,” making marijuana “by far the largest cash crop in the United States when compared to the average production values of other crops from 2003 to 2005.” Gettman, *supra* note 75, at 11 & tbls.3–5, 13 & tbl.7; see Eric Bailey, *Pot Is Called Biggest Cash Crop*, L.A. TIMES, Dec. 18, 2006, at B3, available at LEXIS, LAT File (citing the report and noting that, while the government withheld judgment on the findings of the report, an ONDCP spokesman cited examples of other countries combating their “largest cash crops” of illicit drugs as an argument against legalization of marijuana). This report also claims that “marijuana is the top cash crop in 12 states, one of the top 3 cash crops in 30 states, and one of the top 5 cash crops in 39 states.” Gettman, *supra* note 75, at 13. These figures, which include amounts eradicated by drug enforcement agencies, are extrapolated using DEA eradication estimates. *Id.* at 11. This report estimates that the government eradicates less than ten percent of marijuana cultivated in the United States, whereas the DEA estimates that between thirty and fifty percent is eradicated. *Id.* at 7; DEP’T OF JUSTICE, CANNABIS CULTIVATION, *supra* note 70, at 13. This discrepancy is understandable given that the United Nations reports that in the United States “official estimates of the extent of domestic cultivation vary by more than a factor of six.” U.N. WORLD DRUG REPORT, *supra* note 22, at 155.

¹⁶⁹ See OFFICE OF NAT’L DRUG CONTROL POL’Y, EXECUTIVE OFFICE OF THE PRESIDENT, WHAT AMERICA’S USERS SPEND ON ILLEGAL DRUGS 26 tbl.9 (2001), available at <http://www.whitehousedrug>

Under prohibition, none of this market is taxed. Legalized marijuana would generate billions of dollars in tax revenue.¹⁷⁰ As a previously prohibited, and thereby untaxed, commodity, “the yield of a new tax on [marijuana] is pure gain.”¹⁷¹ The budgetary impact, while only one of many factors to be considered in evaluating a marijuana policy, strongly favors legalization.

Another factor to be considered is medical marijuana, which has gained wide support.¹⁷² As noted above, thirty-one states and the District of Columbia have recognized its value.¹⁷³ Yet in *Gonzales v. Raich*, the Supreme Court held that “the mere fact that marijuana . . . is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.”¹⁷⁴ Regardless of state efforts to support medical marijuana, in “any conflict between federal and state law, federal law shall prevail.”¹⁷⁵ And state medical marijuana initiatives do not represent the only source of conflict between medical marijuana and federal prohibition.¹⁷⁶ For example, the Institute of Medicine recommends further research to investigate the therapeutic benefits of medical marijuana,¹⁷⁷ but federal prohibition acts to inhibit medical marijuana

policy.gov/publications/pdf/american_users_spend_2002.pdf (estimating total expenditures in 2000 at \$10.5 billion). *But see* Eric Bailey, *A Call to Tax Marijuana*, L.A. TIMES, Feb. 24, 2009, at B1, available at LEXIS, News Library, LAT File (estimating marijuana industry in California alone at \$14 billion dollars).

¹⁷⁰ Facing a state budget crisis, in February 2009 a California assemblyman introduced the Marijuana Control, Regulation, and Education Act, a measure that “would remove marijuana and its derivatives from existing statutes defining and regulating controlled substances” and “would instead legalize the possession, sale, cultivation, and other conduct relating to marijuana . . . by persons 21 years of age and older” by establishing “a set of regulations and laws concerning marijuana comparable to those imposed on alcohol.” A.B. 390, 2009–10 Leg., Reg. Sess. (Cal. 2009); Bailey, *supra* note 169. With an estimated \$14 billion marijuana industry, this measure “could mean upward of \$1 billion in tax revenue for [California] each year.” *Id.*

¹⁷¹ KLEIMAN, *supra* note 18, at 272 (noting that “revenues from marijuana taxes would . . . be virtually found money”).

¹⁷² See Booth, *supra* note 131 (reporting that “national polls show up to 73 percent support for medical marijuana”).

¹⁷³ *Supra* text accompanying note 7.

¹⁷⁴ *Gonzales v. Raich*, 545 U.S. 1, 28 (2005).

¹⁷⁵ *Id.* at 29. Medical marijuana statutes can also run afoul of state laws prohibiting the sale of marijuana. See Bill Nemitz, *Maine’s Cannabis Contradiction*, PORTLAND PRESS HERALD (Maine), Feb. 26, 2009, at B1, available at LEXIS, News Library, PORTPS File (noting that Maine’s medical marijuana statute, passed a decade ago, provided for no legal means of obtaining marijuana, a “Catch-22” which an upcoming ballot initiative may remedy).

¹⁷⁶ See Denial of Marijuana Scheduling Petition, Marijuana Scheduling Petition, 54 Fed. Reg. 53,767, 53,773 (Dep’t of Justice Dec. 29, 1989) (denial of petition) (denying petition to change scheduling of marijuana despite DEA A.L.J. Francis L. Young’s recommendation that marijuana be rescheduled as a Schedule II drug with accepted use in medical treatment); *U.S. Resists Easing Curb on Marijuana*, N.Y. TIMES, Dec. 31, 1989, § 1, at 20, available at LEXIS, News Library, NYT File (reporting that the DEA rejected the recommendation of its chief administrative judge and refused to relax restrictions on medical marijuana).

¹⁷⁷ INST. OF MEDICINE, *supra* note 19, at 3–4.

research.¹⁷⁸ Given that these conflicts would not exist under a policy of legalization, the medical marijuana issue is a factor that heavily favors legalization.

Full legalization of marijuana has yet to be adopted by any country or state; therefore, it is difficult to foresee what effect legalization might have on the number of marijuana users. Decriminalization has not been shown to produce an increase in use,¹⁷⁹ but legalization and decriminalization are

¹⁷⁸ For example, the DEA maintains a monopoly on marijuana production for approved research. See Marc Kaufman, *Researchers Press DEA to Let Them Grow Marijuana*, WASH. POST, May 24, 2007, at A3, available at LEXIS, News Library, WPOST (“The [DEA] has opposed petitions that would end the government’s marijuana monopoly, saying that the current system works well and that allowing other growers could lead to more diversion to illicit use. All the marijuana produced for research is grown at the University of Mississippi and distributed through the National Institute on Drug Abuse.”). Marijuana is the only Schedule I drug where such a monopoly is maintained, *Drug Enforcement Administration’s Regulation of Medicine: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 72 (2007) [hereinafter *DEA Hearing*] (questioning of David Murray, Director of Counter-Drug Technology, ONDCP, by Rep. Jerrold Nadler, Member, Subcomm. on Crime, Terrorism, and Homeland Security), and the DEA has refused to act on recommendations of its own administrative law judges and relax the monopoly to facilitate legitimate medical marijuana research. Kaufman, *supra* (noting that a DEA administrative law judge ruled to “break the government’s monopoly on growing [marijuana]” and allow the applicant to grow marijuana at his facility for research purposes).

Professor Lyle E. Craker first filed an application with the DEA to grow marijuana in 2001. Manufacturer of Controlled Substances, 68 Fed. Reg. 43,755 (Dep’t of Justice July 24, 2003) (notice of application). After a six-year wait, in 2007 Professor Craker finally received a recommendation for approval of his application from a DEA administrative law judge. DEA A.L.J. Mary Ellen Bittner stated that “there is currently an inadequate supply of marijuana available for research purposes” and said that approving Professor Craker’s application would be “in the public interest.” In the Matter of Lyle E. Craker, Opinion and Recommended Ruling, Dep’t of Justice Docket No. 05-16, Feb. 12, 2007, at 87. The government filed an exception to the recommendation. In the Matter of Lyle E. Craker, Government’s Exception to Opinion and Recommended Ruling, Dep’t of Justice Docket No. 05-16, Mar. 26, 2007, at 2. After that filing, a letter signed by forty-five members of Congress was sent to DEA Administrator Karen Tandy urging that Professor Craker be allowed to produce marijuana for legitimate research purposes. Letter from Members of Congress to Karen P. Tandy, Adm’r, DEA, available at <http://www.maps.org/mmj/signonfinal.pdf>. Despite this congressional support, the DEA issued its final ruling in January 2009 denying Professor Craker’s petition to grow marijuana for medical research. Lyle E. Craker, 74 Fed. Reg. 2,101 (Dep’t of Justice Jan. 14, 2009) (denial of application).

Prohibition can also act indirectly to limit medical marijuana research. Researchers at Ohio State University have discovered a possible link between one of the active ingredients in marijuana and the possible prevention or reversal of Alzheimer’s disease. Maia Szalavitz, *Marijuana’s Memory Paradox*, BRAIN & BODY, <http://health.msn.com/health-topics/alzheimers-disease/articlepage.aspx?cp-documentid=100230518> (last visited Mar. 10, 2009). “Given the controversy that would likely arise if a protective effect were to be discovered, however, no one has funded the epidemiological studies that would be needed to show this.” *Id.* (noting difficulty one researcher had in getting an earlier paper on the subject published); see also Gardiner Harris, *F.D.A. Dismisses Medical Benefit from Marijuana*, N.Y. TIMES, Apr. 21, 2006, at A1, available at LEXIS, News Library, NYT File (reporting claims by scientists “that the federal government had actively discouraged research”).

¹⁷⁹ See Eric Single et al., *The Impact of Cannabis Decriminalisation in Australia and the United States*, 21 J. PUB. HEALTH POL’Y 157, 177 (2000) (“The key aspect of cannabis decriminalisation is that it does not appear to lead to increases in availability, use, or problems associated with cannabis use.”). During the 1970s, eleven states had some type of decriminalization, and there was no measurable increase in use in those states compared to other states. KLEIMAN, *supra* note 18, at 268–69.

wholly different policies.¹⁸⁰ If “arrest and criminal justice processing is for many users the most substantial risk of using marijuana,”¹⁸¹ then removal of those sanctions makes it likely that legalization will bring about an increase in use.¹⁸² Decriminalization of marijuana in the Netherlands brought little to no increase, but the later “de facto legalization” of marijuana when it was sold in Dutch “coffee shops” may have led to an increase in use.¹⁸³ The repeal of alcohol prohibition in the United States did not bring about an immediate, large increase in consumption of alcohol, but a sharp rise in consumption did occur fifteen years later when the strict controls put in place after Prohibition began to be relaxed and advertising of alcohol became more aggressive.¹⁸⁴ A strong possibility that legalizing marijuana will result in some increase in use is a factor that weighs against legalization.¹⁸⁵ It can, however, be argued that this negative effect of legalization would be outweighed by removal of the many harsh consequences of prohibition.¹⁸⁶

¹⁸⁰ See KLEIMAN, *supra* note 18, at 270 (“[F]ull legalization . . . would have effects so different from those of mere decriminalization that the two policies should not be discussed . . . as more and less . . . versions of essentially the same policy.”); Single et al., *supra* note 179, at 178 (“The success of decriminalisation [in not producing an increase in use] should not be taken to indicate that . . . legalisation would also have little or no impact.”).

¹⁸¹ KLEIMAN, *supra* note 18, at 268.

¹⁸² Compare Egan & Miron, *supra* note 48, at 26 (positing that “any increase in demand from legalization would plausibly come from casual users, whose marijuana use would likely be modest”), with KLEIMAN, *supra* note 18, at 274 (arguing that there is no question as to whether an increase would occur “but how large it would be and how much of it would reflect new heavy use”). Both sources point out that marijuana and alcohol may be substitute goods and some increase in marijuana use might be attributed to a decrease in alcohol consumption. *Id.* at 275; Egan & Miron, *supra* note 48, at 26–27.

¹⁸³ INST. OF MEDICINE, *supra* note 19, at 103–04; Robert MacCoun & Peter Reuter, *Interpreting Dutch Cannabis Policy: Reasoning by Analogy in the Legalization Debate*, 278 *SCIENCE* 47, 48–50 (1997) (concluding that “progression from depenalization to de facto legalization” led to an increase in marijuana use). *But see* Dirk Korf, *An Open Front Door: The Coffee Shop Phenomenon in the Netherlands*, in 1 European Monitoring Ctr. for Drugs & Drug Addiction, *A Cannabis Reader: Global Issues and Local Experiences* 137, 149 (Sharon Rödner Sznitman et al. eds., 2008), available at <http://www.emcdda.europa.eu/publications/monographs/cannabis> (follow Volume 1 pdf hyperlink) (questioning MacCoun and Reuter’s conclusions, *supra*, finding “striking similarities” between cannabis use in the Netherlands and other European Union countries, as well as the United States, and positing that “[i]t seems more likely that the parallel development of cannabis use with stages in the decriminalisation process in the Netherlands was accidental, and that trends in cannabis use were predominantly affected by other factors that were not unique to the Netherlands”).

¹⁸⁴ MacCoun & Reuter, *supra* note 183, at 51; *see also* Mark A.R. Kleiman, *Dopey, Boozy, Smoky—and Stupid*, *AM. INT.*, Jan.–Feb. 2007, <http://www.the-american-interest.com/ai2/article.cfm?id=224&Mid=7> (last visited Mar. 10, 2009) (“Full commercial legalization of cannabis, on the model now applied to alcohol, would vastly increase the cannabis-abuse problem by giving the marketing geniuses who have done such a fine job persuading children to smoke tobacco, drink to excess and supersize themselves with junk food another vice to foster.”).

¹⁸⁵ See Gettman, *supra* note 75, at 17 (“Advocates for and supporters of the current prohibitive marijuana policies often argue against alternatives to law enforcement suppression policies by claiming that legalization . . . would lead to greater use of marijuana.”).

¹⁸⁶ The harsh consequences of prohibition include the death penalty. Although the Supreme Court has held that only those convicted “for crimes that take the life of the victim” can be put to death, *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2665 (2008) (reversing state supreme court judgment upholding death sentence for convicted child rapist), it should be noted that federal law as it is currently written

A possible increase in adult use of marijuana under legalization does not necessarily translate into an increase in underage use. Advocates of legalization argue that legalizing marijuana may succeed where prohibition has failed and actually reduce the availability of marijuana for underage use.¹⁸⁷ Underage use of marijuana is a necessary concern under any policy, and while it can be argued that marijuana is not so harmful as to require strict prohibition under all circumstances, every effort must be made to prevent and deter underage use.¹⁸⁸ If retail sale of marijuana to adults is legalized, only selling to minors will remain illegal.¹⁸⁹ Under the current system of prohibition, selling marijuana to anyone is illegal, regardless of age. With no incentive to differentiate between the ages of their customers, drug dealers do not discriminate by age.¹⁹⁰ On the other hand, stricter enforcement of laws prohibiting the sale of tobacco products to those under eighteen is believed to have contributed to the significant decrease in cigarette smoking among teenagers.¹⁹¹ A marijuana legalization policy would also include an age limit on purchase and use, and provide for strong sanctions against those who ignore the restrictions. In forty years, prohibition has failed to reduce the availability of marijuana to teenagers. There is no way of knowing exactly what effect legalization of marijuana might have on underage use. Nevertheless, it may be possible to create and maintain a system at least as effective at deterring underage

includes marijuana trafficking among those offenses subject to the death penalty. Distributing 100 kilograms (approximately 220 pounds) of marijuana or 100 marijuana plants is subject to a sentence of imprisonment for not less than five years and not more than forty years. 21 U.S.C. § 841(b)(1)(B) (2006). Distributing 300 times those amounts (30,000 kilograms or 30,000 plants) while obtaining “substantial income or resources” from a “continuing criminal enterprise” with gross receipts of \$10 million or more in a twelve month period in “concert with five or more other persons” while occupying “a position of organizer, a supervisory position, or any other position of management” is punishable by life in prison. 21 U.S.C. § 848 (2006). Those who traffic in twice those amounts, either 60,000 kilograms or 60,000 plants, or twice the gross receipts (\$20 million), *ceteris paribus*, “shall be sentenced to death.” 18 U.S.C. § 3591(b)(1) (2006).

¹⁸⁷ See, e.g., Gettman, *supra* note 75, at 17 (“[W]ithout effective and credible control over production it is impossible to limit access to marijuana by teens and children, and limiting such access is not only the paramount objective of anti-drug policies but also the only certain way to reduce marijuana use in the long term.”); Kampia, *supra* note 33 (arguing that “the complete prohibition of marijuana for adults not only doesn’t help to keep marijuana away from kids, but it actually hampers such efforts”).

¹⁸⁸ See U.N. WORLD DRUG REPORT, *supra* note 22, at 155–56 (noting that while “[i]t is nearly impossible to die of an overdose” of marijuana, the health risks associated with marijuana use “appear to be higher for people who start consuming [marijuana] during adolescence”).

¹⁸⁹ See Kampia, *supra* note 33 (“Regulation works. . . . If we really want to control marijuana and keep it away from our kids, it’s time to bring it within the law and regulate it as we do tobacco.”).

¹⁹⁰ See *id.* (“Have you ever seen a marijuana dealer with a ‘We Card’ sign?”). But see JustThinkTwice.com, *Totally Lame (& Dangerous & Illegal) Things to Do on Pot*, STUMBLE WEED, http://www.justthinktwice.com/stumbleweed/totally_lame_01.htm (last visited Mar. 10, 2009) (“[D]ealing marijuana near schools or to minors brings extra punishment.”).

¹⁹¹ See *supra* note 96 and accompanying text; Editorial, *A Good Example for Fighting Tobacco*, N.Y. TIMES, Jan. 8, 2008, at A22, available at LEXIS, News Library, NYT File (noting remarkable success in New York City of reducing underage cigarette smoking through such efforts as aggressive anti-tobacco media campaign and cracking down on vendors who sell to minors).

use as the system we have now by focusing enforcement resources on only one demographic.¹⁹² For these reasons, underage use is not a factor that weighs heavily for or against legalization.¹⁹³

An issue that has not yet been addressed here is the concern over the increasing potency of marijuana.¹⁹⁴ Improved cultivation methods, including the area of hydroponics, are producing higher potency strains of domestically produced marijuana.¹⁹⁵ This increase in potency reflects one method used by drug trafficking organizations (DTOs) to circumvent prohibition enforcement.¹⁹⁶ One concern with increased potency is that a marijuana user would be unprepared for the stronger effect of a higher potency product.¹⁹⁷ Legalization would remove this concern. Black market products are subject to little quality control and, in the case of a product like marijuana, no labeling. This can also increase the possibility of receiving a product other than the intended purchase. The National Institute on Drug Abuse reports that “marijuana is frequently combined with other drugs, such as crack cocaine, PCP, formaldehyde, and codeine cough syrup, sometimes without the user being aware of it.”¹⁹⁸ Under legalization, a system of testing as to potency, and labeling as to both variety and potency would be required. Just as alcoholic beverages are purchased based on brand, variety, and alcohol content, legalized marijuana would be selected by brand, variety, and potency. Prohibition of marijuana has inadvertently helped to create the potency problem; legalization of marijuana would alleviate it.

Full legalization of marijuana is an unknown. Many countries, as well

¹⁹² See Gettman, *supra* note 75, at 17–18 (“Replacing the façade of control provided by current policies with effective regulatory policies is . . . the first step in enacting effective policies to reduce teenage marijuana use.”).

¹⁹³ See KLEIMAN, *supra* note 18, at 275 (“Were it not for the fact that the current prohibition also signally fails to deny access to marijuana to minors . . . increased access by minors might count as an insuperable disadvantage of legalization.”).

¹⁹⁴ See DEP’T OF JUSTICE, THREAT ASSESSMENT, *supra* note 68, at 18 (reporting that “average THC (delta-9-tetrahydrocannabinol) content in tested samples of marijuana” have almost doubled in the last ten years, from 5.01% in 1997 to 9.64% in 2007); U.N. WORLD DRUG REPORT, *supra* note 22, at 156 (expressing concern that higher potency marijuana may increase health risks).

¹⁹⁵ DEP’T OF JUSTICE, CANNABIS CULTIVATION, *supra* note 70, at 2, 9. The DEA maintains that by the early 1990s, “[d]ue to modern sophisticated cultivation techniques, U.S.-grown marijuana became one of the most potent and highly-prized cannabis products in the world.” DEA HISTORY, *supra* note 43, at 80.

¹⁹⁶ See DEP’T OF JUSTICE, CANNABIS CULTIVATION, *supra* note 70, at 2 (“Rising law enforcement pressure . . . has not yet stemmed the increase in domestic cannabis cultivation, either outdoors or indoors. Rather, DTOs are simply adapting their methods (relocating to new areas, changing their growing cycles, and growing higher potency plants both indoors and outdoors) in order to continue operating in the United States while maintaining their profits.”).

¹⁹⁷ See Ted Leggett, *Why Should We Care About Cannabis?*, UNODC PERSPECTIVES, <http://www.unodc.org/newsletter/en/perspectives/0601/page011.html> (last visited Mar. 10, 2009) (“While more research is required to determine the impact of the ‘new,’ more potent cannabis, there has been an increase in the number of people complaining of ‘unexpected effects’ from consuming cannabis in emergency rooms in the United States.”).

¹⁹⁸ NIDA RESEARCH REPORT, *supra* note 17, at 2.

as a quarter of the states in the United States, have removed some or all of the criminal sanctions for personal use, but none have fully legalized production, distribution, and possession.¹⁹⁹ This Note has addressed several issues relating to marijuana policy, but many factors will need to be considered in assessing the goals of a legalization policy, and the optimal regulatory system for achieving them.²⁰⁰ What is known and needs no further consideration is that the current policy of prohibition must be replaced. Detering the use of marijuana is a worthy goal, but the methods used in enforcing prohibition have been both harmful and ineffective. It is time to admit that prohibition has failed to meet its goals and adopt a new marijuana policy. Legalization could be that policy.

V. CONCLUSION

*What the United States would be like with legal recreational [marijuana] is unknown. Sometimes, however, the known is so bad or futile that a trade for the unknown is the best course of action.*²⁰¹

Prohibition of marijuana has proven to be a very expensive failure. Prohibition has, at best, had limited success in deterring the use of marijuana, and it has been ineffective in removing the criminal enterprises that work to meet the demand created by that use. Programs designed to help keep kids from using marijuana are having little, if any, effect, and enforcement methods are doing nothing to reduce availability. It is not difficult to imagine that the money and manpower devoted to these endeavors could be better utilized.

The ineffectiveness of the enforcement and prevention methods of the federal prohibition policy, especially coupled with the racial and economic disparities in the way those methods are applied, undoubtedly helps explain the move away from a strict prohibition policy. Now that decriminalization is slowly working its way from state to state and

¹⁹⁹ See Danilo Ballotta et al., *Cannabis Control in Europe*, in 1 European Monitoring Ctr. for Drugs & Drug Addiction, *A Cannabis Reader: Global Issues and Local Experiences* 97, 112 (Sharon Rödner Sznitman et al. eds., 2008), available at <http://www.emcdda.europa.eu/publications/monographs/cannabis> (follow Volume 1 pdf hyperlink) (noting that “personal use of cannabis attracts administrative sanctions or alternatives to custodial sanctions in 16 countries” and that “drug policies in many European countries seem to concur that criminal action against non-problematic use/possession of cannabis should receive the lowest prosecutorial priority”) (footnote omitted); *supra* note 4 (listing states that have passed laws decriminalizing marijuana).

²⁰⁰ This Note focuses on the economic implications of a change in marijuana policy. There are many other factors to consider that are beyond the scope of this Note. Among these are the international repercussions of legalizing marijuana. The United States is a signatory to the United Nation’s Single Convention, which prohibits the illicit traffic in marijuana. Single Convention on Narcotic Drugs, art. 28, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204. Whether and to what extent this treaty should influence U.S. marijuana policy is just one of the factors to be addressed before any decision is reached concerning a change in policy.

²⁰¹ Robb, *supra* note 31.

municipality to municipality, it may not be possible to go back to a stricter policy. If this is true, then the federal policy of prohibition must be abandoned and a new national policy adopted.

The current system of decriminalization retains many of the same problems associated with the stricter policy of prohibition from which it is evolving. The ineffectiveness and inequities of enforcing the prohibition on trafficking still remain. Underage usage rates show no decrease through decriminalization, and may actually increase. Decriminalization may remove the criminal sanctions from possession for personal use, but the continually increasing expenditures at state and federal levels indicate that no significant reduction in costs can be attributed to decriminalization. Fewer people might be going to jail,²⁰² but otherwise the current system is identical to prohibition. Without some significant change in form, decriminalization is no better policy than prohibition.²⁰³

Legalization, on the other hand, is a complete unknown, and the evolving decriminalization system is no indicator of what legalization would be like.²⁰⁴ Under legalization, some increase in demand for marijuana is probably inevitable, but legalization would remove the supply side of the equation from the hands of criminals. Legalization would also remove the direct and collateral sanctions that currently fall so harshly upon minority and low-income marijuana users. With respect to deterring use in children, the unknown of legalization might be preferable. Starting from a position of strict prohibition and benefiting from the knowledge gained in reducing underage tobacco use, if marijuana is taken off the streets and put in the hands of regulatory agencies, it may be possible to create and maintain a system at least as effective at deterring underage use as the one we have now. At the very least, legalization of marijuana is a viable option that should be given serious consideration.

The national marijuana debate is not going away. In fact, it may be just getting started as the use of marijuana becomes more acceptable to the mainstream population. For example, recreational drug use by presidential candidates has been a topic of discussion in several of the most recent presidential elections.²⁰⁵ In the years since President Clinton first ran for

²⁰² *But see* Nizza, *supra* note 135 (noting that misdemeanor marijuana possession arrests in Denver have increased by fifty percent since 2004 and during that time two ballot initiatives have passed making such offenses the lowest priority for city law enforcement).

²⁰³ This Note focuses on the current policy of decriminalization, which removes sanctions only for personal use while leaving in place all prohibitions on production and distribution. This is not the only form decriminalization can take. Other possibilities include allowing limited cultivation for personal use and allowing not-for-profit exchanges for small quantities.

²⁰⁴ *See* KLEIMAN, *supra* note 18, at 280 (positing that while legalization of marijuana is certainly not a risk-free solution, "it seems more likely than not that some form of restricted licit availability represents our least-bad alternative for dealing with the most widely used illicit drug").

²⁰⁵ *See* Gail Collins, Op-Ed, *Barack's Blast from the Past*, N.Y. TIMES, Dec. 15, 2007, at A23, available at LEXIS, News Library, NYT File (discussing ways in which campaigns address past drug use of candidates).

the presidency, the defensive posture for those candidates with drug use in their past has moved from a denial of inhaling marijuana smoke to an open discussion by then-Senator Barack Obama about his use of marijuana and other drugs.²⁰⁶

The full range of public policy implications associated with legalizing and regulating marijuana is beyond the scope of this Note. The purpose of this Note is not to conclusively determine that legalization is the best policy, but to demonstrate that it is a viable alternative, and to further advance the marijuana policy debate.

²⁰⁶ *See id.* (“There are lots of different ways for a presidential candidate to deal with the question of drug use. You can admit it, deny it or say you didn’t inhale.”).