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September 8, 2009

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Legalizing Marijuana: California's Pot of Gold?

Michael Vitiello*

I. INTRODUCTION

In early 2009, California Assembly member Tom Ammiano authored AB 390, which proposes legalizing marijuana production and taxing its sales.¹ Newly appointed Attorney General Eric Holder has signaled that the federal approach towards medical marijuana will be softer than that of his predecessor.² Ammiano cited such statements as evidence that the Obama administration may give California room to legalize marijuana.³ Given the ongoing budget crisis in California, Ammiano no doubt sought to build support among legislators and members of the public desperate to find a needed source of revenue and those troubled by California's burgeoning prison population, along with the long-standing opponents of marijuana laws.

Not surprisingly, Ammiano's bill has produced a heated debate. Supporters of legalizing marijuana marshal powerful arguments for its legalization, including projected revenues of over a billion dollars, with savings of another billion dollars in reduced prison costs.⁴ Opponents predict widespread marijuana use, including a dramatic increase in use by California's youth, with no significant reduction in prison costs or significant increases in revenue.⁵ As is typical of debates about important policy questions today, the debate surrounding AB 390 has generated much heat and little light. Issues surrounding AB 390 need more rational debate. That is the subject of this essay.

Part II briefly lays out the policy supporting marijuana legalization and the provisions of AB 390.⁶ Part III discusses the threshold problem before anyone should seriously

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1. AB 390, 2009 Leg., 2009-2010 Sess. (Cal. 2009).

2. See David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, N.Y. TIMES, Mar. 19, 2009, at A20.

3. Press Release, Assemblymember Tom Ammiano, Ammiano Calls for Feds to Respect States with Medical Marijuana Laws (Mar. 27, 2009), available at http://democrats.assembly.ca.gov/members/a13/News_Room/Press/20090327AD13PR01.aspx.

4. See *infra* Part IV.A.1-2.

5. See *infra* Part IV.A.3.

6 Section II focuses primarily on arguments in support of AB 390. That is, it develops arguments favoring taxing and regulating marijuana production. It does not review the existing literature that advocates legalizing marijuana use per se. That literature dating back decades is ample. See, e.g., JOHN KAPLAN, MARIJUANA: THE NEW PROHIBITION (World Publishing Company 1970). For more recent literature, see, e.g., JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS (Temple University Press 2001). Despite the

consider becoming a registered marijuana grower even if AB 390 were to become law: can anyone realistically hope that the federal government will abstain from its efforts to enforce marijuana laws? Part IV then reviews the debate surrounding AB 390, including an assessment of extravagant claims by both sides about the results of legalizing marijuana. Sorting through charges and countercharges, I point out some of the inconsistencies within proponents and opponents' own arguments. Further, legalizing marijuana will entail many unanticipated consequences. Whether proponents can deliver on their promises will depend on whether the legislature thinks through issues that proponents and opponents are not likely to focus on in their passionate advocacy. Finally, in Part V, I tepidly favor legalizing marijuana.

II. AB 390

Support for legalizing marijuana is not new. But demographic changes may favor reforming marijuana laws.⁷ With its widespread use among college students beginning in the 1960's, marijuana is no longer a drug associated with fringes of society.⁸ Today, NORML, the most visible organization lobbying for its legalization, claims that 100 million Americans have used marijuana.⁹ A World Health Organization study reports that over 40% of Americans have tried it.¹⁰ Proponents of legalizing marijuana can point to the current hypocrisy among politicians: at least three Presidents, a Supreme Court Justice, California's governor and numerous prominent, often conservative, members of Congress, have admitted using marijuana.¹¹ Despite that, few are willing to advocate for its legalization.

arguments advanced for legalization, proponents have failed to convince legislators. The current arguments have legs because of the potential to tax a lucrative cash crop.

7. Cf. Norma Love, *NH Demographic Change Shows in Legislature Votes*, YAHOO NEWS, May 3, 2009, http://news.yahoo.com/s/ap/20090503/ap_on_re_us/us_blue_new_hampshire (discussing how New Hampshire's changing demographics have led to bills legalizing medical marijuana and gay marriage).

8. See Sarah N Lynch, *An American Pastime: Smoking Pot*, TIME, July 11, 2008, <http://www.time.com/time/health/article/0,8599,1821697,00.html>.

9. The National Organization for the Reform of Marijuana Laws (NORML), <http://norml.org/> (last visited May 9, 2009).

10. Carla Marinucci, *Political Winds Shift in Favor of Legalized Pot*, S.F. CHRONICLE, Apr. 12, 2009, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/11/MNF0170FPU.DTL> (last visited May 28, 2009).

11. This includes former presidents George W. Bush and Bill Clinton, President Barack Obama, Supreme Court Justice Clarence Thomas, and Newt Gingrich. See David D. Kirkpatrick, *In Secretly Taped Conversations, Glimpses of the Future President*, N.Y. TIMES, Feb. 20, 2005, <http://www.nytimes.com/2005/02/20/politics/20talk.html?pagewanted=1&r=1> (stating that in secretly taped conversations, "Mr. Bush appears to have acknowledged using marijuana"); Gwen Ifill, *The 1992 Campaign: New York; Bill Clinton Admits Experiment with Marijuana in 1960's*, N.Y. TIMES, Mar. 30, 1992, at A15, available at <http://www.nytimes.com/1992/03/30/us/the-1992-campaign-new-york-clinton-admits-experiment-with-marijuana-in-1960-s.html> (discussing Bill Clinton's marijuana use); Lois Romano, *Effect of Obama's Candor Remains to Be Seen*, WASH. POST, Jan. 3, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/02/AR2007010201359.html> (discussing President Obama's past drug use); NORML, Tokin Politics, http://norml.org/index.cfm?Group_ID=3461 (last visited May 9, 2009) (noting that Justice Thomas admitted using marijuana in college); Keith Bradsher, *Many Whitehouse Employees Used Drugs, Gingrich Asserts*, N.Y. TIMES, Dec. 5, 1994, at A17, available at <http://www.nytimes.com/1994/12/05/us/many-white-house-employees-used-drugs-gingrich->

Proponents of legalizing marijuana can also point to the selective enforcement of drug laws. Despite survey data suggesting that the same proportion of whites, Hispanic, and African-Americans use illegal drugs, enforcement falls far more heavily on minority communities.¹² Saddled with criminal records, young minority adults bear yet another disability when they attempt to enter the main stream of American society.

Further, proponents have long argued that, unlike alcohol, marijuana use is not associated with violent crime.¹³ And while smoking marijuana involves similar risks to those involved in the use of tobacco, marijuana users are not likely to smoke as much as cigarette users.¹⁴ And while both tobacco and alcohol are listed among the ten most addictive substances, marijuana does not make that list.¹⁵ As a result, marijuana seems to cause less harm than do two legal substances widely used in America.

These arguments have been around for some time. Apart from occasional efforts to legalize marijuana, most proponents have concentrated efforts on legalizing marijuana for medical use.¹⁶ To date, thirteen states have adopted compassionate use statutes, allowing seriously ill individuals to use marijuana.¹⁷ No doubt, many advocates of medical marijuana see it as a stepping stone towards the legalization of marijuana. But until Ammiano's bill, the legalization movement in California has been relatively quiet.¹⁸

Timing is everything, of course. Headlines have featured three issues that make Ammiano's proposal credible. The recent budget crises in California have demonstrated gridlock in the legislature, with Democrats virtually unable to raise taxes to meet the

asserts.html?n=Top/Reference/Times%20Topics/Subjects/M/Marijuana (noting that Mr. Gingrich admitted using marijuana "years ago").

12. One recent study suggests that this disparity has decreased in recent years. *See* MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS (2009).

13. *Alcohol and Cocaine—But Not Cannabis—Linked to Violent Behavior, Study Says*, NORML.org, http://norml.org/index.cfm?Group_ID=7337 (last visited May 9, 2009).

14. *Compare* THE NATIONAL SURVEY ON DRUG USE AND HEALTH REPORT, Nov. 14, 2003, *available at* <http://www.oas.samhsa.gov/2k3/cigs/cigs.htm> (stating an average of thirteen cigarettes a day for daily smokers), *with* DALE GIERINGER, CALIFORNIA NORML REPORT, Feb. 2009, *available at* http://www.canorml.org/background/CA_legalization2.html (stating the norm as ten joints a day for heavy marijuana smokers).

¹⁵ *See* Scientificpsychic.com, Rehabilitation from Drug Addiction, *available at* <http://www.scientificpsychic.com/health/drug-rehab.html> (last visited May 26, 2009).

16. *See, e.g.,* Carol J. Williams & Maura Dolan, *U.S. Asked to Stop 'False Information' on Medical Pot*, L.A. TIMES, Apr. 14, 2009, <http://www.latimes.com/news/local/la-me-medical-marijuana15-2009apr15,0,6135178.story>.

17. ProCon.org, 13 Legal Medical Marijuana States, *available at* <http://medicalmarijuana.procon.org/viewresource.asp?resourceID=000881> (last visited May 20, 2009); *see also* Ronald Fraser, *Medical Marijuana: Its time has come*, THE PATRIOT NEWS, May 9, 2009, *available at* http://www.pennlive.com/editorials/index.ssf/2009/05/medical_marijuana_its_time_has.html (last visited May 20, 2009).

18. The last serious legalization effort seems to be the report by Harvard University in 2005. JEFFREY A. MIRON, THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION (Harvard University 2005). *available at* <http://www.prohibitioncosts.org/mironreport.html> (last visited May 20, 2009).

projected deficits because of the discipline among Republicans.¹⁹ Proponents of AB 390 project significant income from sales of licenses to sell and then the sale of marijuana. For example, the Chair of the Board of Equalization projects that AB 390 could generate about \$990 million from the fee imposed on sellers and another \$349 million generated by the \$50/ounce fee on the sale of marijuana.²⁰

Second, AB 390 may pick up support from those who have read headlines about California's prison crisis. The federal courts have taken over the prison health care system.²¹ The court-appointed receiver's demand for several billion dollars to build adequate health care facilities has dominated the news, especially when the state's Attorney General and Governor sought to have him ousted.²² A three judge panel has hinted that it may order the release of about 55,000 prisoners to bring the system in compliance with the Eighth Amendment.²³ Proponents of AB 390 point to significant savings in prison costs that would flow from its passage. That is so, they argue, because of the large number of prisoners in prison on marijuana charges and those who have been released on parole, only to be returned to prison as a result of failed urine tests, indicating the use of marijuana. Proponents claim another billion dollars that the state will save by legalizing marijuana.²⁴

The third headline issue that may increase support for AB 390 is the violence in Mexico, relating to the drug trade. Stories about the thousands of murders, especially in border towns, raise the specter of violence spilling into the United States.²⁵ Here, too, proponents of AB 390 argue that legalizing marijuana will reduce gang violence because, as with the end of prohibition, gangs will no longer be able to profit from marijuana sales. As a result, they will give up their turf wars over the sales of marijuana.²⁶

19. See Kristin Kloberdanz, *The Great California Fiscal Earthquake*, TIME, Jan. 8, 2009, <http://www.time.com/time/nation/article/0,8599,1870299,00.html?iid=sphere-inline-sidebar>.

20. Jim Sanders, *Legal Pot: Bill Sees Cash Harvest for State*, SACRAMENTO BEE, Feb. 24, 2009, available at <http://www.sacbee.com/capitolandcalifornia/story/1647570.html> (last visited May 20, 2009).

21. Solomon Moore, *The Prison Overcrowding Fix*, N.Y. TIMES, Feb. 10, 2009, at A17, available at <http://www.nytimes.com/2009/02/11/us/11prisons.html>.

22. Denny Walsh, *State Seeks to Have Prison Receiver Replaced*, SACRAMENTO BEE, Jan. 28, 2009, <http://www.sacbee.com/capitolandcalifornia/story/1580109.html>; see also Scott Sabatini, *Judge Backs Continued Role of Prison Receiver in California*, LEGALNEWSLINE, Mar. 25, 2009, <http://legalnewsline.com/news/219961-judge-backs-continued-role-of-prison-receiver-in-california>.

23. Solomon Moore, *The Prison Overcrowding Fix*, N.Y. TIMES, Feb. 10, 2009, at A17, available at <http://www.nytimes.com/2009/02/11/us/11prisons.html>.

24. Board of Equalization Marijuana Control, Regulation, and Education Act: Revenue Effect and Assumptions Feb. 23, 2009.

25. See Guy Lawson, *The Making of a Narco State*, ROLLING STONE, Mar. 4, 2009, http://www.rollingstone.com/politics/story/26435119/the_making_of_a_narco_state/print; Matt Sanchez, *Mexican Drug Cartels Armed to the Hilt, Threatening National Security*, FOX NEWS, Feb. 4, 2009, <http://www.foxnews.com/story/0,2933,487911,00.html>

26. Editorial, *How to Stop the Drug Wars*, THE ECONOMIST, Mar. 5, 2009, available at http://www.economist.com/opinion/displaystory.cfm?story_id=13237193 (arguing that "prohibition has failed" and legalization is the "least bad solution").

Enter AB 390. Ammiano's bill does several things. AB 390 legalizes the possession, sale, transportation, and cultivation of marijuana for adults age twenty-one and older.²⁷ Specifically, AB 390 amends or repeals several sections of California Health and Safety Code to eliminate civil and criminal penalties associated with marijuana use, possession, and production.²⁸ The bill further prohibits the use of state or local funds to assist in the enforcement of federal laws inconsistent with AB 390's provisions, or to "provide for greater sanctions for conduct prohibited by this division."²⁹ AB 390 does not alter criminal statutes forbidding driving under the influence or possession of marijuana on school property, nor does it affect the rights of employers concerning employee use.

AB 390 raises revenue by enacting a "supplemental fee" of fifty dollars per ounce of marijuana purchased.³⁰ It also mandates that the state treasurer deposit payments received to the "Drug Abuse Prevention Supplemental Funding Account" for the purpose of promoting drug education, awareness, and rehabilitation programs.³¹

III. The Likely Federal Response

Before investing too much time debating AB 390, Californians ought to ask whether the federal government will foreswear criminalizing marijuana. As many learned the hard way, a state's decision to legalize marijuana does not bar federal prosecution. In this section, I review the intransigence of the federal authorities, even when the issue was the more limited question whether states should be able to de-criminalize medical use of marijuana. Even though Attorney General Holder has indicated a softer stance on raiding medical providers of marijuana,³² I doubt that the federal government will foreswear prosecuting all marijuana offenses. Short of that, marijuana dealers should hesitate to sign up for California's licensing program. That in turn would render it ineffective as a source of revenue.

A sad story illustrates the problem. Shortly after passage of Proposition 215, which created immunity from state criminal prosecution for certain users and providers of

27. AB 390, 2009 Leg., 2009-2010 Sess. (Cal. 2009). Citizens may consume marijuana and cultivate up to ten plants on private premises away from public view. *Id.*

28. AB 390 makes the following changes to the California Health and Safety Code: amends section 11014.5 to remove from the definition of "drug paraphernalia" objects designed for the ingesting or inhaling of marijuana, hashish, or hashish oil; amends section 11054(d) to remove marijuana from the list of "hallucinogenic substances"; amends section 11357 to remove criminal penalties for possession of marijuana; repeals sections 11358-11361 relating to the cultivation, sale, and transportation of marijuana; and amends section 11703 to remove marijuana cultivation and possession for sale from the definition of "controlled substances." AB 390, 2009 Leg., 2009-2010 Sess. (Cal. 2009).

29. AB 390, 2009 Leg., 2009-2010 Sess. (Cal. 2009).

30. AB 390 also requires that commercial cultivators obtain licenses and abide by specified regulations, including: adequate security to protect against unauthorized access, prohibitions against employees under the age of twenty-one having access to marijuana, adequate recordkeeping, and background checks. AB 390, 2009 Leg., 2009-2010 Sess. (Cal. 2009).

31. AB 390, 2009 Leg., 2009-2010 Sess. (Cal. 2009).

32. See David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensaries*, N.Y. TIMES, Mar. 19, 2009, at A20.

“medical” marijuana,³³ I received a letter from a man awaiting trial in the local federal court. Over the next few months, I learned that his story was hardly unique. As soon as Proposition 215 became law, marijuana growers like the writer entered into detailed contracts with cannabis clubs, whereby they would provide the club with marijuana. The man who wrote to me learned the hard way that Proposition 215 did not prevent a separate sovereign, the United States, from pursuing a violation of its drug laws.³⁴ Despite his good faith defense, the best offer that he received from the government was a term of seven-years in prison. I lost track of his case after a colleague and I met with one of his supporters and discussed his unlikely success at defending his case on the merits. I believe that he took the bargain. Other defendants pursued various defenses, like necessity, with little success.³⁵

Apart from the inability of California to limit the federal government’s ability to enforce its law, examining federal policy on drug enforcement should have signaled marijuana growers that federal drug agents would not sit by idly. While the United States criminalized marijuana less than seventy-five years ago, federal enforcement of drug laws has been vigorous for most of that time.

Commentators attribute early efforts to criminalize marijuana as the product of the end of prohibition and racism.³⁶ Many see Harry J. Anslinger, who had aggressively enforced the Harrison Act, as the chief villain in the war against marijuana.³⁷ As I have written elsewhere, “Anslinger’s appeal to racism and hysteria was unabashed.”³⁸ He and other proponents of the Marijuana Tax act argued that marijuana caused criminal and violent behavior.”³⁹ During hearings on the act, he claimed, without scientific evidence, that it was addictive and produced “in its users insanity, criminality, and death.”⁴⁰ While he believed that Hispanics were the largest problem, he also spread tales about African-Americans: his agency reported cases of “colored students” smoking marijuana with white women students and “getting their sympathy with stories of racial persecution.”⁴¹

33. CAL. HEALTH & SAFETY CODE § 11362 (enacted by Chapter 875); see also Tammy L. McCabe, *It’s High Time: California Attempts to Clear the Smoke Surrounding the Compassionate Use Act*, 35 MCGEORGE L. REV. 545 (2004).

34. 21 U.S.C.A. § 801 (West 1999) (prohibiting intrastate cultivation and distribution of marijuana); *Gonzales v. Raich*, 545 US 1 (2005) (holding that 21 U.S.C.A. § 801 does not violate the Commerce Clause); see also Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707 (1998).

35. See *United States v. Oakland Cannibis Buyer’s Co-op*, 532 U.S. 483, 486 (2001) (holding that there is no medical necessity exception to the Federal Controlled Substance Act’s prohibitions on manufacturing and distributing marijuana).

36. RICHARD LAWRENCE MILLER, *THE CASE FOR LEGALIZING DRUGS* 99 (Praeger Publishers 1991).

37. *Id.*

38. Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 749 (1998).

39. See Miller, *supra* note 35, at 99.

40. Charles Whitebread, Speech to the California Judges Association 1995 Annual Conference: The History of the Non-Medical Use of Drugs in the United States available at <http://www.druglibrary.org/schaffer/History/whiteb1.htm> (last visited May 21, 2009).

41. See Miller, *supra* note 35, at 99.

Despite Anslinger's anti-marijuana stance, until the 1970's, marijuana use and prosecution remained out of the main stream. That changed with the wholesale use of marijuana by college students and draft protestors.⁴² At first, widespread use among the middle class seemed to presage softening of federal law. For example, the National Commission of Marijuana and Drug Abuse, a commission appointed by President Nixon, recommended that federal law effectively de-criminalize possession of marijuana for personal use.⁴³ Nixon repudiated the commission's recommendation.⁴⁴

Instead of following the commission's recommendation, Nixon urged adoption of federal anti-drug legislation. The resulting legislation, the Controlled Substances Act, classifies marijuana as a Schedule I drug, one lacking an "accepted medical use" with "a high potential for abuse."⁴⁵

For a short period, de-criminalizing marijuana seemed plausible. President Carter recommended decriminalizing it.⁴⁶ But presidents since then have continued to work at appearing tough on crime, with resulting increases in the numbers of offenders in prison for drug related crimes.⁴⁷

The get-tough-on-drugs mentality is evident in litigation surrounding efforts to reschedule marijuana, thereby allowing its medical use. A review of NORML's efforts to have marijuana reclassified demonstrates the long standing position of federal drug enforcement agencies. Beginning in 1972, NORML began the process to get marijuana rescheduled. Subsequent litigation took twenty years.⁴⁸ Drug enforcement

42. See Whitebread, *supra* note 40 (noting that in 1969 Congress passed the Dangerous Substances Act, which actually lowered the penalties for possession of marijuana).

43. See generally First Report of National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding (GPO 1972) at 152 (stating that "[t]he Commission recommends only the following changes in federal law: Possession of marihuana for personal use would no longer be an offense, but marihuana possessed in public would remain contraband subject to summary seizure and forfeiture" and "[c]asual distribution of small amounts of marihuana for no remuneration, or insignificant remuneration not involving profit would no longer be an offense").

44. LESTER GRINSPOON, M.D., MARIHUANA RECONSIDERED 193 n.3 (2d ed. 1977).

45. 21 U.S.C. §812(b)(1)(A) (1994).

46. MICHAEL POLLAN, THE BOTANY OF DESIRE: A PLANT'S-EYE VIEW OF THE WORLD 137 (2002). Apparently, President Carter's sons and even his drug czar smoked marijuana. *Id.* at 125.

47. See CDCR.ca.gov, California Department of Corrections and Rehabilitation Offender Information Services, *Prison Census Data for the Year 1978*, tbl. 5A, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALP_RISd1977_78.pdf (stating 73 as the total marijuana offenses for 1978); *Prison Census Data for the Year 1988*, tbl. 10 available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALP_RISd1988.pdf (stating 966 as the total marijuana offenses for 1988); *Prison Census Data for the Year 1998*, tbl. 33, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALP_RISd1999.pdf (stating 1,021 as the total marijuana offenses for 1998); *Prison Census Data for the Year 2006*, tbl. 2, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENS_USd0612.pdf (stating 1,355 as the total marijuana offenses for 2006).

48. See Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 752-55 (1998).

administrators used various procedural tactics to prevent a hearing on the issue, but were reversed by the D.C. Court of Appeals.⁴⁹ Eventually, after a two year hearing with a record “nearly five feet high,”⁵⁰ the judge recommended that marijuana be rescheduled.⁵¹ The DEA administrator again rejected the recommendation, an order eventually affirmed on appeal.⁵²

For over a decade, the government did run a Compassionate Use Program. Between 1976 and 1988, the agency provided marijuana to about a dozen approved patients.⁵³ With the onset of the AIDS epidemic, and a dramatic increase in applications for the program, the FDA suspended the program for further review.⁵⁴ Because the program sent a message that seemed contrary to the first President Bush’s public opposition to illegal drugs, the government cancelled the program in 1992.⁵⁵ President Clinton’s administration did not revive the program.⁵⁶ Further, arrests for marijuana increased during Clinton’s term in office.⁵⁷

Despite the second President Bush’s strong state’s rights rhetoric,⁵⁸ his administration vigorously opposed medical marijuana. Federal law enforcement frequently raided cannabis clubs in California and elsewhere.⁵⁹ Further, while many conservatives have

49. See Nat’l Org. for the Reform of Marijuana Laws (NORML) v. Drug Enforcement Admin., 559 F.2d 735, 741-44 (D.C. Cir. 1977) (detailing the procedural history); see also Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 753 (1998).

50. [57 Fed. Reg. 10,499 \(1992\)](#).

51. See Drug Enforcement Agency, In re Marijuana Rescheduling Petition, Docket No. 86-22, Opinion, Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of Administrative Law Judge, Sept. 6, 1988, at 67 (on file with the University of Michigan Journal of Law Reform) Judge Young noted that other federal agencies, such as the FDA, would likely have to act even if the DEA rescheduled the drug to Schedule II to make marijuana readily available.

52. See *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131 (D.C. Cir. 1994).

53. See Charles Seabrook, *Federal Cut Causes Problems in Medical Marijuana Problems*, Atlanta Const., Oct. 31, 1992, at E1.

54. Cf. Paul Cotton, *Government Extinguishes Marijuana Access*, 267 JAMA 2573, 2573 (1992) (stating that the timing of the cancellation of the program was influenced by the influx of applications from AIDS patients).

55. See John Bowersox, *PHS Cancels Availability of Medical Marijuana*, 84 J. NAT’L CANCER INST. 475 (1992).

56. CNN.com, *Medical Marijuana Rules Criticized* (Nov. 30, 1999), <http://www.cnn.com/HEALTH/alternative/9911/30/medical.marijuana/index.html>; NewsBriefs, *Clinton Administration Sticks with Bush Policy; Won’t Return to Ford-Reagan-Carter Policy* (Aug. 1994), <http://www.ndsn.org/august94/medmj.html>.

57. NORML, *Marijuana Arrests Hit Record Levels; Over Four Million Arrested for Marijuana During the Clinton Administration* (Oct. 18, 2000), http://norml.org/index.cfm?Group_ID=4219

58. See, e.g., Thomas B. Edsall, *Huckabee Embraces Confederate Flag to Woo White Evangelicals*, HUFFINGTON POST, Jan. 18, 2008, http://www.huffingtonpost.com/2008/01/18/huckabee-embraces-confede_n_82199.html (stating that George W. Bush, like presidential candidate Mike Huckabee, “said that the confederate flag issue is a matter of states’ rights . . . and should not fall under federal jurisdiction”).

59. See David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, N.Y. TIMES, Mar. 19, 2009, at A20 (“In the Bush administration, federal agents raided medical marijuana distributors that violated federal statutes even if the dispensaries appeared to be complying with state laws.”).

railed against the sweeping scope of the Supreme Court's Commerce Clause jurisprudence,⁶⁰ the Bush Justice Department argued an expansive view of the Commerce Clause⁶¹ in its efforts to overrule the Ninth Circuit's decision finding that cultivation of a small amount of marijuana for medical use had an insufficient effect on interstate commerce to allow its criminalization.⁶² In *Gonzales v. Raich*,⁶³ the Supreme Court agreed with the Bush administration in reliance, in part, on *Wickard v. Filburn*,⁶⁴ probably the Court's broadest interpretation of the Commerce Clause.

As a Senator, Barack Obama opposed federal legislation that would have furthered federal interference with cannabis clubs.⁶⁵ As a candidate, Obama promised to end raids on cannabis clubs.⁶⁶ Early in his administration, President Obama seems committed to that position, as does Attorney General Holder.⁶⁷ But that is a far cry from endorsing the legalization of marijuana. Indeed, in a press conference in early 2009 where the president took questions submitted on-line, he quickly distanced himself from legalizing marijuana.⁶⁸

Further, with far more pressing agenda items, notably two wars and an economy in the tank, Obama is unlikely to take on a divisive issue like legalizing drugs. Imagine the cry from the radio talk show hosts about the destruction of Western Civilization (despite some of their own problems with illegal drug use)! Despite increased public support for legalization, that support has not been through the crucible of a hard advertising campaign that would portray the risks of marijuana use.⁶⁹

60. See Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison*, 11 WM. & MARY BILL RTS. J. 403, 430 (2002) (stating that "whenever a local activity has any 'effect' on interstate activity, the Sweeping and Supremacy Clauses give Congress the push it needs to sweep that activity under the Commerce Clause").

61. U.S. CONST. art I, § 8, cl. 3.

62. *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003).

63. 545 U.S. 1 (2005).

64. 317 U.S. 111 (1942).

65. See Obama: Decriminalize pot, THE WASHINGTON TIMES, Jan. 31, 2008, <http://www.washingtontimes.com/news/2008/jan/31/obama-decriminalize-pot/> (stating that last fall during a nationally televised presidential debate, Sen. Barack Obama hesitantly raised his hand and joined with most of his Democratic rivals to declare that he opposed decriminalizing marijuana).

66. See Ryan Grim, *Holder Vows To End Raids On Medical Marijuana Clubs*, HUFFINGTON POST, Feb. 26, 2009, http://www.huffingtonpost.com/2009/02/26/holder-vows-to-end-raids_n_170119.html (stating that Holder's declaration is a fulfillment of a campaign promise by President Barack Obama, and marks a major shift from the previous administration); see also, Tommy Christopher, *DEA Marijuana Raid Kills Buzz From Obama Administration's New Policy*, POLITICS DAILY, Mar. 31, 2009, <http://www.politicsdaily.com/2009/03/31/dea-marijuana-raid-kills-buzz-from-obama-administrations-new-pol/> (stating that Obama pledged to end federal raids on Cannabis Clubs during his campaign).

67. Stephen Gutwillig, *A Fleeting Change in Pot Policy?* L.A. TIMES, Mar. 5, 2009, available at <http://www.latimes.com/news/opinion/la-oe-gutwillig-imler5-2009mar05,0,1714462.story> (last visited May 21, 2009).

68. Press Release, Remarks By The President At "Open For Questions" Town Hall (Mar. 26, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Open-for-Questions-Town-Hall/ (last visited May 21, 2009).

69. See Raymond L. Goldstein, Karen Goldstein, James H. Swan & Wendy Clemena, *Harry and Louise and Health Care Reform: Romancing Public Opinion*, 26 J. HEALTH POL. POL'Y & L. 1325 (2001) (discussion the impact of the "Harry and Louise" campaign ads which claimed the Clinton plan limits

Absent legalization of marijuana at the federal level, California's efforts to legalize and tax marijuana are likely to fail. AB 390 does propose that state and local law enforcement not cooperate with federal law enforcement agents, if efforts to gain federal approval fail.⁷⁰ But that may be small comfort. Because state law cannot trump federal law, the state cannot assure growers that their conduct is lawful.⁷¹ Producers would face a difficult dilemma: even if the current administration takes a position of benign neglect, registering as a grower would leave a paper trail to the growers.

Apart from any sympathy that the president may have for reform, the federal law enforcement bureaucracy is not likely to give up its interest in criminalizing marijuana production.⁷² Thus, even if growers avoid prosecution during the Obama presidency, all bets would be off during future administrations. And by signing up with the state, growers would now be out in the open, easy prey for drug enforcement agents in the future. Further, absent a clear commitment from the current administration, California producers would remain subject to arrest for violating federal law in the immediate term as well.

As indicated, the federal government will not legalize marijuana any time soon. While the current administration takes a benign view towards prosecuting marijuana, that may not be enough to create incentive for producers to register as producers, were AB 390 to pass.

IV. The debate

Despite my doubts about the federal government's position on marijuana, the growing interest in legalizing marijuana begs further inquiry. On the assumption that California were to pass AB 390, would it work?

In April, 2009, the Sacramento Bee published an op-ed piece that I wrote on AB 390. This essay expands on the thesis that I advanced there. At core, I argued that claims by proponents and opponents of AB 390 overstated the benefits and harm that would result from passage of the bill.⁷³ As I argue here, mine is a call for careful examination of the issues surrounding legalizing marijuana. My fear is that the debate will be dominated by

choice, sponsored by the Health Insurance Association of America (HIAA), during the 1993–1994 health care reform debate.

70. AB 390, 2009 Leg., 2009–2010 Sess. (Cal. 2009). One should not discount the importance of that provision. Some have criticized the current state of affairs where cooperating law enforcement choose whether to proceed under federal or state law, based on the differing severity of the punishment. *See, e.g.*, Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783 (2004).

71. *Gonzales v. Raich*, *supra* note 34.

72. No doubt, a government agency like the DEA has a vested interest in maintaining marijuana laws on the books. By comparison, some commentators believe that agents responsible for enforcing Prohibition backed efforts to criminalize marijuana to maintain their power and influence.

73. Michael Vitiello, Op-Ed., *Should Marijuana be Legal?* SACRAMENTO BEE, Apr. 5, 2009, available at <http://www.sacbee.com/325/story/1754154.html> (last visited May 21, 2009).

the passionate advocates for prohibition or legalization.⁷⁴ At the end of the day, legalizing marijuana does create risks.⁷⁵ But many of those risks, like widespread use by teenagers, already exist.⁷⁶ And thoughtful legislation can reduce many of those risks. But creating thoughtful legislation is hard work, the product of genuine debate among policy experts, not just vested interests. Further, legalizing marijuana does generate some benefits, including increased revenue.⁷⁷ Whether the benefits outweigh the risks – the question that we ought to be asking – is dependent on careful scrutiny of the risks and benefits. This section does not answer all of the questions that it poses. But it does suggest some of the hard issues that California faces in trying to decide whether to legalize marijuana.

A. Summing up the debate: more heat than light

1. The Good News

The debate about marijuana has become interesting because of the current economic crisis. Californians face a crushing deficit, forcing unpleasant choices.⁷⁸ The requirement of a balanced budget in bad economic times certainly contradicts Keynesian

74. A peek at the comments that my op-ed evoked supports my fear that most of the interest parties are more passionate than rational. Some examples: “No it should not be legalized. But, if it is I guess we will just all go back to the: “STONED AGE”; “It should be legalized to make the Left happy.... and oxycotin should be legalized to make the Right happy”; “Absolutely. How many young people have criminal records for something that should have been legal long ago? This country is on a binge to destroy young people with our draconian drug laws. It has been proven over and over that the drug war is a failure and it only helps those illegally selling it. Just like prohibition, it doesn't work. If people want to do it, they will find a way. Tobacco and alcohol are the real killers and they are legal. Doesn't that make any sense to anyone? MJ doesn't kill people and its effects are completely reversible. It's a drug of youth and those living with physical pain. Legalizing it will save lives. Look what is happening at our border over drugs. Legalize most drugs and regulate them. Stop the big profits for dealers and the violence stops. BUT THAT IS NOT WHAT LAW ENFORCEMENTS WANTS. THEY WANT JOB SECURITY AND DRUG PEDDLERS AND BUYERS ARE EASY BUSTS that keep our prisons overflowing and the taxpayers getting bilked. I would much rather my kid used MJ than alcohol any day of the week. Smoking cigarettes & alcohol have killed many people I know, yet they are legal. Just because we have laws, doesn't mean they are good laws. They are making money for someone.” Sacbee.com, Forums, *available at* <http://www.sacbee.com/forums/?plckForumPage=ForumDiscussion&plckDiscussionId=Cat%3a2159608f-a073-49c3-97ba-1a25b36cf915Forum%3ab9b0b864-1f07-4190-9da5-78ebe1a48caaDiscussion%3affdff4d3-59c8-4fee-b477-e5cb9a5d04ba&plckCategoryCurrentPage=0> (last visited May 26, 2009).

75. *See infra* note 135.

76. *See* National Institute of Drug Abuse, *Monitoring the Future: National Results on Adolescent Drug Use Overview of Key Findings 2008*, 10, *available at* <http://www.monitoringthefuture.org/pubs/monographs/overview2008.pdf> (stating that by 1975, when the majority of young people (55%) had used an illicit drug by the time they left high school. The proportion stood at 47% in 2008”).

77. *See infra* note 84. Proponents tend to ignore some potential increased costs as well. *See infra* note 134.

78. *See* Eric Bailey & Patrick McGreevy, *Poor would be hard hit by proposed California budget cuts*, L.A. TIMES, May 22, 2009, *available at* <http://www.latimes.com/news/local/la-me-budget22-2009may22.0.4603538.story> (last visited May 26, 2009); *see also* Sacbee.com, Editorial: County's choices led to its crisis, *available at* <http://www.sacbee.com/opinion/story/1766518.html> (last visited May 26, 2009).

theory,⁷⁹ but for many states, balanced budgets are a reality.⁸⁰ Cutting education and other social services at a time of need seems especially shortsighted and, in some instances, cruel. California's requirement of a super-majority⁸¹ gives the Republicans veto power over new taxes.⁸² And in recent years, Republicans in California, like elsewhere, have shown great party discipline, remaining virtually in lockstep on refusing to raise taxes.⁸³ In that context, Ammiano's bill may look like a silver bullet.

According to Ammiano's press release, AB 390 "would generate much needed revenue for the state, restrict access to only those over 21, end the environmental damage to our public lands from illicit crops, and improve public safety by redirecting law enforcement efforts to more serious crimes."⁸⁴ Quoting several other public officials, the press release makes the case: marijuana is a significant part of California's economy; it may represent crop worth as much \$14 billion dollars that goes untaxed and widely available. As one of his supporters stated, "it's time to bring this major piece of our economy into the light of day."⁸⁵

A Board of Equalization spokesperson has estimated the value of California's marijuana crop at \$4 billion. Ammiano's bill got a boost from BOE Chairwoman Betty Yee, when she publicly supported AB 390. She estimated that the bill would raise about \$1.3 billion per year (\$990 million from a licensing fee and \$349 million in sales tax).⁸⁶ In addition to income from taxes, proponents contend that the state would receive significant savings in reduced prison costs.⁸⁷

79. See Paul Krugman, Op-Ed., *The Conscience of a Liberal- Slumps and Spontaneous Remission (wonkish)* N.Y. TIMES, Feb. 17, 2009, available at <http://krugman.blogs.nytimes.com/2009/02/17/slumps-and-spontaneous-remission-wonkish/> (last visited May 26, 2009); see also Theatlantic.com, *The Balanced-Budget Debate*, available at <http://www.theatlantic.com/unbound/flashbks/budget/budgetint.htm> (last visited May 26, 2009).

80. NCLS.org, *State Balanced Budget Requirements*, available at <http://www.ncsl.org/programs/fiscal/balreqs.htm> (last visited May 26, 2009).

81. CAL. CONST. art. IV, § 12; see also NCLS.org, *Supermajority Vote Requirements to Pass the Budget*, available at <http://www.ncsl.org/programs/fiscal/supmjbud.htm> (last visited May 26, 2009).

82. See Editorial, *End the supermajority*, L.A. TIMES, Dec. 23, 2008, available at http://www.latimes.com/news/opinion/la-ed-vote23-2008dec23_0,6986978.story (last visited May 26, 2009); see also William M. Welch, *In California's meltdown, misery has long reach*, U.S.A. Today, Feb. 20, 2009, available at http://www.usatoday.com/news/nation/2009-02-19-california-hurting_N.htm (last visited May 26, 2009).

83. See Rushlimbaugh.com, *Attaboy! California Assembly Republicans Refuse to Give In*, Feb. 17, 2009, available at http://www.rushlimbaugh.com/home/daily/site_021709/content/01125107.guest.html (last visited May 26, 2009).

84. Press Release, Tom Ammiano, *Ammiano Proposes Bill To Tax And Regulate Marijuana* (Feb. 23, 2009), available at http://democrats.assembly.ca.gov/members/a13/News_Room/Press/20090223AD13PR01.aspx.

85. *Id.*

86. Betty T. Yee, Chairwoman State Board of Equalization, *Quarterly E-Newsletter*, Jan. 2009-Mar. 2009 *Board of Equalization Marijuana Control, Regulation, and Education Act: Revenue Effect and Assumptions* Feb. 23, 2009. The bill calls for an initial fee of \$5,000 imposed on marijuana growers and then a \$2,500 annual fee in addition to a tax of \$50 per ounce fee. *Id.*

⁸⁷ *Id.*

Unlike previous attempts to legalize or de-criminalize marijuana, Ammiano has captured media interest.⁸⁸ Ammiano's backers include several people already critical of the war on drugs. For example, former Orange County Superior Court Judge James P. Gray, a long time opponent of the war on drugs, has appeared on radio talk shows debating against AB 390's opponents.⁸⁹ In addition to listing his various books, Gray's website includes endorsements of his book on the failed war on drugs from several prominent public figures. The list includes the late Milton Friedman, George Schultz, Adrianna Huffington, and Walter Cronkite.⁹⁰ Main stream publications like the Economist have editorialized in favor of ending the failed war on drugs.⁹¹ Some TV pundits, including Glenn Beck (Fox) and Jack Cafferty (CNN) have questioned the wisdom of the war on drugs.⁹² Many proponents advance the financial wisdom of legalization, not just personal choice arguments.

Proponents also focus on prison savings and better allocation of law enforcement resources. Proponents project a savings of about a billion dollars based on estimates of the number of offenders in California's prisons for marijuana offenses.⁹³ While proponents and opponents clash on whether any offenders are currently in California's prisons for possession of marijuana,⁹⁴ no one denies that, statewide, law enforcement officials arrest and prosecute many offenders for marijuana offenses, with many of them ending up in county jails.⁹⁵ Estimates vary on the amount of those savings.⁹⁶ Further, proponents argue that even if few, if any, offenders are in prison merely on possession of marijuana charges, many end up back in prison for parole violations based on failed urine tests that show marijuana usage.⁹⁷ They also contend that AB 390 would allow

88. Joe Garofoli, *Without co-sponsor, Ammiano's pot bill lagging*, S.F. CHRON., Apr. 12, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2009/04/12/MNKJ170434.DTL&hw=Ammiano&sn=003&sc=691> (last visited May 26, 2009).

89. See Judgejimgray.com, Related Videos and Audio, <http://www.judgejimgray.com/grayvideo.php> (last visited May 26, 2009); see also KQED.org, Michael Krasny, *Legalizing Marijuana*, available at <http://www.kqed.org/epArchive/R903020900> (last visited May 26, 2009).

90. Judgejimgray.com, *Why Our Drug Laws Have Failed and What We Can Do About It*, <http://www.judgejimgray.com/whyourdruglawshavefailed.php> (last visited May 26, 2009).

91. Economist.com, *How to stop the drug wars*, THE ECONOMIST, Mar. 5, 2009, available at http://www.economist.com/opinion/displaystory.cfm?story_id=13237193 (last visited May 27, 2009).

92. See Garofoli, *supra* note 88.

93. KQED.org, Forum with Michael Krasny, *Legalizing Marijuana*, (NPR radio broadcast Mar. 2, 2009), available at <http://www.kqed.org/epArchive/R903020900> (last visited May 26, 2009) (Debate between Gray and Lovell on Forum).

94. *Id.*

95. NORML, *Marijuana Arrests For Year 2007: 872,721 Tops Record High- Five Percent Increase over 2006* (Sep. 15, 2008), http://www.norml.org/index.cfm?Group_ID=7698 (last visited May 27, 2009) (citing approximately 872,000 arrests related to marijuana and 775,000 of those for possession).

96. NORML suggests that the savings would be "over \$170 million in law enforcement costs for arrest, prosecution, trial and imprisonment of marijuana offenders." DALE GIERINGER, CALIFORNIA NORML REPORT, Feb. 2009, available at http://www.canorml.org/background/CA_legalization2.html (stating the norm as ten joints a day for heavy marijuana smokers). Others, like the BOE report, suggest a higher figure, as does Judge Gray. KQED.org, Michael Krasny, *Legalizing Marijuana*, available at <http://www.kqed.org/epArchive/R903020900> (last visited May 26, 2009) (Debate between Gray and Lovell on Forum).

97. See KQED.org, Forum with Michael Krasny, *supra* note 94.

reallocation of law enforcement resources away from fighting marijuana towards fighting more serious criminal conduct.⁹⁸ As summarized by a photograph on California NORML's webpage, someone is arrested for a marijuana offense every 45 seconds.⁹⁹

Beyond these significant savings, proponents contend that legalizing marijuana would “declaw powerful and violent Mexican drug cartels.”¹⁰⁰ As argued in *The Economist*, “far from reducing crime, prohibition has fostered gangsterism on a scale that the world has never seen before. According to the UN’s perhaps inflated estimate, the illegal drug industry is worth some \$320 billion a year.” Some proponents analogize to the post-Prohibition era, when legalizing alcohol weakened the power of mobsters around the country.¹⁰¹ In addition to undercutting the drug cartels, legalizing marijuana may reduce corruption among law enforcement officials in the United States as well.¹⁰²

Finally, the medical marijuana experiment seems to have worked. That is, many Americans and especially Californians have seen that marijuana can be made available, regulated and used responsibly.¹⁰³ That fact, in combination with the economic arguments and the demographic changes, helps to explain why increasing numbers of Americans and 54% of Californians favor legalizing marijuana.¹⁰⁴

2. *The Even Better News*

The previous section highlights the arguments surrounding AB 390. But the proponent literature includes an even rosier picture of the post-legalized world. For example, NORML, the best known and probably oldest organization advocating legalization, makes some sweeping claims about the benefits flowing from legalization. A brief summary follows.

Beyond the tax revenue, California NORML sees additional benefits. It argues that beyond retail sales of marijuana, the total economic impact should include “spinoff industries such as coffeehouses, tourism, and industrial hemp.”¹⁰⁵ Analogizing to the wine industry, that organization argues that legalized marijuana could generate three times as much economic activity as its retail sales. “If the marijuana industry were just one-third the size of the wine industry, it would generate 50,000 jobs and \$1.4 billion in wages, along with additional income and business tax revenues for the state.”¹⁰⁶ It estimates that industrial hemp could become a business comparable to the \$3.4 billion

98. *Id.*

99. California NORML, <http://www.canorml.org/> (last visited May 27, 2009).

100. See Marinucci, *supra* note 10.

101. See *How to Stop the Drug Wars*, *supra* note 25.

102. See Press Release, *FBI: Federal Probation Officer Charged with Drug Trafficking and Bribery*, ENEWS PARK FOREST, July 17, 2009, available at http://www.enevspf.com/index.php?option=com_content&view=article&id=8946:fbi-federal-probation-officer-charged-with-drug-trafficking-and-bribery&catid=88888909&Itemid=88888905 (stating a United States Probation Officer has been arrested and charged with drug trafficking and bribery).

103. See Marinucci, *supra* note 10.

104. *Id.*

105. See Gieringer, *supra* note 13.

106. *Id.*

cotton industry in California.¹⁰⁷ Meanwhile, hemp is better for the environment than is cotton. Growers need fewer pesticides for hemp than for cotton and the fields are virtually weed free after harvest.¹⁰⁸

CA NORML recognizes that legalizing marijuana will drive down the price. But the decrease would be offset by increased consumption.¹⁰⁹ NORML also argues that marijuana is far less destructive than alcohol and tobacco.¹¹⁰ As a result, one might expect lower human and health care costs associated with marijuana use than with alcohol and tobacco use.

Further, although not highlighted by proponents of AB 390, some commentators argue that tax revenue will increase from a second source. Employees of illegal drug dealers do not report income and, as a result, do not pay taxes on that income. Legalizing marijuana production and sales would add revenue from legal workers through their state and federal taxes.¹¹¹

3. *The Bad News*

Many critics of AB 390 rehash traditional arguments against legalizing marijuana.¹¹² But to be effective in the current debate surrounding AB 390, they must start by directly rebutting the claims that legalization of marijuana will increase revenue and reduce violent gang activity.¹¹³ Those are the kinds of issues that have increased public support for legalization.¹¹⁴ For example, in a debate that may presage future heated discussions about AB 390,¹¹⁵ John Lovell, a lobbyist for the California Police Officers' Association,

107. *Id.* Some true believes in hemp claim that, hemp, had it not been made illegal, would have brought the United States out of the Great Depression. See TreeHuggersofAmerica.org, <http://www.treehuggersofamerica.org/hemp.php>.

108. NORML.org, NORML Statement on the Cultivation of Industrial Hemp, http://norml.org/index.cfm?Group_ID=5447 (last visited May 28, 2009).

109. See Gieringer, *supra* note 13.

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

111. See MIRON, *supra* note 18 (stating that the costs required to enforce prohibition, and the transfers that occur because income in a prohibited sector is not taxed, are relevant to rational discussion of the policy on legalization).

112. See Sanders, *supra* note 19. The article quotes Assemblyman Tom Berryhill on legalizing marijuana stating, "I think it's a slippery slope." *Id.*

113. See KQED.org, Forum with Michael Krasny, *supra* note 94 (Comment by Lovell).

114. See Sanders, *supra* note 19 (Comment by CAW916). Further, Lovell contends that polls do not accurately reflect public preference on legalizing marijuana. He cites rejection of Proposition 5 in the most recent election as evidence of the public's truer sentiment on legalizing marijuana. See KQED.org, Forum with Michael Krasny, *supra* note 94 (Comment by Lovell). Lovell's position on Proposition 5 ignores the fact that the proposition included a number of other provisions, including one that would reduce parole for methamphetamine dealers. The opponents of Proposition 5 labeled the proposal a Drug Dealers' Bill of Rights. Hence, concluding that Californians oppose decriminalizing marijuana based on the rejection of Proposition 5 is questionable at best.

115. KQED.org, Forum with Michael Krasny, *supra* note 94 (Comment by Lovell) (some sharp rhetoric used by Lovell, calling the statement that there are thousands of felons in prison for marijuana possession a "base canard" and that legalizing marijuana will reduce violence among drug cartels "the height of demagoguery." *Id.*

has argued that the estimates of revenue and prison and law enforcement savings are illusory.

On the question of revenue, Lovell contends that the street price for illegal marijuana will always be less than the price for legally purchased marijuana. His contention is based on the fact that legal marijuana will always carry a \$50 surcharge, making it more expensive than the street variety.¹¹⁶ Further, he contends that legal producers will have to comply with various state regulations, like Cal OSHA and minimum wage laws,¹¹⁷ driving up their costs.

Lovell, like the Office of National Drug Control Policy,¹¹⁸ rebuts claims that our prisons house thousands of felons convicted of possession of marijuana.¹¹⁹ He insists that no one is in prison for smoking marijuana.¹²⁰ While he cannot contend that marijuana offenders do not end up in jail,¹²¹ he argues that the only marijuana offenders in prison are those involved in drug trafficking.¹²² Further, according to Lovell, parole officers do not “roll over” parolees merely for urine tests indicating marijuana use.¹²³

Opponents see no savings in law enforcement efforts or in a reduction of violence among drug cartels. Lovell argues, for example, that police are not targeting small users of marijuana but instead more serious criminal actors.¹²⁴ Offenders may be charged with marijuana offenses when the police arrest them for other more serious charges. Because a prosecutor may end up offering a plea agreement for a possession offense, rather than a more serious drug related offense or other criminal offense, some offenders who appear in the statistics as marijuana offenders are in fact more serious criminals.¹²⁵

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Whitehousedrugpolicy.gov, Office of National Drug Control Policy, Who’s Really in Prison for Marijuana, http://www.whitehousedrugpolicy.gov/publications/whos_in_prison_for_marij/whos_in_prison_for_marij.pdf (last visited May 28, 2009).

¹¹⁹ KQED.org, Forum with Michael Krasny, *supra* note 94.

¹²⁰ *Id.* During his debate on Forum, Lovell called assertions that our prisons house thousands of individuals convicted of possession of marijuana a “base canard.” *Id.* When questioned about parole violators who failed urine tests, he contended that parole officers never “roll” a parolee merely for a failed urine test that showed marijuana use. Somewhat inconsistently, he also argued that those parolees who were returned to prison for marijuana offenses were in prison not for the marijuana offense but for the original felonious conduct. *Id.*

¹²¹ See AG.CA.gov, <http://ag.ca.gov/cjsc/datatabs.php> (revealing that for example, in 2007, almost 58,000 individuals were arrested for misdemeanor marijuana offenses).

¹²² KQED.org, Forum with Michael Krasny, *supra* note 94.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Whitehousedrugpolicy.gov, Office of National Drug Control Policy, Who’s Really in Prison for Marijuana, *supra* note 118 at 9 (stating that “in reality, the vast majority of inmates in state and federal prison for marijuana have been found guilty of much more than simple possession. Some were convicted for drug trafficking, some for marijuana possession along with one or more other offenses. And many of those serving time for marijuana pled down to possession in order to avoid prosecution on much more serious charges”).

Drug cartels will continue to present a problem even if California legalizes marijuana. That is so because they are involved in the drug trade generally, not just in the marijuana trade.¹²⁶ Thus, even if they no longer dominate the marijuana trade (something that some, like Lovell, contest), they will continue to engage in violence as they fight over territory in which to distribute other illegal drugs.¹²⁷

Opponents to legalizing marijuana also question whether society ought to legalize another mind-altering drug.¹²⁸ Some of the debate is philosophical: for example, Lovell criticizes libertarians as narcissistic, unwilling to accept their social responsibilities to one's neighbors.¹²⁹ He is critical of alcohol use as well (one of the other mind-alerting drugs he targets as a social evil).¹³⁰ While that kind of neo-prohibitionist philosophy is not likely to gain traction with many Americans as they consume high quality wine,¹³¹ critics point out that problem drinking is already a significant national problem, leading to more than 100,000 deaths a year and costing an estimated \$276 billion a year.¹³² Alcohol costs businesses in the hundreds of billions in lost productivity, premature death and crime.¹³³ Further, a report by the National Center on Addiction and Substance Abuse at Columbia University focused on the billions of dollars that states spend on coping with the fallout of drug and alcohol abuse: for example, the report estimated that states spend 96 cents of each dollar spent on substance abuse and addiction on "shoveling up" the wreckage that they cause, including the abuse visited on children of abusing parents.¹³⁴ Legalizing marijuana, and thereby presumably increasing its use, can only exacerbate these problems.

126. KQED.org, Forum with Michael Krasny, *supra* note 94.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. While other nationals still consume more wine per capita, American recently overtook France as the largest consumer of wine in the world. Associated Press, *Americans top the world in winedrinkng as global consumption shrinks*, L.A. TIMES, Apr. 8, 2009, available at <http://www.latimes.com/business/la-fi-wine8-2009apr08,0,3819303.story> (last visited May 29, 2009).

132. Tenth Special Report to Congress on Alcohol and Health, at xi (2000), available at <http://pubs.niaaa.nih.gov/publications/10report/intro.pdf> (last visited May 29, 2009) (stating that "because alcohol use problems exact such a personal, social, and economic toll on the American people—an estimated 100,000 lives and \$184.6 billion annually—the scientific progress described in the Tenth Special Report is heartening"). Many of the drivers in alcohol related auto accidents have evidence of alcohol and marijuana in their blood. Whitehousedrugpolicy.gov, Office of National Drug Control Policy, Marijuana Myths & Facts, at 5, http://www.whitehousedrugpolicy.gov/publications/marijuana_myths_facts/marijuana_myths_facts.pdf (last visited May 29, 2009) (stating that "another study looked at data concerning shock-trauma patients who had been involved in traffic crashes. The researches found that 15 percent of the trauma patients who were injured while driving a car or motorcycle had been smoking marijuana, and another 17 percent had both THC and alcohol in their blood").

133. Ensuring Solutions to Alcohol Problems, <http://www.ensuringsolutions.org/> (last visited May 29, 2009).

134. The National Center on Addiction and Substance Abuse at Columbia University (CASA), Shoveling Up II: The Impact of Substance Abuse on Federal, State, and Local Budgets, available at <http://www.casacolumbia.org/ViewProduct.aspx?PRODUCTID=3594d7eb-1e01-4c31-bf01-e363d92053ed> (last visited May 29, 2009).

Because of the harm to children and other social costs, opponents of marijuana point to various studies raising serious health concerns for users of marijuana.¹³⁵ Various studies, mostly from abroad where researchers have been able to study marijuana more freely, suggest an array of health problems caused by smoking marijuana. Studies show that marijuana leads to “memory loss, distorted perception, trouble with thinking and problem-solving, and anxiety. Students who use marijuana may find it hard to learn, thus jeopardizing their ability to achieve their full potential.”¹³⁶ Especially among young people, marijuana can lead to various mental health problems, including depression, anxiety and panic attacks.¹³⁷ Regular users between 12 and 17 years old are at a much greater risk than non-users of having thoughts about committing suicide.¹³⁸ Swedish researchers have linked marijuana use to an increased risk of schizophrenia.¹³⁹ That is consistent with findings by other researchers that correlate marijuana use with serious mental illness among adults.¹⁴⁰ Marijuana, according to the Office of National Drug Control Policy, is associated with similar problems to alcohol abuse, like poor academic and job performance.¹⁴¹ According to the Office of National Drug Control Policy, regular marijuana users often experience the same kinds of lung related problems experienced by cigarette smokers.¹⁴²

Again, according to opponents, legalizing marijuana will only increase the human and social costs. Lovell argues that AB 390 will increase marijuana use exponentially. He relies on a study from the Midwest, indicating that when legislation allowed wine to be sold in grocery stores (making it more readily available to consumers), wine consumption went up 700% in the first year, and 300% over time.¹⁴³ Not only will use go up among adults, but because AB 390 reduces penalties for selling drugs to teenagers, their use will also increase.¹⁴⁴

Thus, according to critics, legalizing marijuana will lead to increased hardship and damage. Because legal marijuana will be more expensive than the illegal product, AB 390 will not provide revenue and will not address prison overcrowding. Instead, the bill is a drug dealers’ bill of rights.¹⁴⁵

B. Sorting through the debate: a healthy dose of agnosticism

135. Whitehousedrugpolicy.gov, Office of National Drug Control Policy, Marijuana Myths & Facts, *supra* note 132 at 3.

136. *Id.*

137. *Id.* at 4.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 6.

142. *Id.*

143. KQED.org, Forum with Michael Krasny, *supra* note 94.

144. *Id.*

145. *Id.* Opponents of Proposition 5 such as John Lovell had used the same line in helping to defeat the proposition, calling it the “Drug Dealers’ Bill of Rights” because it shortens parole for meth dealers and other drug felons from 3 years to 6 months. The Rock Group Youth Community.com, College & Career Guide to the Polls: Proposition 5, Oct. 28, 2008, *available at* <http://www.trgyc.com/cc/2008/10/28/ccs-guide-to-the-polls-prop-5/> (last visited May 29, 2009).

Sorting through charges and countercharges presents a daunting task. That is so for a number of reasons. Good data are hard to find, making an honest assessment of costs and benefits difficult.¹⁴⁶ Further, proponents and opponents seldom engage directly on the same point. Like the clichéd ships passing in the night, the two sides of the debate often fall back on familiar themes that are not fully responsive to each others' main concerns.¹⁴⁷ At a minimum, a healthy dose of skepticism may bring clarity to the debate.

1. The economic costs and benefits from the marijuana tax

Assessing claims of cost savings and increased revenues may be the most important aspect of the debate for many Californians. Ammiano's bill has traction because of its promised economic benefits. Whether AB 390 or legalization of marijuana results in net economic benefits is a close question and depends on many unexamined assumptions that need to be addressed. The current debate ignores many salient issues.

Opponents contend that illegal marijuana would always be cheaper than the legal product because the sellers of the illegal product would not have to pay a licensing fee and a \$50/ounce tax and because legal producers would have to pay workers the minimum wage and comply with various safety regulations.¹⁴⁸ Further, they contend that California would not experience a reduced prison population because no one is in prison on possession of marijuana charges.¹⁴⁹ And, according to Lovell, law enforcement priorities would not change.¹⁵⁰

146. Opponents and proponents cite "scientific" studies that support their respective positions. Compare Drug Policy Alliance Network, *Myths and Facts About Marijuana*, available at <http://www.drugpolicy.org/marijuana/factsmyths/> (citing five myths about the harm caused by marijuana that are rebutted by scientific data) with National Institute on Drug Abuse, Research Report Series: Marijuana Abuse, available at <http://www.nida.nih.gov/ResearchReports/Marijuana/default.html> (citing studies demonstrating various risks associated with marijuana use).

147. See Whitehousedrugpolicy.gov, Office of National Drug Control Policy, Who's Really in Prison for Marijuana, *supra* note 118 at 31 (stating that "marijuana legalizers claim that thousands of people are imprisoned for marijuana possession. Implicating that these inmates are otherwise law-abiding individuals arrested for nothing more than smoking a joint. These legalization proponents make their case by lumping together all marijuana defendants regardless of the quantities involved and the nature or seriousness of the conviction. In doing so, they blur the critical distinction between "simple possession" a low-level criminal offense—and "simply possessing," a vague, all-encompassing term that can mean any possession, including felony amounts. They also overlook the fact that many of those technically serving time for marijuana possession were actually sent to prison on much more serious charges. Claims about disproportionately harsh sentences for those who violate marijuana laws divert attention from the key point, which is this: The overwhelming majority of people incarcerated for marijuana offenses are not occasional, casual, or first-time users. Rather they are criminals who have been found guilty of trafficking, growing, manufacturing, selling, or distributing the drug, or who were convicted of multiple offenses that happened to include a marijuana charge").

148. See Sanders, *supra* note 19; see also KQED.org, Forum with Michael Krasny, *supra* note 117.

149. See KQED.org, Forum with Michael Krasny, *supra* note 94 (comment by Lovell); see also Whitehousedrugpolicy.gov, Office of National Drug Control Policy, Who's Really in Prison for Marijuana, *supra* note 125.

150. See KQED.org, Forum with Michael Krasny, *supra* note 124.

The argument is flawed in part. It ignores basic market principles: the price of illegal marijuana reflects the cost of doing business and that cost includes the risk of being caught, bribes paid to avoid detection, and the cost of muscle. Further, many buyers would be willing to pay a premium to know the quality of the marijuana, to deal with a legitimate business person without having to fear being ripped off,¹⁵¹ and to avoid the hassle of the illegal trade. While I could find no data on labor costs for workers in the illegal marijuana business, one would guess that illegal workers would make more than would employees of a legal marijuana producer because risk is usually a factor in setting wages.¹⁵² But depending on policing decisions, the cost of doing business may go down.

Whether illegal drug dealers' costs of doing business would remain the same would depend on the level of enforcement of marijuana laws if AB 390 were to pass. Without enforcing the laws against unregistered producers, California would not get the promised benefits. Thus, if proponents of legalization are correct that California would see a shift in law enforcement priorities away from the marijuana trade to more serious crimes,¹⁵³ promises of economic benefits for the state would become illusory. Without strenuous enforcement, illegal dealers' costs would go down; that is, the scenario predicted by opponents of legalization (a cheaper illegal product undercutting the legal market) would become more probable. Further, as currently drafted, AB 390 makes illegal drug sales a violation of tax laws, rather than retaining current criminal penalties.¹⁵⁴ Surely, if the goal of the bill is to raise taxes from legal sales, meaningful penalties must be kept in place to deter dealers who skirt the law.

Proponents of AB 390 may overstate the revenue to be generated for another reason. They analogize legalization of marijuana to legalization of alcohol and tobacco, easily regulated and taxed.¹⁵⁵ Further, legalizing alcohol drove bootleggers out of the business.¹⁵⁶ But marijuana is different from good whiskey, wine and tobacco. Making good whiskey and growing one's own tobacco are difficult. While California boasts a good deal of good homemade wine, homemade wine remains a tiny niche with most wine drinkers finding it easier to buy affordable wine. That may be because it is time consuming, at least to do so on a large scale, and because it requires expensive

151. *Drug Dealer Kills Gripping Customer, Police Say*, ST. PETERSBURG TIMES, Aug. 3, 1988, at 4B, available at <http://news.google.com/newspapers?nid=888&dat=19880803&id=g-QMAAAAJ&sjid=NmYDAAAIAAJ&pg=6127,2050913> (last visited June 17, 2009) (where a man who went to his drug dealer's house to complain about the quality of the crack cocaine purchased earlier that day was shot to death by his drug dealer); see also, Bob Mitchell, *Drug Dealer Guilty of Killing Client with Metal Bar*, THE STAR, Sep. 19, 2008, available at <http://register.thestar.com/News/GTA/article/502700> (last visited June 17, 2009) (where a drug dealer was found guilty of killing a customer with a metal bar. The article states the dealer would carry a tire iron used to "dominate" people and "enforce his authority" as a drug dealer).

152. David Samuels, *Dr. Kush*, THE NEW YORKER, July 28, 2008, at 3, available at http://www.newyorker.com/reporting/2008/07/28/080728fa_fact_samuels?currentPage=1 (last visited June 17, 2009) (stating that being a drug courier was risky but it paid good enough to not have to work for half the year. Mules received a cut from five to sixteen per cent of the purchase price).

153. See Press Release, Tom Ammiano, *supra* note 84.

154. AB 390, ch. 4, 2009 Leg., 2009-2010 Sess. (Cal. 2009).

155. See Marinucci, *supra* note 10.

156. See *supra* note 101.

equipment.¹⁵⁷ By comparison, marijuana is easy to grow¹⁵⁸ and at least some current dealers will maintain their clientele, even if they must reduce their prices.¹⁵⁹

Listening to the debate and reading claims by opponents and proponents do not alert Californians to the complexity of the economic issue. Instead, one fears that voters and policy-makers are being fed exaggerated claims by both sides. Californians motivated by the hopes of a cash cow may be disappointed with the results. As this one example suggests, whether AB 390 could possibly deliver on its proponents' promises depends on other public policy choices, including the need to keep pressure on illegal drug dealers.

That is hardly the only uncertainty in the debate. Whether AB 390 would lead to increased marijuana use is also up for grabs.¹⁶⁰ Opponents claim that legalization of marijuana would lead to dramatic increases in marijuana use, a claim that has some, but hardly overwhelming, empirical support.¹⁶¹ Of course, increased use would come with attendant social costs unless marijuana use replaced other substance abuse. Thus, if people merely switched substances, say from alcohol to marijuana, harmful health consequences and impaired work performance may remain constant. Further, if ready availability of marijuana were to increase its use, would more potential cocaine or methamphetamine users switch to marijuana? If so, that would appear to be a net benefit, rather than an additional cost. But if California suddenly had far more impaired citizens, it would face increased medical and other costs associated with "shoveling up" after substance abusers.¹⁶²

Proponents contend that marijuana is already so readily available that marijuana use would not increase, again a claim with modest empirical support.¹⁶³ In fact, some proponents claim that marijuana use might go down and cite the example of the Netherlands, where marijuana use is about half the rate as it is in the United States.¹⁶⁴

157. See Oak Barrel Winecraft, <http://www.oakbarrel.com/winemaking/index.shtml> (last visited May 29, 2009). Some examples of higher end prices of winemaking equipment include a stainless steel tank for \$950, a crusher for \$1,495, a wine press for \$2,495, and yeast for \$16.95. *Id.*

158. Sophia Choi, Marijuana the New Meth in Las Vegas?, NEWS 3, Apr. 21, 2008, available at <http://www.kvbc.com/global/story.asp?S=8204596> (last visited Sep. 7, 2009) (quoting an undercover sergeant stating that marijuana is easy to grow and is a popular drug).

159. John Burnett, *What if Marijuana Were Legal? Possible Outcomes*, NATIONAL PUBLIC RADIO, Apr. 20, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=103276152> (last visited June 17, 2009) (stating that all cannabis legalization has done is force the drug mafias to improvise).

160. See *infra* note 166.

161. See Studyworld.com, Legalizing Marijuana, available at http://www.studyworld.com/newsite/ReportEssay/SocialIssues/drug%5CLegalization_of_Marijuana-382564.htm (stating that there is no strong evidence that legalizing marijuana would increase the use of the drug. In fact, there is some evidence suggesting that drug use under a relaxed legal system might not increase at all).

162. See *supra* note 134.

163. For example, data from the Netherlands suggest that marijuana use went down when that country exempted small quantities of marijuana from its criminal law. See *infra* note 165.

164. Cedro-uva.org, Drug use in the population of 12 years and over in the USA and the Netherlands, 1997 and 2001, available at <http://www.cedro-uva.org/stats/national.nlusa.html> (revealing that in 1997, 32.9 percent of people in the USA had tried cannabis whereas only 15.6 had tried it in the Netherlands and in 2001, 36.9 percent of people in the USA had tried cannabis compared to only 17 in the Netherlands).

Proponents are usually silent on attendant social costs; that is so because the central premise of legalization is that marijuana is so readily available that California already bears those costs. Legalization would not increase attendant social costs. Perhaps. In one sense, proponents want it both ways: Much of the appeal of legalizing marijuana is the found money, the pot of gold to help staunch the economic bleeding in the state's budget. But if legalizing marijuana would not increase its use and might even reduce its use, the economic bonanza would not be as great as promised.¹⁶⁵

Whether legalizing marijuana would lead to increased marijuana use is another “maybe.” Opponents of AB 390 argue that California should not make available another mind-altering substance.¹⁶⁶ Were I convinced that legalizing marijuana would lead to a significant increase in marijuana consumption, I might side with the prohibitionists.¹⁶⁷ At least some of the opponents of legalization see no social value in mind altering drugs.¹⁶⁸ I am less judgmental on that score – unless those whose minds have been altered are driving, for example. Millions of Americans enjoy a glass of wine with dinner and do so in part for the mild mind-altering effect. Further, one might launch a defense of mind-alerting substances, as Michael Pollan has done in *Botany of Desire*,¹⁶⁹ as part of the creative process of many artists and religious experiences of many mystics. While I share some of John Lovell's cynicism about libertarianism, one cannot discount the value that many people place on mild-alteration, something that virtually every civilization has done to some degree.¹⁷⁰

But whether AB 390 would lead to a dramatic increase in marijuana use and abuse is not a foregone conclusion. Legalization would probably result in a period of experimentation by some adults who have never tried marijuana. But most adults who want to try marijuana have done so already: marijuana is readily available in California's illegal market and gray market of medical marijuana.¹⁷¹ The overwhelming majority of those who sample marijuana do not become frequent users.¹⁷² Brain studies demonstrate that many substance abusers choose a substance because it provides a chemical lacking in the

¹⁶⁵ States legalizing gambling have faced a similar dilemma: while recognizing the harm that gambling can cause, states stand to gain economically through increased tax revenues. Those tax revenues are fairly painless for legislators, freed from the need to raise taxes on the wider population. Faced with those temptations, most states aggressively advertise their lotteries.

¹⁶⁶ KQED.org, Forum with Michael Krasny, *supra* note 128.

¹⁶⁷ That is so because substance abuse has significant social and health costs. *See, e.g.,* The National Center on Addiction and Substance Abuse at Columbia University (CASA), *supra* note 134.

¹⁶⁸ KQED.org, Forum with Michael Krasny, *supra* note 130.

¹⁶⁹ *See* MICHAEL POLLAN, *THE BOTANY OF DESIRE: A PLANT'S-EYE VIEW OF THE WORLD*, 157-160 (Random House 2001).

¹⁷⁰ *Id.* at 157.

¹⁷¹ Many Californians smoke marijuana without the immunity from state prosecution provided by Proposition 215. But anyone interested in that protection apparently can find a compliant doctor, willing to make a recommendation allowing the patient to secure “medical marijuana.” As described in *Dr. Kush*, some doctors are willing to recommend marijuana as “treatment” for conditions from which most of us suffer, like stress and anxiety. *See* Samuels, *supra* note 152 at 4.

¹⁷² Cannabishealing.com, Marijuana and Addiction, <http://www.cannabishealing.com/marijuana-addiction.php> (last visited June 26, 2009).

brain in sufficient quantity.¹⁷³ Thus, many schizophrenics are heavy smokers because of the effect of nicotine on their brains.¹⁷⁴ So too, un-medicated depressed individuals are more likely than their non-depressed peers to be heavy smokers. Tobacco seems to provide the brain with dopamine and norepinephrine, neurotransmitters that regulate mood.¹⁷⁵ Marijuana's active ingredients play a similar role in some of our brains. For example, humans have cannabinoid receptors in the brain. People whose brain systems lack cannabinoid receptors are especially receptive to marijuana use.¹⁷⁶ But the large majority of the population would segue back to martinis or red wine even if they were to sample legalized marijuana.

But brain chemistry is not the only factor in substance abuse. Researchers believe that addiction is best explained by a host of bio-psychological factors. For some, genetic and neurotransmitter etiology may predominate, but for others, psychosocial factors predominate.¹⁷⁷ Those factors include temperament (whether the individual is a risk taker or is harm avoidant); mental health problems; self esteem and impulse control; family role-models; cultural norms and mores; local availability, and socio-economic status.¹⁷⁸

A quick look at the factors leading to substance abuse suggest the difficulty that policy-makers face in predicting whether legalizing marijuana would increase its use significantly. By analogy to tobacco use, we do know that more people want to quit when tobacco taxes are increased.¹⁷⁹ Thus, keeping the price of marijuana high may limit access and abuse. But, as I argued above, people can grow their own marijuana relatively easily, unlike tobacco, and keeping the price of legal marijuana high does create incentives for illegal dealers, absent continued enforcement of drug laws against them.¹⁸⁰ Further, at least for some users, part of the lure of a particular substance is the risk associated with its use and the culture surrounding it.¹⁸¹ That may mean that those individuals would not find legalized marijuana a drug of choice – certainly, that may explain fewer people in the Netherlands use marijuana than do in the United States. But

173. MALCOM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE*, 245-246 (Back Bay Books 2002).

174. *Id.* at 245.

175. *Id.* at 245.

176. See MICHAEL POLLAN *supra* note 168 at 166-168.

177. National Institute on Drug Abuse, U.S. Department of Health and Human Services, *Drugs, Brains, and Behavior: The Science of Addiction*, 8-9 (2008), available at <http://www.drugabuse.gov/scienceofaddiction/sciofaddiction.pdf> (last visited June 26, 2009).

178. *Id.* at 7, 9.

179. Brian Lockhart, *Legislators Likely to Hike Cigarette Tax to Help Deficit*, CONNECTICUT POST, June 23, 2009, available at http://www.connpst.com/ci_12676206 (last visited June 26, 2009) (quoting Margaret LaCroix, a Lung Association spokeswoman stating that in the past “when there are significant tax increases, smoking decreases overall three to four percent. A seven or eight dollar pack of cigarettes prices youths out of the market.”).

180. See *supra* note 154.

181. National Institute on Drug Abuse, *supra* note 176 at 6 (stating that one of the reasons people take drugs is to engage in “thrilling” and “daring” behaviors).

those individuals might seek out more dangerous drugs if their motivation is the thrill of the illegality of their conduct.¹⁸²

One important provision in AB 390 is its requirement that proceeds raised under the law “shall be expended exclusively for drug education, awareness, and rehabilitation programs . . .”¹⁸³ The lack of adequate resources for drug treatment is a great weakness in our current “war” on drugs. As I mentioned above, many individuals choose substances (whether alcohol, illegal drugs, tobacco, or caffeine) in part because of the substance’s effect on the individual’s brain chemistry.¹⁸⁴ Many people self-medicate through the use of illegal substances.¹⁸⁵ Indeed, many professionals who deal with substance abuse lament the lack of money spent on prevention and treatment.¹⁸⁶ Elsewhere, in the debate about reducing the prison population, main stream organizations argue that we can reduce the prison population and reduce recidivism rates by increasing resources for substance abuse treatment programs.¹⁸⁷ Of course, in the short run, using marijuana tax revenue for treatment makes less of the money raised by AB 390 available to reduce the budget deficit, one of the selling points for the law.¹⁸⁸ But again, legalizing marijuana may increase use and abuse of marijuana, increasing the need for drug treatment. While I suspect that the revenue generated by legalizing marijuana¹⁸⁹ would exceed the increased need for treatment, the current debate about the effects of legalizing marijuana ignores these kinds of difficult questions.

2. *Economic benefits from the reduced prison population*

Legalizing marijuana will reduce California’s overcrowded prison population and save another billion dollars. Or so the argument goes.

While proponents of AB 390 claim that California’s prisons include thousands of paroled felons who are in prison because of urine tests indicating marijuana use,¹⁹⁰ the data do not support the contention that legalizing marijuana will lead to significant reductions in prison spending. That is so for several reasons.

182. *Id.*

183. AB 390, ch. 4, sec. 34031, 2009 Leg., 2009-2010 Sess. (Cal. 2009).

184. *See supra* note 172.

185. *See* Samuels, *supra* note 152 at 5.

186. *See* The National Center on Addiction and Substance Abuse at Columbia University (CASA), *Shoveling Up II: The Impact of Substance Abuse on Federal, State, and Local Budgets*, *supra* note 135.

187. AMERICAN BAR ASSOCIATION: COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, *Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies*, 13-15 (American Bar Association 2007).

188. *See* Press Release, Tom Ammiano note 85 (stating that the revenue from casual marijuana use directed to the treatment of serious drug addiction is a prudent use of limited resources).

189. As suggested above, that would depend on how the law is administered, for example, to assure that illegal drug users really are drummed out of the business. *See* discussion *supra* note 154.

190. *See* KQED.org, Forum with Michael Krasny, *supra* note 94; *see also* Eric Schlosser Interview, December 1997, *available at* <http://www.pbs.org/wgbh/pages/frontline/shows/dope/interviews/schlosser.html>.

The Prison Census Data for 2007 do not support the claim that California's prisons contain thousands of inmates who were guilty of marijuana possession offenses. In 2007, new admissions for marijuana related offenses included the following: marijuana possession for sale, 27 women and 519 men; marijuana sales, 12 women and 191 men; other marijuana offenses, 2 women and 82 men.¹⁹¹

Data for several years prior to 2007 suggest somewhat higher total numbers of marijuana offenders. For example, between 1998 and 2006, the total number of new prison admissions for marijuana offenses ranged from a high of 1817 in 1998 and a low of 1253 in 2004.¹⁹² During that nine year period, on average, California imprisoned 1480 new marijuana offenders each year.¹⁹³ But the overwhelming percentage of those offenders were incarcerated for the sale of marijuana or the possession with the intent to sell, not simply possession of marijuana.¹⁹⁴

Nor do the data suggest that California's prisons warehouse thousands of parolees returned to prison for marijuana use. In the 2004 consent decree in *Valdivia v. Schwarzenegger*,¹⁹⁵ the state agreed to a different approach to the treatment of offenders whose violation of parole involved drug use, making it somewhat harder to re-incarcerate an offender for such a violation.¹⁹⁶ Consistent with the consent decree, the Prison Census Data for 2007 show that few felon parole violators returned to prison for marijuana related offenses: marijuana possession for sale, 10 women and 231 men; marijuana sales, 2 women and 69 men; other marijuana offenses, 0 women and 9 men.¹⁹⁷ Even if a consensus existed that marijuana offenses do not warrant prison time, the total numbers are small by comparison to the total prison population and are not likely to generate significant savings.

California's data are similar to those nationwide. The Office of National Drug Control Policy reports the following data: "at midyear 2002, approximately 8,400 state prisoners

¹⁹¹ California Department of Corrections and Rehabilitation, California Prisoners and Parolees 2007, 45, tbl 26, *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALP_RISd2007.pdf (last visited June 26, 2009)

¹⁹² See California Department of Corrections and Rehabilitation, Characteristics of Inmate Population Report Archive, (1998-2009) *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CensusArchive.html.

¹⁹³ *Id.*

¹⁹⁴ *Id.* New admissions for "other marijuana offenses" ranged from a high of 137 in 2003 to a low of 104 in 2004. *Id.*

¹⁹⁵ *Valdivia v. Schwarzenegger*, 603 F.Supp.2d 1275, 1278-79 (2009).

¹⁹⁶ *Valdivia v. Schwarzenegger*, No. Civ. S-94-0671, at 15 (E.D. Cal. Filed Mar. 9, 2004).

¹⁹⁷ California Department of Corrections and Rehabilitation, California Prisoners and Parolees 2007, *supra* note 190 at 51, tbl. 31, Even in the years prior to *Valdivia*, California was not revoking parole for a large numbers of offenders whose only violation was marijuana use. See, e.g., California Department of Corrections and Rehabilitation Offender Information Services; Estimates and Statistical Analysis Section, Data Analysis Unit, California Department of Corrections and Rehabilitation Offender Information Services; Estimates and Statistical Analysis Section, Data Analysis Unit, Other Marijuana Offenses (Marijuana Other): 10 (.1%).

were serving time for possessing marijuana in any amount. Fewer than half of that group, or about 3,600 inmates, were incarcerated on a first offense.”¹⁹⁸ And, of course, some of those offenders may have faced more serious charges but plead to the lesser charge.

Those data also mask other realities. As reported, the data do not show how many of those offenders pled guilty to lesser charges to avoid more serious penalties. But given that most offenders plead guilty,¹⁹⁹ one can infer that most of the offenders in prison for marijuana offenses plead to those charges to avoid trial on more serious charges. Similarly, at least some of the offenders who have parole revoked because of marijuana charges may have faced other charges. Authorities often seek parole revocation rather than referring offenders for new felony charges because parole revocation is a less time consuming process.²⁰⁰ Thus, legalizing marijuana would not even reduce the prison population by the small number of offenders currently there for marijuana related offenses. For some significant number of them, the state would pursue more serious charges anyway.

Focusing on savings for the prison system may be the wrong place to look for savings. Most possession of marijuana offenses are misdemeanors, less likely to result in incarceration.²⁰¹ Nationwide, almost 900,000 people were arrested for marijuana related offenses in 2007.²⁰² Over 88% of those were charged with possession only.²⁰³ Some charged with more serious offenses of sale or manufacture were growing marijuana for personal or medical use.²⁰⁴ Despite California’s medical marijuana law, in 2007, authorities arrested more than 74,000 people in California for marijuana related offenses.²⁰⁵ About 80% of those were arrested for misdemeanor marijuana offenses.²⁰⁶

198. Whitehousedrugpolicy.gov, Office of National Drug Control Policy, Who’s Really in Prison for Marijuana, *supra* note 118 at 20.

199. A report prepared by the Legislative Analyst’s Office states that only .6% of criminal cases are tried to juries. Of the remaining cases, 80% are resolved by guilty plea. See ELIZABETH G. HILL, *California’s Criminal Justice System: A Primer* 34 (January 2007), available at http://www.lao.ca.gov/2007/cj_primer/cj_primer_013107.pdf.

200. DALE G. PARENT & DAN WENTWORTH, *Responding to Probation and Parole Violations*, 10 (U.S. Department of Justice 1994) (stating that “revocation is used as a substitute for prosecution on new alleged crimes because it decreases the burden of proof for the alleged new crime from beyond a reasonable doubt to a preponderance of evidence and invokes the far less rigorous due-process safeguards of a quasi-adversarial hearing process. Overburdened prosecutors sometimes rely on revocation to dispose of probationers and parolees who are charged with new crimes when the new offense is minor or the evidence is weak”).

201. For example, according to the California Attorney General’s web page, statewide, there were 57,995 misdemeanor marijuana arrests, compared to 16,124 felony marijuana arrests. See California Department of Justice, Total Felony Arrests By Gender, Offense and Arrest Rate Stateswide, tbl. 3A, available at http://stats.doj.ca.gov/cjsc_stats/prof07/00/3A.htm.

202. See NORML, Marijuana Arrests For Year 2007: 872,721 Tops Record High -Five Percent Increase Over 2006, *supra* note 96; see also, F.B.I Uniform Crime Report, <http://www.fbi.gov/ucr/cius2007/index.html>.

203. *Id.*

204. See California Department of Justice, Total Felony Arrests By Gender, Offense and Arrest Rate Stateswide, *supra* note 202 at tbl. 3A.

205. *Id.*

206. *Id.* Of 74,119 marijuana arrests, only 16,124 were felony arrests – about 21%. *Id.*

The cost of prosecuting and jailing those individuals is substantial and California would avoid much of that expense, were AB 390 to become law. The savings would not flow directly to the state to relieve its current budgetary crisis but to local governments that are under similar financial pressure as is the state.²⁰⁷

Less easy to measure is the human cost of being arrested for marijuana related offenses. Criminal charges involve collateral consequences that offenders may carry with them for many years. For example, many states disenfranchise an individual convicted of a felony.²⁰⁸

Even here, I want to add a caution about the net benefit to local governments. Like the use of tax evasion charges to prosecute Al Capone,²⁰⁹ authorities no doubt use violations of marijuana laws to arrest and prosecute offenders whom they suspect of more serious conduct. Certainly, police use a variety of means to prosecute gang members. For example, in California, many district attorneys have used broad gang injunctions.²¹⁰ In many of those cases, they are not able to find evidence of other, more serious offenses.²¹¹ In effect, police may use marijuana laws like the police in New York used violations of petty offenses to reduce the rate of more serious crime.²¹²

Whether using marijuana laws in that fashion is a legitimate exercise of police power may be debated. Historically, arrest rates for drug offenses had a discriminatory effect. Thus, while roughly the same percentage of whites, African-Americans and Hispanics are involved with drugs, arrest and incarceration rates for minorities are far higher than for whites.²¹³

Finally, proponents of AB 390 face the same problem in arguing that California authorities would get out of the business of prosecuting marijuana offenses. At a minimum, they would still have to prosecute illegal drug dealers if the licensing and taxing provisions are to be effective.

3. *Reducing violence among the drug cartels*

207. Kevin O'Leary, *Shrinking California in Order to Save It*, TIME, July 21, 2009, available at <http://www.time.com/time/nation/article/0,8599,1911862,00.html>.

208. See, e.g., Miss. Const. art. 12, §241. Mississippi allows a former felon disenfranchised under §241 may regain the right to vote only if a super-majority of the legislature passes a bill allowing it. Miss. Const. art. 12, §253. California allows a felon to vote once she has completed parole. Cal. Const. art. 2, §4.

209. FBI.gov, FBI History: Famous Cases Alphonse Capone, aka. Al, Scarface, <http://www.fbi.gov/libref/historic/famcases/capone/capone.htm> (last visited Aug. 22, 2009).

210. For an extensive discussion of issues surrounding the use of gang injunctions to deal with lawless behavior, see *People ex rel Gallo v. Acuna*, 929 P.2d 596, 601-02 (Ca. 1997).

211. Ryan Young, *Sharpen the Blade: Void for Vagueness and Service of Process Concerns in Civil Gang Injunctions*, 40 MCGEORGE L. REV. (Forthcoming 2009).

212. See FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE*, 150 (Oxford University Press 2007); see also Economist.com, *Can the Can*, THE ECONOMIST, Nov. 20, 2008, available at http://www.economist.com/sciencetechnology/displayStory.cfm?story_id=12630201.

213. See MARC MAUER, *THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS* (2009), available at http://www.sentencingproject.org/doc/dp_raceanddrugs.pdf.

Proponents of AB 390 contend that legalizing marijuana would “declaw powerful and violent Mexican drug cartels.”²¹⁴ Outside California, serious commentators see narco-violence and international criminal organizations that thrive on drug proceeds as threats to economic and political stability.²¹⁵ As argued in an editorial in *The Economist*, “far from reducing crime, prohibition has fostered gangsterism on a scale that the world has never seen before. According to the UN’s perhaps inflated estimate, the illegal drug industry is worth some \$320 billion a year.”²¹⁶

Proponents analogize legalization to the post-Prohibition era, when legalizing alcohol weakened the power of mobsters around the country.²¹⁷ Legalizing marijuana may reduce corruption among law enforcement officials in the United States as well.²¹⁸

These are real and worthwhile benefits that may flow from legalizing marijuana. But even were California to legalize marijuana, Mexican drug cartels would still compete for the markets elsewhere in the United States.

Further, proponents of legalizing drugs are caught in a political dilemma. While some commentators urge legalizing all drugs for personal use,²¹⁹ proponents of AB 390 have eschewed that position. Further, despite large numbers of recreational users of drugs like Ecstasy, cocaine, LSD and even heroin,²²⁰ the public is simply not interested in such sweeping reform.²²¹ But failing to legalize other illegal drugs leaves a thriving business

214. See Marinucci, *supra* note 10.

215. See, e.g., Drug Policy Alliance Network, What’s Wrong with the Drug War, *available at* <http://www.drugpolicy.org/drugwar/> (last visited Aug. 27, 2009).

216. See How to Stop the Drug Wars, *supra* note 26; Insofar as some of those proceeds flow to organizations like Al Qaeda, the risk of continued illegal drug trafficking is even greater. MSNBC.com, *U.S. Targeting Taliban Tied to Drug Trade*, ASSOCIATED PRESS, Aug. 10, 2009, *available at* <http://www.msnbc.msn.com/id/32355093> (stating that linking the fight against Taliban or Al Qaeda insurgents to people seen driving the country’s illegal drugs trade is an issue that has long stirred debate inside NATO).

217. See *supra* note 102.

218. See *supra* note 103.

219. Jeffrey A. Miron, *Commentary: Legalize Drugs to Stop Violence*, CNN, March 24, 2009, *available at* <http://edition.cnn.com/2009/POLITICS/03/24/miron.legalization.drugs/index.html> (last visited Aug. 27, 2009) (stating that Legalization is desirable for all drugs, not just marijuana).

220. Don Dahler, *Study: Baby Boomers’ Drug Use Skyrockets Rate Of Popping Pills, Doing Coke, Smoking Pot, Etc., Nearly Doubles From 7 Years Ago; Only Age Group To Go Up*, CBS, Aug. 20, 2009, *available at* <http://wcbsv.com/health/baby.boomers.drug.2.1135709.html> (last visited Aug. 27, 2009) (stating that according to the Substance Abuse and Mental Health Services Administration, the percentage of Americans age 50 to 59 who report using illegal drugs nearly doubled between 2002 and 2007, from 5.1 percent to 9.4 percent).

221. See Angus Reid Global Monitor, *Canada Majority Would Legalize Marijuana*, May 8, 2008, *available at* http://www.angus-reid.com/polls/view/30688/canadian_majority_would_legalize_marijuana/ (revealing polling data from Canada demonstrates the point. One study found that 53% of Canadians favored legalizing marijuana, but fewer than 10% of those polled favored legalizing Ecstasy, cocaine or heroin).

for drug cartels.²²² Any hope that legalizing marijuana would reduce violence between Mexican gangs may be illusory. In fact, it may increase violence as gangs fight for distribution of other illegal drugs.²²³ In addition, legalizing marijuana may run the risk of making the remaining illegal drugs more attractive to some users – as discussed above, for some, part of the allure of marijuana is the risk associated with its illegality.²²⁴ At a minimum, dealers would have added incentive to make drugs that were still illegal more readily available if they were to lose the marijuana market.

I find the debate between proponents and opponents of AB 390 singularly unhelpful. Proponents contend that marijuana use would go down after a period of increased use and also contend that depriving Mexican gangs of billions in income would reduce narco-corruption.²²⁵ Opponents contend that illegal marijuana use would go up because illegal marijuana would always be less expensive than the legal form and that narco-violence would continue as drug cartels expand their trade into other drug activities.²²⁶ They surely cannot have it both ways. But that is the frustrating thing about the debate thus far.

4. Increased use among teens

What about increased use among teenagers? Most voters would oppose legalizing marijuana if we were convinced that use of marijuana by teenagers would increase significantly.²²⁷ As with alcohol abuse among teens, excessive use of marijuana by teens presents special concerns, according to reported studies.²²⁸ Whether legalization will lead to significant increases in use and abuse is far from a foregone conclusion.

Opponents of AB 390 argue that legalizing marijuana sends the message that marijuana use is acceptable and that its ready availability will lead to increased use among teens.²²⁹ But that ignores the fact that marijuana is available to teens today.²³⁰ Legalizing marijuana would only make it marginally more available.

222. See *supra* note 220 (stating "much of the traffic from Mexico or Colombia is for cocaine, heroin and other drugs, while marijuana production is increasingly domestic. Legalizing only marijuana would therefore fail to achieve many benefits of broader legalization").

223. That has certainly been the case during the crack epidemic during the 1980's when gangs competed over territory in United States cities. See FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 81 (Oxford University Press 2007).

224. See *supra* note 182; see also Alison Stateman, *Can Marijuana Help Rescue California's Economy*, TIME, May 13, 2009, available at <http://www.time.com/time/nation/article/0,8599,1884956,00.html> (last visited Aug. 31, 2009).

225. *Supra* note 102.

226. See discussion *supra* note 117.

227. See Brian Montopoli, Poll: Americans Oppose Legalizing Marijuana, Lowering Drinking Age, Mar. 19, 2009, <http://www.cbsnews.com/blogs/2009/03/19/politics/politicalhotsheet/entry4877495.shtml>.

228. See Marijuana Myths & Facts, *supra* note 133 at 4; see also National Institute of Drug Abuse, Monitoring the Future *supra* note 76.

229. Ryan Grim, *Myths About High Times in America*, THE WASHINGTON POST, Aug. 9, 2009, available at (last visited Aug. 31, 2009).

230. See Marijuana Myths & Facts, *supra* note 133 at 17 (stating that most high school seniors said they could obtain the drug fairly easily or very easily).

Even if marijuana were more widely available, teens might not be more likely to use marijuana. Cigarette consumption provides an interesting analogy: teen smoking has not correlated to the amount spent on educational campaigns.²³¹ Teens smoke because of image, not because of the threat of wrinkled skin, lung cancer or heart attacks. Studies show that young people who smoke emulate “cool” adults who smoke.²³² Shaping the message about “cool” is difficult and American society has failed badly to make marijuana use “uncool.”²³³ At least some in the Netherlands believe that marijuana usage is lower there than in the United States because its use is legal and uncool.²³⁴

Predicting how teenagers will react to legalization is difficult. While AB 390 directs that funds be used for drug education, that may be unproductive, as it apparently has been with regard to anti-tobacco advertising.²³⁵ As currently written, AB 390 falls back on the tried and not so true method of trying to scare teens through drug education. Insuring that legalizing marijuana does not substantially increase use by teens would require creative efforts by experts in substance abuse and teen psychology. Parties to the debate are not currently thinking outside the box. Opponents are falling back on the old scare tactics and proponents on largely useless drug education strategies.

5. *Personal freedom*

Those who listen closely to the debate about legalization will hear another set of charges and countercharges that need to be explored, if only briefly. Those charges surround issues of personal freedom.

Conservatives, or at least conservative opponents of legalization of marijuana, accuse the other side of hypocrisy. For example, they point to the willingness of liberals to regulate all sorts of substances, from tobacco to trans fats, while they are willing to legalize a substance as dangerous as those that they would ban.²³⁶ Risk adverse when it comes to global warming or exposure to possible cancer causing substances, we are suddenly willing to legalize a substance that can cause significant harm. Surely, those of us who favor legalizing marijuana ought to address that charge.²³⁷

231. See MALCOLM GLADWELL, *supra* note 172 at 250.

232. *Id.*

233. *Drug Use Down Among Uncool Kids*, THE OXION, Oct. 21, 1997 available at <http://www.theonion.com/content/node/29880> (last visited Aug. 27, 2009) (stating that Health and Human Services researchers tested the limits of uncool kids' aversion to drugs by enlisting 15 popular kids to pressure a sample group of A.P. calculus students to smoke marijuana. Resistance was universal. One student recounted, "I was trying to get this geek named Jonathan to smoke a joint, and he just started crying," Sandusky High School (OH) star quarterback Chris Mitchell said. "What a girl."

234. KQED.org, Forum with Michael Krasny, *supra* note 94.

235. See MALCOLM GLADWELL *supra* note 172 at 250.

236. See GEORGE LAKOFF, *THE POLITICAL MIND: WHY YOU CAN'T UNDERSTAND 21ST-CENTURY AMERICAN POLITICS WITH AN 18TH-CENTURY BRAIN*, 71-72 (Penguin Group 2008) (While many of the proponents of legalization of marijuana are libertarians who consistently oppose governmental regulations, John Lovell accuses libertarians of being narcissists, unconcerned about their responsibility to their neighbors).

237. See *infra* for my tepid defense of my support for legalization.

But conservatives are guilty of the same kind of inconsistency, if not hypocrisy. Conservatives tout freedom constantly.²³⁸ For example, former President George W. Bush filled his speeches with references to freedom.²³⁹ Conservatives often sneer at liberals for our unwillingness to accept risk.²⁴⁰ They denigrate Al Gore's commitment to the fight against global warming and accuse liberals of being unwilling to accept all matter of risk in our lives.²⁴¹ Nonetheless, when it comes to legalizing marijuana, many conservatives see the end of civilization as we know it. They portray legalization as imposing unavoidable and extreme risks and discount the choice of millions of Americans to try marijuana.²⁴²

Concerned listeners to the debate surrounding AB 390 or legalization generally ought to demand proponents and opponents to address the appropriate limits of personal freedom.

V. Some thoughts and conclusions

The debate surrounding AB 390 does not prove that civil discourse has gone down hill in recent years. But as someone who was undecided on the question of legalization when I began focusing on the question, I have found the debate unhelpful. Almost all of the discussion about legalization is passionate advocacy, not reasoned debate. Even after considering the questionable assumptions about savings in prison costs or the supposed dramatic increase in use of marijuana, I am a tepid supporter of legalization.

Legalizing marijuana would bring the law in line with the behavior of millions of Americans. For most of them, it has produced little harm. American law favors freedom of choice, absent compelling arguments to the contrary. I must tolerate a great deal of behavior that I do not believe in for myself, but have little say in those matters. That is a cost of freedom.

In deciding whether to make some conduct unlawful, legislatures often do a cost-benefit analysis of the legislation.²⁴³ A cost-benefit analysis seems to support legalizing marijuana.

Part of the problem with the current debate is that opponents of marijuana focus on the total cost to society associated with marijuana use.²⁴⁴ That is the wrong place to start.

238. See LAKOFF, *supra* note 237 at 180-183.

239. *Id.* at 179-180.

240. See, e.g., Ernest Baert, The EU Fights Global Warming. Don't Worry about the Costs, March 21, 2007, available at <http://www.brusselsjournal.com/node/2000>; see also Globalwarminghype.com, Global Warming Politics, <http://www.globalwarminghype.com/politics.html>.

241. See LAKOFF, *supra* note 237 at 188-189.

242. See discussion *supra* note 136.

243. Such cost-benefit analysis has been used in debates about global warming and the endangered species act. See Michael C. Dorf, Why the Supreme Court Decision Upholding Cost-Benefit Analysis Under the Clean Water Act Should Not be Used to Discredit Best-Practice Standards, Apr. 6, 2009, available at <http://writ.news.findlaw.com/dorf/20090406.html>; see also National Wildlife Federation, Bush Administration Suppresses Facts to Weaken Endangered Species Act, June 24, 2004, available at <http://www.nwf.org/news/story.cfm?pageId=57139C4F-DED5-3CB0-3F478525211A303C>.

Years of an expensive war on drugs has not and cannot eradicate marijuana use.²⁴⁵ In California, as long as marijuana is available for medical use, eradicating marijuana use is simply not going to happen. As a result, the right cost figure in the legalization debate is the marginal rate of increased use, with marginal increased health costs. Thus, the cost is considerably less than opponents contend.

But what about the benefit side of the equation? To state the obvious, California is in bad financial shape. Indeed, anyone who witnessed the spectacle of the legislature's budget morass during the past year might hope for a quick fix, marijuana or stronger! I cannot fault the proponents of AB 390 for trying to find free money to help the state resolve its financial woes. But AB 930 would probably not generate as much money as its proponents contend, if only because it would not produce the reduced prisons costs and without continued law enforcement efforts against illegal sellers of marijuana, tax revenue would be far lower than projected.²⁴⁶

Nonetheless, properly done, legalizing marijuana might generate some revenue and depending on how the law was structured, policy-makers could reduce some of the risks created by legalizing marijuana. The best outcome of all might be the generation of substance abuse funds. Even if more Californians use marijuana after its legalization, a very small number would become chronic users.²⁴⁷ The best outcome for all Californians would be if legalization generated enough money to put in place real drug treatment programs for substance abusers. That kind of legislation would be worth backing with enthusiasm.

244. *See, e.g.* The Social Cost of Legalizing Drugs, ASSOCIATED CONTENT, June 21, 2006, *available at* http://www.associatedcontent.com/article/38813/the_social_cost_of_legalizing_drugs_pg2.html?cat=17.

245. *See* Mike Moffat, Should Governments Legalize and Tax Marijuana? Examining a Recent Study on Legalization, ABOUT.COM, *available at* <http://economics.about.com/od/incometaxestaxcuts/a/marijuana.htm>.

246. *See* discussion *supra* notes 189-212.

247. *Supra* note 171.