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No Rational Basis: The Pragmatic Case for Marijuana Law Reform

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NO RATIONAL BASIS: THE PRAGMATIC CASE FOR MARIJUANA LAW REFORM

Eric Blumenson and Eva Nilsen


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ABSTRACT

This article presents a critique of marijuana prohibition and suggests some alternative regulatory approaches that would be more productive and consonant with justice. Part I relies on a forty-year empirical record to demonstrate that (1) reliance on a law enforcement approach has aggravated rather than mitigated the risks involved with marijuana use, and (2) criminalization, which results in the arrest of more than 700,000 Americans annually for possession of any amount of marijuana, is an inhumane and destructive response to an act that almost 100 million Americans have committed. Part II assesses the relative merits of several alternative reform policies, including both decriminalization and legalization under a regulatory scheme.

INTRODUCTION

Under the federal drug laws, marijuana is designated a Schedule I controlled substance, a status reserved for the drugs with the most serious potential for abuse and no medical benefit. This status places marijuana in a graver category than cocaine and on a par with heroin. Those convicted of possessing it may be sentenced to 1 year in prison and a minimum fine of $1,000.

Are the federal marijuana laws, and the laws of the thirty seven states that also criminalize possession, defensible? We believe they are not, and that the government’s seventy year attempt to prevent marijuana use and punish its users has proved inhumane and counterproductive. This article presents that case. It is a case that has special salience today, because for the first time in decades serious marijuana law reform appears to be achievable. In the last two years, political resistance weakened markedly. Reform bills or ballot

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1 21 U.S.C. § 812 (2007). Schedule 1 is reserved for controlled substances that (a) have a high potential for abuse, (b) have no currently accepted medical use in treatment in the United States, and (c) cannot be safely used even under medical supervision.” Id. Cocaine and oxycontin are listed as Schedule II drugs. Id.


initiatives were approved in a number of jurisdictions, the Obama Administration has suggested treating rather than jailing non-violent drug offenders, and Attorney General Holder ordered a stop to federal prosecutions of medical marijuana use in states that permit it. In California, Governor Schwarzenegger has proposed consideration of the legalization and taxation of marijuana, and in Congress, Rep.

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4 Successful marijuana ballot initiative efforts in the past year include Massachusetts ballot initiative Question 2, codified as 94C M.G.L. 32L (2008), in which voters decriminalized possession of less than one ounce of marijuana, substituting a $100 civil fine, by a margin of 65%-35%; Michigan Proposition 1, codified as MCLS § 333.26421 (2008), in which voters changed the law to allow for medicinal use of marijuana on a doctor’s recommendation by a margin of 63%-37%; and local ballot initiatives in Hawaii County, Hawaii, Fayetteville, Ark., and several Massachusetts towns, where voters made enforcement of adult marijuana possession laws the lowest law enforcement priority, in each case by substantial majorities. See Marijuana Policy Project, 2008 Ballot Initiatives, http://www.mpp.org/library/2008-ballot-initiatives.html. However, California’s Proposition 5, which sought to enhance a successful 2002 drug reform initiative by changing marijuana possession from a criminal misdemeanor to a civil infraction, and substituting treatment for incarceration for many non-violent offenders, went down to defeat 60%-40%. Id. More than a dozen legislatures have taken up measures to either reduce penalties for marijuana use or allow its use for treatment purposes. Jesse McKinley, Marijuana Advocates, Not-So-Secret Holiday Hints at Change, N.Y. TIMES, Apr. 20, 2009, at A13.

Recent polls also show substantial public support for marijuana law reform. See infra n. 123.

5 See Carrie Johnson and Amy Goldstein, Choice of Drug Czar Indicates Focus on Treatment, Not Jail, WASH. POST, Mar. 12, 2009, at A04 (quoting White House as favoring treatment rather than jail for drug offenders); Kurt Schmoke, Obama Not Completely Silent on the Drug War, HUFFINGTON POST, May 22, 2008, http://www.huffingtonpost.com/kurt-schmoke/obama-not-completely-sile_b_103122.html (same) Gary Fields, White House Drug Czar Calls for End to “War on Drugs”, WALL ST. J., May 14, 2009, at A3, available at http://online.wsj.com/article_email/SB124225891527617397-lMyQiAxMDI5NDEyNTtxNTU4Wj.html(reporting that Obama’s new drug czar, Gil Kerlikowske, says the administration “is likely to deal with drugs as a matter of public health rather than criminal justice alone, with treatment's role growing relative to incarceration”). In another sign that the Obama Administration is rethinking drug policy, the Justice Department has urged Congress to lower sentences for sale and possession of crack cocaine so that they no longer exceed (by a factor of 100:1) those for powdered cocaine. Solomon Moore, Justice Dept. Seeks Equity in Sentencing for Cocaine, N.Y. TIMES, April 30, 2009, at A17. However, Obama’s first budget did not show much interest in reforming the law enforcement emphasis of the drug war, as described infra at note 92.


7 Rebecca Cathcart, Schwarzenegger Urges a Study on Legalizing Marijuana Use, N.Y. TIMES, May 7, 2009, at A21. The article reports that 56 percent of California voters support legalizing and taxing marijuana for recreational use. Governor David
Barney Frank introduced a decriminalization bill for the first time because, he said, the public is now ready to support it.\(^8\)

This article’s focus here is on the fruitlessness of current marijuana laws and policies. Based on a forty-year empirical record, we contend in Part I that (1) reliance on a law enforcement approach has aggravated rather than mitigated the risks involved with marijuana use, and (2) criminalization, which results in the arrest of more than 700,000 Americans annually for possession of any amount of marijuana,\(^9\) is an inhumane and destructive response to an act that

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\(^8\) Act to Remove Federal Penalties for the Personal Use of Marijuana by Responsible Adults, H.R. 5843, 110th Cong. (submitted April, 2008). Rep. Frank’s bill would decriminalize possession of up to 100 grams (or 3.5 ounces) of marijuana and also remove criminal penalties from users who share marijuana with others so long as they don’t sell it. *Id.* Frank announced his intention to file the bill on Bill Maher’s television program, stating that caution had prevented his doing so for decades but that it was now time for politicians to “catch up with the public.” See *Real Time with Bill Maher,* (HBO Mar. 22, 2008), available at http://www.citizensugar.com/1138194. Regarding popular support for change, see *supra* note 4, 7, and 123..

The decriminalization movement has gained significant traction abroad as well in countries that still criminalize possession. Noting the benign outcome of Portugal’s 2001 decriminalization, the U.N.’s 2009 World Drug Report states that although “incarceration will continue to be the main response to detected traffickers, it should only be applied in exceptional cases to users.” United Nations Office of Drugs and Crime, *World Drug Report* 2009, at 168 and 169, available at www.unodc.org/documents/wdr/WDR_2009/WDR2009_eng_web.pdf. See also Fernando Henrique Cardoso, César Gaviria and Ernesto Zedillo, *The War on Drugs Is a Failure,* WALL ST. J., Feb. 23, 2009, at A15, in which the former presidents of Mexico, Colombia, and Brazil summarize their report for The Latin-American Commission on Drugs and Democracy, which concludes that prohibition and criminalization “have not yielded the expected results...[W]e are farther than ever from the announced goal of eradicating drugs” and proposes “the careful evaluation, from a public-health standpoint, of the possibility of decriminalizing the possession of cannabis for personal use.” *Id.* This view is “shared across Latin America, where governments or high courts in Ecuador, Columbia and Mexico have [joined Argentina in moving] to decriminalize small-scale possession [of drugs] for personal use. Alexei Barrioneuvo, *Softer Policy on Drugs Is Debated in Argentina,* N.Y. TIMES, Feb. 15, 2009, at A20.

almost 100 million Americans have committed. In Part II, we point to some regulatory alternatives that we believe would deliver more successful and humane results.

The pragmatic analysis undertaken here is only one element of the analysis necessary to properly assess marijuana policy. If individual liberties are implicated by the criminalization of marijuana use, there are also moral and constitutional concerns. Restraints on religious practice, for example, cannot be properly evaluated by merely calculating the utilitarian costs and benefits; something of greater weight is required to override the fundamental right to free religious exercise. A key question, then, is whether marijuana criminalization implicates fundamental human rights, an issue we address in a forthcoming essay. There we present a principled, civil libertarian case against marijuana criminalization based on the ethical requirements of liberty and just punishment.

The other, related restraint on legislative cost-benefit judgments is constitutional. If marijuana criminalization abridges constitutional guarantees regarding cruel and unusual punishment, or privacy, or due process, or First Amendment freedoms, it must be abandoned. This

274 Table. A2 (81.7% of all 2005 drug arrests, and over 88% of all marijuana arrests, are for possession, not sale or manufacture).


12 Although the empirical record we elucidate should cast doubt on the validity of marijuana possession laws under both the “strict scrutiny” and “rational basis” due process tests, court decisions on the subject hold otherwise, at least for now. See, e.g. United States v. Fogarty, 692 F.2d 542, 547 (8th Cir. 1982)(upholding the classification of marijuana as a Schedule 1 substance on a rational basis test because “there is no constitutional right to import, sell, or possess marijuana”; the case charged a conspiracy to distribute 26,000 pounds of marijuana); Nat’l Org. for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 130-31 (D.D.C. 1980)(holding personal use of marijuana is not a fundamental right); United States v. Rush, 738 F.2d 497, 511 (1st Cir. 1984) (rejecting claim that religious use of marijuana is constitutionally protected); United States v. Middleton, 690 F.2d 820, 822 (11th Cir. 1982)(same); Washington v. Balzer, 954 P.2d 931, 938 (Wash. Ct. App. 1998)(same); Arizona v. Hardesty, 204 P.3d 407, 417 (Ariz. Ct. App. July 31, 2008)(same); and a long list of state court decisions detailed in John Williams, Annotation, Constitutionality of State Legislation Imposing Criminal Penalties for Personal Possession or Use of Marijuana, 96 A.L.R. 3d. 225 (1979). But see Ravin
article puts such constitutional concerns aside as well, and assesses marijuana criminalization pragmatically. It explores how well marijuana criminalization has served the goals it was intended to achieve, and whether an alternative approach would do better.

I. THE CURRENT CRIMINALIZATION REGIME AND ITS PROBLEMS

A. SELF-DEFEATING POLICIES

For many decades now, the government has relied primarily on law enforcement to achieve a “drug-free” country, continually escalating that approach in the face of repeated failure. Yet despite laws threatening dire consequences to users, an exponential increase in marijuana arrests, a sequence of drug czars prioritizing marijuana control, massive interdiction and eradication efforts, and now...
widespread drug testing, the same percentage of twelfth grade students use marijuana now as did in 1975. Approximately 25 million Americans have used marijuana sometime in the past year, 15 to 20 million of them in the past month, spending approximately $11 billion on the drug annually. In relation to population, these numbers substantially exceed those of countries with far less punitive drug laws.

It is theoretically possible that without the drug war, marijuana use might be even more common. What is empirically well-established in our view, however, is that by waging the war against it, the government has inflicted greater damage than the drug ever could. This is not our view alone. As early as 1972, the National Commission on Marihuana and Drug Abuse reported that the social costs of criminalizing marijuana exceeded the benefits. So did a relatively recent report on Canadian marijuana laws prepared for the Canadian Senate. Most recently, in August 2008, Britain’s former anti-drug policy director called for drug legalization, and asserted that the overwhelming majority of police, health, and political officials

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19 The yearly figure is the finding of the Substance Abuse and Mental Health Services Administration, Results from the 2006 National Survey on Drug Use and Health (Sept. 2007), and adopted by the ONDCP. The monthly range is based on different estimates: 14.8 million from the National Survey report, and 20 million from drug policy experts MacCoun and Reuter, infra note 46 (provided in 2001), at 343. The authors note that drug use in general declined in the 1980’s and then rose again in the 1990’s. It has remained relatively stable since that time. Id. at15-17.


23 Canadian Senate Special Committee on Illegal Drugs, Cannabis: Our Position for a Public Policy (Sept. 4, 2002).
believe that illegality causes more far more harm than good, even while they publicly recite the “nonsensical tough-on-drugs mantra.”

Here is the short list of unintended damage inflicted by our current marijuana laws and policy. (The intended, destructive impact of criminal and civil sanctions is detailed in the next section, I-B.)

1. Marijuana criminalization means that roughly 15 million current users must obtain the drug through illicit means, creating and supporting a massive, $10.5 billion dollar black market controlled increasingly by organized crime groups. This produces a number of damaging consequences. First, limiting marijuana distribution to illegal channels makes marijuana a completely unregulated drug. It eliminates any government control over the purity, potency, labeling, advertising, and availability of marijuana. Most significantly given the ONDCP’s concern with minors smoking marijuana, under the present system illegal producers and dealers need not fear a loss of license if they market to minors, as legal businesses would. For the past 30 years, studies have shown that between 83 and 90 percent of high school seniors say marijuana is easy to obtain; a reform policy could hardly do worse.

Second, we increase the risk that teenagers and others will abuse hard drugs by forcing marijuana experimenters to buy from criminal dealers who may also sell cocaine, methamphetamine or other drugs. The Netherlands policy of licensed marijuana coffee houses was designed in part to separate marijuana users from hard drug users and dealers.

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24 Duncan Campbell, Ex-Drugs Policy Director Calls for Legalization, THE GUARDIAN, Aug 13, 2008, available at http://www.guardian.co.uk/politics/2008/aug/13/drugs.legislation. The director, Julian Critchley, stated that "the idea that many people are holding back solely because of a law which they know is already unenforceable is simply ridiculous." Some would say this willful blindness goes back to the beginning of the modern drug war. See, e.g., R. J. BONNIE & CHARLES WHITEBREAD, THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES 298-299 (1974) (in which two criminal law specialists examined our government’s drug policy in its first years and concluded that “logic, science and philosophy have had almost nothing to do with the evolution of drug policy.”)

25 Office of National Drug Control Policy, What America’s Users Spend on Illegal Drugs (Cambridge, MA; Abt Associates, 2001) at Table 1, p. 3 (finding U.S. residents spent $10.5 billion on marijuana).


27 See MACCOUN & REUTER, infra note 46, at 245.
Third, by creating an illicit black market, the criminalization of marijuana is itself criminogenic. Like prohibition of liquor, which fostered organized crime and internecine gang warfare that disappeared after the 21st amendment, illicit marijuana producers today have no way of contracting with rivals or settling disputes legally; the drug cartel wars in Mexico and Texas provide the most extreme current example.28 There is also evidence that interdiction and eradication policies have led a significant number of drug smugglers to abandon marijuana in favor of more compact and powerful drugs that would be less detectable. Some drug researchers believe that the cocaine epidemic of the late 1970’s is in part attributable to the anti-marijuana efforts during Nixon’s second term.29 It is possible that interdiction influenced the demand side as well: by forcing marijuana prices ever higher, those who couldn’t afford it may have been pushed to other cheaper and easily available drugs, such as crack and methamphetamine.

2. The drug war has changed law, and law enforcement, in damaging ways that few would have accepted 40 years ago, mostly as a result of enforcement against marijuana offenders who make up the vast majority of drug arrests. Legal doctrine has been rewritten in fundamental ways to accommodate a “drug exception” in numerous areas. Marijuana offenses have been the catalyst for some of the most significant Supreme Court retrenchments on Fourth amendment rights and First Amendment free speech rights.30 Even election laws: Congress, deciding that the marijuana

31 Morse v. Frederick, 551 U.S. 393 (2007) (upholding 10 day school suspension and confiscation of banner that appeared to advocate drug use at off campus, school sponsored activity). According to historian Richard Lawrence Miller, federal and state authorities have trampled on the free speech rights of pro-marijuana advocates and organizations by such means as specifically targeting them for arrest and asset forfeiture, threatening Stanford University with loss of federal funds if it did not dismiss an anti-drug war lecturer, and pressuring pro-marijuana magazines High Times and Sinsemilla Tips by harassing their advertisers. RICHARD LAWRENCE MILLER, DRUG WARRIORS AND THEIR PREY: FROM POLICE POWER TO POLICE STATE 38-40 (1996). Another example is the one year ban on medical marijuana advocacy imposed by a judge as part of a felonious possession of marijuana sentence. Kevin Woster, Judge Defends Marijuana Sentence, Rapid City Journal, July 26, 2009, available at
war took precedence over election law, prohibited the District of Columbia from declaring the results of a medical marijuana referendum that had been duly placed on the ballot.32

On the ground, because marijuana offenses generally do not involve a complainant, police must use law enforcement techniques which are highly subject to abuse, including seizing drugs and money without accountability, wiretapping, “drop-see” testimony to justify a search, and offering immunity to one offender in return for testimony against another.33 Further, drug law enforcement has distorted police agendas, channeling them away from violent crimes and towards drug arrests, because only in the latter case are seized assets transferred into the budget of the police department that seized it.34

Finally, there is the more general cost in law enforcement legitimacy which results from laws that make almost 100 million Americans criminals for conduct that they and many others consider innocent and none of the state’s business.35 This problem has been compounded by unequal enforcement rates: members of minority groups are arrested for drugs in numbers greatly out of proportion to their use, continuing a pattern that has often prevailed throughout the history of drug control.36 As former senator and sociologist Daniel


34 Id. at 77-80.
35 See supra, note 10 (regarding numbers of users). The American Law Institute’s Model Penal Code chose not to include criminal penalties for private consensual sex for reasons that apply just as forcefully to laws against marijuana: “(1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.” MODEL PENAL CODE §213.2 cmt. at 2 (1980), cited with approval in Lawrence v. Texas, 539 U. S. 558, 572 (2003).
36 Eric Eckholm, Reports Find Persistent Racial Gap in Drug Arrests, N.Y. TIMES, May 6, 2008, at A21. Summarizing two reports, by Human Rights Watch and by the Sentencing Project, Eckholm reports that “large disparities persist in the rate at which black and whites are arrested and imprisoned for drug offenses, even though the two races use illegal drugs at roughly equal rates.” Id. Adult black males are twelve times as likely to be imprisoned for drug convictions as their white counterparts, reports Eckholm, citing the Human Rights Watch report. Id. Latinos comprise 13.9% of yearly reported illicit drug users, yet 42.6% of people convicted of drug offenses. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES AGENCY, OFFICE OF APPLIED STUDIES, NATIONAL SURVEY ON DRUG USE AND HEALTH, Table G.11 (2006)(incidence of drug use); Angela Arboleda, Latinos in the Federal
Patrick Moynihan urged many years ago, “it is essential that we understand that by choosing prohibition we are choosing to have an intense crime problem concentrated among minorities.”

3. Criminalization of marijuana hinders treatment for those who want it, in two ways. Drug users reasonably fear that there will be legal consequences to admitting to their illegal use, even to obtain treatment. At the same time, marijuana criminalization makes treatment spaces less available to those who truly need it, because a large number of people occupying treatment spaces are marijuana users who are there only under court coercion. It also has fostered ONDCP educational efforts that mislead some students and undermine their own credibility with others.

4. The opportunity costs of our marijuana criminalization policy are immense. A Marijuana Policy Project report on the economic fallout from criminalization, endorsed by five hundred economists and three Nobel prize winners, estimates that the state and federal government poured at least $7.7 billion into marijuana prohibition in the year 2004. To these costs must be added an estimated $2.4

_Criminal Justice System_ (National Council of La Raza, Statistical Brief No.1), July 2002, at 3 (percentage of drug offenders who are Latino). All this has resulted in a massive exodus of men from inner city communities; the exponential increase in the number of American prisoners to 2.1 million, a seven-fold increase from 1970, has been fueled in large part by drug offenses.

On the historical connection between drug prohibition and racism, see DAVID F. MUSTO, THE AMERICAN DISEASE 219 (1987) (stating that marijuana was associated in the early 1900’s with Mexican laborers, who were believed to be incited to violence by smoking marihuana); RUDOLPH J. GERBER, LEGALIZING MARIJUANA, DRUG POLICY REFORM AND PROHIBITION POLITICS 139 (2004) (linking Federal Narcotics Board director Henry Anslinger’s vehement opposition to marijuana from the 1930’s through the 1960’s to racism). On the marginalization and destruction of minority communities through drug enforcement generally, see Eva S. Nilsen, Decency, Dignity and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse, 41 U.C. DAVIS L. REV. 111, 120-123, 155-156 (2007).


38 Rather than explaining the differences between moderation and abuse, and between drugs, dosages and their consequences, ONDCP drug education programs tend to treat all kinds of drug use as equally dangerous, and consistently have been shown to have little or no effect on drug use. See INFORMING AMERICA’S POLICY ON ILLEGAL DRUGS: WHAT WE DON’T KNOW KEEPS HURTING US 234 (Charles F. Manski et al. eds., National Academy Press, 2001).

billion that could otherwise have flowed to federal and state governments through taxes were marijuana regulated rather than criminalized. Based on these figures, the cost of criminalization is $10 billion annually, an enormous sum that might otherwise be used to fund drug education, treatment, or other more constructive projects.

What went wrong?

In our view, two structural flaws underlie Administration policymaking and account for much of the four-decade long record of failure. The first is the drug war’s single-minded goal – what it counts as “victory.” That goal is a “drug free America,” the government’s expressed objective for decades. In pursuit of it, the ONDCP has prioritized measures to reduce the numbers of drug users, and neglected the far more damaging problems associated with drug abuse. Although the ONDCP has now abandoned the slogan in favor of a 25% reduction in five years, the exclusive focus on numbers of users (“prevalence”) remains. This strategy helps explain why marijuana and heroin are equated as Schedule I drugs, why “zero tolerance” policies proliferate, and why both the Clinton and George W. Bush drug czars placed marijuana suppression at the center of their efforts. It also explains why marijuana is the major drug in


41 The first factor placing a drug in Schedule I is its actual or relative potential for abuse. Yet abuse is defined as “the non-medical use of a substance listed in section 202 of the Controlled Substances Act, as amended (21 U.S.C. 802) which has not necessarily resulted in physical or psychological dependence.” Public Health, 42 C.F.R. § 34.2 (2009). It is hard to parse these words, and the provision’s circularity promotes irrational classification. Placing marijuana in Schedule I, which prevents any medical use, guarantees that all use will be defined as “abuse.”

42 Ryan King & Marc Mauer, The War on Marijuana: The transformation of the war on drugs in the 1990s, 3 HARM REDUCTION J. 1, (2006), http://www.harmreductionjournal.com/content/3/1/6 (stating that “since 1990, the primary focus of the war on drugs has shifted to low-level marijuana offenses”); Sally Satel, A Whiff of ‘Reefer Madness’ in U.S. Drug Policy, N.Y. TIMES, Aug. 16, 2005, at F6 (reporting ONDCP resistance to putting as much emphasis on methamphetamines as marijuana, its “main target,” on grounds that marijuana is a gateway to more dangerous drugs). According to his aide David Murray, John Walters, drug czar in the George W. Bush administration, focused on marijuana because “if you’re going to have a national office of drug-control policy, you look at the most prevalent drug in the society that’s readily available – you don’t go after
arrests, forfeitures, school prevention efforts, drug testing in the workplace, and anti-drug ads. The ONDCP’s focus on marijuana is extraordinary, especially given the fact that marijuana was very nearly legalized in 1970’s. A more rational approach would focus on the most hazardous drugs and most vulnerable populations, seeking to minimize the individual and societal damage produced by both the use and control of drugs. Such a harm reduction policy would measure success in terms of quality of life and health, not merely in terms of levels of drug use. Just as it makes sense for public policy to distinguish the

meth first thing...you go for the vector that’s most likely to spread, and that’s teen marijuana.” Ben Wallace-Wells, supra note 15, at 110. His predecessor in the Clinton Administration, Barry McCaffrey, shared that view. According to Carol Bergman, ONDCP’s congressional liaison under Lee Brown, McCaffrey was inordinately focused on teenage marijuana use and combating medical marijuana initiatives. Id. at 105, 107. McCaffrey sought, and Congress appropriated, approximately one billion dollars on anti-marijuana ads during the second term of the Clinton Administration. Id. at p. 106. Whether the emphasis on marijuana control continues under the Obama Administration remains to be seen.


44 At that time, President Carter, many members of Congress, and a substantial part of the public favored legalization or decriminalization of marijuana. See Presidential Message, August 2, 1977, Congressional Quarterly Almanac 32, at 41E; See also Michael Massing, The Fix 142 (University of California Press 2000) (discussing softening of drug policy in the Carter years).

45 This principle is central to the harm reduction policies enunciated by one prominent organization advocating drug reform, the Open Society Institute founded by George Soros, as well as those governments abroad that have chosen a harm reduction approach. See Harm Reduction in Principle (1998), available at http://www.soros.org/harm-reduction/harm.htm. The principle is derived from certain insights that have generally eluded American drug policy. One is that all drug use is not alike, as zero tolerance policies imply; rather, there are differences among “soft” and “hard” drugs, and among patterns of use. These carry with them differences in risk, from negligible to severe. Another insight is that many drug users will respond to health and safety programs but not abstinence efforts, at least not initially. The harm reduction principle also presupposes that there are net benefits to bringing drug use above ground, so that risks can be recognized and monitored, social service programs can have access to addicts, and addict dependence on drug dealers is reduced.

The Beckley Foundation Drug Policy Programme, an international drug policy research group, also opposes the single-minded focus on numbers of users, on two grounds: first, “it is necessary to take into account the costs of these policies. Second, drug policy should be conducted within clear deontological constraints,” specifically with respect for human rights and it is “salutary to note that some of the more successful recent policies to control and contain the supply of drugs have failed to respect these basic principles.” Marcus Roberts, Mike Trace & Axel Klein, Law Enforcement and Supply Reduction 11 (2005), Drugscope Report for the
alcoholic from the moderate drinker, drug policy should recognize that the risks of drug-taking behavior can be mitigated and that doing so is important.

*Politicized science*

The other structural flaw that has doomed the drug war is that the ONDCP has seen itself as a political, even missionary, agency, pushing a position rather than assessing it in light of experience. Its scientific and empirical premises are too rarely derived by scientific method and too often generated by pre-existing policies. Public policy experts MacCoun and Reuter have done the service of reviewing the history of the ONDCP, and conclude that “[t]he plausibility of relaxing the stringency of America’s marijuana prohibition regime has been obvious for a quarter century; yet those bodies that have endorsed such relaxation have suffered only calumny as a consequence.”

Rewriting or rejecting its own commissioned research to suit political agendas marred the government’s drug war from its inception – not surprisingly, in light of the truism that truth is the first casualty of war. At that time, during Nixon’s first term when drug use and the counterculture exploded, the Administration created the “Shafer Commission,” formally known as the Commission on Marijuana and Drug Abuse. It unequivocally recommended marijuana decriminalization, finding that experimental or intermittent use resulted in little danger of physical and psychological harm. The report also urged more attention to scientific findings, stating that “government agencies have sometimes used drug research to support policy rather than shape it.” Ignoring both recommendations, the President disowned the report out of hand, stating that although

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48 National Commission on Marijuana and Drug Abuse, Drug Use in America: Problem in Perspective 279, 368-70 (1973), at http://www.druglibrary.org/schaffer/Library/studies/duapip/pipmenu.htm. The commission added that studies producing the answers drug policy officials wanted “were promoted and publicized; projects which appeared to document the “wrong” results” were quietly buried and not released. [New research] should specifically include studies that examine without bias alternate hypotheses and approaches.” *Id.*
marijuana was no more dangerous than the drink then in his hand, following his commission’s view would send the wrong message.49

Thus began a cycle of research, recommendations, and rejection. In 1982 the National Academy of Sciences drafted a report suggesting that existing marijuana policies should be evaluated with a view to possible decriminalization.50 The NAC president was apparently pressured by the Reagan Administration to disown the report, which he did.51 Then during the Clinton Administration, Drug Czar Barry McCaffrey rejected research he had commissioned from the Institute of Medicine that found marijuana not to be a gateway drug, continuing to insist that it is.52 His Congressional liaison at the time now says that General McCaffrey’s views “didn’t track with the conclusions our researchers came to. It felt like he was trying to manipulate the data.”53 McCaffrey also ignored the predominant parts of two National Institute of Health reports recommending further study of marijuana’s potential health benefits,54 insisting there were none and citing only the part of one report that said it could not recommend marijuana smoking as a medical treatment at that time. The bulk of that 1999 report, finding health benefits and urging development of vaporizers or patches that could obviate smoking, went unheeded and unmentioned.55

In a searing report published just after McCaffrey left office, the National Research Council, an arm of the National Academy of Science, complains that drug policy-makers “are in no better position to evaluate the effectiveness of [the law enforcement focus] than they were in 1973 . . . .” The report concludes that “it is unconscionable

49 MacCoun & Reuter, supra note 46 at 376 (citing a law enforcement official’s account of his conversation with President Nixon). See also Rudolph J. Gerber, Legalizing Marijuana, Drug Policy Reform and Prohibition Politics 25 (2004) (quoting President Nixon as calling the Report’s authors “soft-headed psychiatrists…who are all on the stuff themselves”).
50 MacCoun & Reuter, supra note 46 at 377.
51 According to MacCoun and Reuter, a visit from Reagan Administration senior officials to NAC President Frank Press cast some doubt on NAC funding levels and subsequently Press wrote an entirely unprecedented introduction to the report disowning it and limited its printing to 300 copies. Id.
52 Wallace-Wells, supra note 15, at 105 (quoting Carol Bergman, noting that this was when “you could see [him] begin to lose credibility”).
53 Id. at 107 (quoting Carol Bergman).
55 Rudolph Gerber, supra note 36, at 86-87.
for this country to continue to carry out a public policy of this magnitude and cost without any way of knowing whether and to what extent it is having the desired effect.”

Under ONDCP head John Walters, drug czar until 2009, the agency continued to make scientific claims that are at best a minority view as if they were settled wisdom – for example, assertions that research has shown a “significant” gateway effect, and that “for

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56 INFORMING AMERICA’S POLICY ON ILLEGAL DRUGS, supra note 38, at 274, 279 (emphasis added). For example, the report criticizes the absence of adequate consumption data and reliable price data, which it considers critical to assess “the responsiveness of users to enforcement, treatment, and other interventions, the relationship between intensity of use and the consequences of use, or the responsiveness of demand to changes in price...[and] the impact of supply-reduction activities on the operation of drug markets.” Id. at 276. It also recommends further research on supply reduction policies, sanctions against illegal drug users, drug use prevention, the drug data needed for monitoring drug problems, drug data organization, and treatment.

Marijuana use has varied up and down over the last three decades, but experts are unable to tie the changes to the government’s drug policy. See, e.g., MACCOUN & REUTER, supra note 46, at 72-100; MASSING, supra note 44, at 190. For example, daily marijuana use among 12th graders in 2006 (5%) was less than the level it was in 1975 (6%) and 1978 (10.7%), but more than twice the level of 1992 (1.9%) Lloyd D. Johnston et al., Monitoring the Future: National Survey Results on Drug Use, 1975-2006, Volume I: Secondary School Students, 2006, at 444 (National Institute on Drug Abuse, NIH Publication No. 07-6205, 2007).

President Reagan’s ONDCP took credit for the drop in drug use in the mid to late 1980’s, which was a period of strong anti-drug activity. Yet cocaine use increased dramatically during those same years, casting doubt on the efficacy of the anti-drug policies. Moreover, as one report notes, “it is puzzling that these strong social messages continued through the 1990’s, when prevalence rose again in the USA. Furthermore, the ‘deterrence’ elements of the U.S. Government strategy—large scale arrests, widespread drug testing, and harsh sanctions for users—were implemented to a much greater degree in the 1990’s, so no clear correlation can be drawn between these government actions and the reductions in prevalence,” 3 MARCUS ROBERTS, ET AL., BECKLEY FOUND., LAW ENFORCEMENT AND SUPPLY REDUCTION 5 (2004).

MacCoun and Reuter point out that most people try drugs when they are in high school and most stop after that. Different birth cohorts are more involved with drugs than others. “The figures for high school seniors dropped dramatically in the 1980’s. They have risen substantially and steadily since the early 1990’s but remain well below the peak figures of the late 1970’s. Id. at 16. When Ronald Reagan assumed the presidency about a third of U.S. high school students admitted to smoking marijuana in the previous month. By 1988 that number had been reduced by half, a fact that he credited to his harsh and pervasive anti-marijuana campaign. However, Michael Massing and MacCoun and Reuter argue that it is not easy to draw conclusions regarding the cause of that reduction in marijuana use. See MASSING, supra note 44, at 190; MACCOUN & REUTER, supra note 46, at 72-100. See also GERBER, supra note 36, at 32-42.
young people, marijuana has surpassed alcohol in addictive risk.

Walters and the Bush Administration have made one of their two drug war priorities marijuana use suppression (the other being eradication and interdiction of Columbian cocaine). One can only speculate on their basis for doing so, since this priority is nowhere to be found in the annals of expert recommendations. MacCoun and Reuter think that marijuana’s symbolic role in the culture wars has something to do with the formidable obstacles to obtaining “a fair hearing for marijuana policy reform.” In any event, there are very high costs to leading a “war” without a reliable scientific and empirical foundation. If ONDPC cannot assimilate inconvenient facts and base its policy decisions on the best evidence, one solution might be its replacement by an agency better insulated from the political branches that will. The National Research Council report finds such inadequate knowledge underlying drug policy, and such restrictions of access to government funded research, that it recommends that drug research be placed under the control of a new agency – one with “stable sources of funding, access to data, and scientific independence” -- that would undertake “a major new research effort on the effects of drug control laws and their enforcement . . . on drug use and its consequences, and on the costs and unintended consequences of enforcement activities.”

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58 Wallace-Wells, supra note 15, at 110
59 MacCoun & Reuter, supra note 46, at 342.
60 Informing America’s Policy on Illegal Drugs, supra note 38, at 275-76.
61 Id. at 278.
62 Id. at 277. The NRC report recommends that the agency be comprised of members of the National Institute of Justice, the National Science Foundation and the Bureau of Justice Statistics. While recognizing the importance of the Department of Justice agencies, the authors say that including the National Science
B. INHUMANE ENFORCEMENT

We have discussed the unintended, counterproductive results of current marijuana policy. There is also intentional damage flowing from marijuana criminalization. Punishment and legal disabilities inflict hardships and suffering on large numbers of Americans by design – damage that also must be counted in any policy assessment.

Most marijuana users avoid imprisonment, but some do not, and who those are has nothing to do with merit or desert. Roommates and spouses may find themselves on the wrong side of the law without any involvement in drugs at all. Gardeners who grow their own for personal consumption may receive harsher punishment as “manufacturers” in some states. Recently, the New Orleans District Attorney was criticized for targeting marijuana users as a means of increasing her felony prosecution numbers. The statistic, which tells only part of the story, is that about 15,000 marijuana offenders are sentenced to prison each year.64

A vast number of others will suffer for their use of marijuana, even though not imprisoned as part of their sentence. These unlucky ones, between 700,000 and 800,000 each year, will lose their liberty through arrest and/or detention for some period of time before trial, and have their lives centered around lawyers, trial courts, legal fees and probation officers for the following year or more. The long-term legally imposed disabilities for those who are convicted may include ineligibility for government grants and contracts, public housing,67

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63 Richard A. Webster, Smoke Screen, New Orleans City Business, July 21, 2008, available at http://www.neworleanscitybusiness.com/print.cfm?recid=31324. The article quotes Tulane University criminologist Peter Scharf as saying that “by prosecuting thousands of marijuana possession cases as felonies… [the D.A., who is running for a judgeship, can] claim she is ‘tough on crime.’ ”

64 MacCoun & Reuter, supra note 46, at 344 (reporting in 2001 that annually 4,000 received federal prison sentences for marijuana offenses and approximately 11,000 received state sentences).


66 Grants, licenses, contracts, and some other federal benefits are restricted as to drug offenders under 21 U.S.C. § 862 (2008). Under section (b), at the discretion of the court, individuals convicted of a first federal or state drug possession offense may be rendered ineligible for all federal benefits for up to one year, and second
and depending on the state, driver’s licenses, occupational licenses, and voting. They may even include losing one’s own land, house or bank account, pursuant to forfeiture laws that transfer drug “instrumentalities” or “proceeds” to the government, ultimately landing primarily in the budget of the agency that seized them. For offenders for up to five years; third offenders are mandatorily permanently ineligible if the offenses involved distribution. Id. Section (b) sanctions may be waived if a person declares himself to be an addict and undergoes treatment or is declared rehabilitated. Id.

The Supreme Court has even upheld the eviction of a drug user’s parents on the basis of their child’s use of drugs, even if it took place outside of the home and the parents knew nothing about it. Dep’t of Hous. & Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002) (interpreting 42 U.S.C. § 1437d(l)(6)). See also 42 U.S.C. § 13661(a) (2007) (providing that a person previously evicted from federally-assisted housing by reason of drug related criminal activity is ineligible for admission to any federally-assisted housing for three years).

Forfeiture of license occurs even when the marijuana arrest had nothing to do with driving or being in a car. See, e.g., VA. CODE ANN. § 18.2-259.1 (2008); GA. CODE ANN. § 40-5-75 (2007); FLA. STAT. ANN. § 322.055(2) (2001); 23 U.S.C. § 159 (2008) (denying portion of highway funds to states that do not suspend the driver’s license of drug felons).

18 U.S.C. §§ 3563(b)(5), 3583(d) (2008) (authorizing sentencing court to place occupational restrictions as conditions of probation); 21 U.S.C. § 862(a), (b), and (d) (discussing limitations on federal licenses to drug offenders); U.S. SENTENCING GUIDELINES MANUAL §§ 5F1.5(a), 5F1.6 (2002); See also 29 U.S.C. §§ 504(a), 1111(a) (1987) (discussing ineligibility from listed positions in labor unions or employee benefit plans); Kathleen M. Olivas et al., The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later, 60 FED. PROBATION 10, 13 (1996) (noting that twenty-five states restrict felons from public office).

As of 2003, thirty-six states permitted all felons to vote after prison release or sentence completion; another seven states permitted some felons to vote after sentence completion; in the other seven states the right to vote can be restored only after executive or legislative clemency. See ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-2.6 n.47 (3d ed. 2004).

21 U.S.C. § 881(a) (2002). Seizures accomplished exclusively by state or local agencies may be “adopted” by the federal government whenever the conduct giving rise to the seizure is in violation of federal law. Directive 90-5, The Attorney-General’s Guidelines on Seized and Forfeited Property, § 9-118.200 (July 1990), in DOJ Asset Forfeiture Manual at B-545 (Prentice Hall 1994). When the federal government has “adopted” a state forfeiture case, 80 percent of judicially or administratively forfeited assets are allocated to the state or local agencies for law enforcement purposes and 20 percent remain with the federal government. In joint seizures, the share is allocated on a case-by-case determination based on the amount of work each agency performed. 21 U.S.C. § 881(e)(3); A GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 7-8 (Dep’t of Justice Mar. 1994). See also Eric Blumenson & Eva Nilsen, Policing for Profit: The Drug War’s Hidden Economic Agenda, 65 U. CHI. L. REV. 35, 44 n.64 (1998).
college students, federal law will strip them of their college loans for even a first marijuana possession offense. For high school students, there is the risk of mandatory expulsion under zero tolerance drug policies in an estimated eighty-eight percent of public schools; for some immigrants, the risk that a conviction may result in deportation; for a parent, the risk of children lost to custody battles or child protection agencies; for the unemployed, job application forms eliciting their criminal records; and for all offenders, a significant risk of time in prison for violating probation under state sentencing laws if caught again.

One must juxtapose lives turned upside down in these ways with the nature of the offense, no different than the activities of millions of other Americans who use intoxicating substances for similar reasons. And even if an offender manages to avoid all of these consequences, there is still the criminal conviction, itself no small thing as the United States Supreme Court stated with regard to the misdemeanor

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72 20 U.S.C. § 1091(r) (2002). This 1998 law suspends or forever terminates a drug offender’s eligibility for federal college loans and grants. Initially the law applied to anyone with a conviction at any time, but a recent amendment excludes convictions prior to college. The periods of ineligibility vary, depending upon the number of convictions and whether they were for possession or distribution of drugs—from a year of ineligibility for a single possession conviction, to permanent ineligibility for a second distribution or third possession conviction. This law and its constitutional and legal infirmities are discussed in detail in Eric Blumenson & Eva Nilsen, How to Construct an Underclass, Or How the War on Drugs Became a War on Education, 6 J. GENDER RACE & JUST. 61, 88-95, 101 (2002).

Tom Angell, a spokesman for Students for Sensible Drug Policy, reports that more than 200,000 college students have lost financial aid in the past 10 years because of drug convictions. Matthew Huisman & Jason Millman, As Frank Prepares Marijuana Bill, States Make Own Efforts, SOUTH COAST TODAY, Apr. 6, 2008, available at http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20080406/NEWS/804060373.


74 8 U.S.C. § 1227(a)(2)(B) (1999); § 237(a)(2)(B) (omitted). Because this provision also authorizes deportation of anyone who is a “drug abuser or addict” even absent a conviction, state decriminalization does not necessarily provide protection. Only deletion of marijuana from the Federal Controlled Substances Act, 21 U.S.C.A. § 802, would do so. 42 C.F.R. § 34.2(g) and (h).
conviction in *Lawrence*, punishable only by a fine: “The stigma this criminal statute imposes … is not trivial … [I]t remains a criminal offense with all that imports for the dignity of the persons charged.”

Jimmy Carter may have been the last President who seriously considered the damage government marijuana policies were causing large numbers of Americans. “Penalties against a drug should not be more damaging to an individual than the use of the drug itself, and where they are, they should be changed,” he said, adding that “nowhere is this more clear than in the laws against possession of marihuana.” The harms the government’s drug war strategy may inflict on users have gone largely uncounted in the government’s assessments of its policies since then. These include not only arrest and the legal consequences we have discussed, but even for those not arrested, dealing with unsavory dealers to obtain the drug, unavailability of treatment for those who want it, and the fear of apprehension, which may also inhibit seeking treatment. It also includes the risk of impure drugs, at times containing poisons like paraquat sprayed by the United States in previous eradication programs.

The ONDCP’s reports pay scant attention to any of this damage. After Carter left office, such concerns were replaced by a large dose of moral opprobrium against drug offenders of any kind. ONDCP Drug Czar William Bennett stated that anyone who uses drugs “is involved in an intentional criminal enterprise that is killing thousands of Americans each year.” Bennett, who thought drugs constituted “our gravest domestic problem,” believed that a non-addicted, casual user should be severely punished because he is “much more willing and able to proselytize his drug use … among his remaining

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78 WILLIAM BENNETT, OFFICE OF NAT’L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 7 (1989).
79 Id. at 9.
non-user peers.” Bennett said he had no problem with beheading them. Bush Drug Czar John Walters’ statement that the extreme “moral poverty” of its users requires “stiff and certain punishment” shows that at least through 2008, the ONDCP was still an agency where compassion was in short supply. Walters is also noted for his 1996 testimony to Congress that the United States already suffered from “too much treatment capacity”, and that treatment is a waste of effort compared to incarceration.

Barry McCaffrey, ONDCP Drug Czar during Clinton’s second term, was no more compassionate towards marijuana users, including those suffering from cancer and other illnesses who found relief in marijuana they could not find elsewhere. By this time, voters in a number of states had passed ballot initiatives legalizing marijuana for medical purposes, based on research finding marijuana to be a useful treatment for glaucoma, nausea in chemotherapy patients, wasting syndrome, and multiple sclerosis pain. McCaffrey, who

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80 Bennett, supra note 78, at 11.
83 Id. at 56. In fact, treatment was available to less than half those who wanted to receive it. Michael Massing, Rebuttal to Letter to the Editor, U.S. Drug Policy: Are we doing the right thing, SALON.COM, Apr. 5, 2000, http://www.salon.com/health/feature/2000/04/05/drung_debate/print.html (citing White House figures showing 5 million Americans in need of drug treatment but only 2.2 million receiving it).

Over thirty-five thousand patients are currently using medical marijuana legally in these states, and over twenty-five hundred physicians have recommended it for use by their patients. See, Drug Science Org., Accepted Medical Use: Medical Professionals, The 2002 PETITION TO RESCHEDULE CANNABIS (MARIJUANA) (2006), available at http://www.drugs science.org/amu/amu_medprof.html.
85 Id. at 81-2 and 84. The American Bar Association “supports federal legislation to establish a program under which [seriously ill] patients can be treated with marijuana . . . .” Letter from Robert D. Evans, A.B.A. Gov’t Affairs Office, to Honorable John Conyers, Ranking Member Committee on the Judiciary, H.R. (May 4, 1998). See generally WENDY CHAPKIS AND RICHARD WEBB, DYING TO GET HIGH: MARIJUANA AS MEDICINE, (NYU Press) (2008), for a sociological account of the medical marijuana controversy. For studies on medicinal benefits, see, NAT’L
discounted the studies and considered medical marijuana to be a disingenuous trojan horse for general legalization,86 travelled to states with medical marijuana regimes and publicly condemned the doctors involved.87 The federal government threatened to criminally prosecute the doctors88 and remove their licenses -- resulting in a successful suit brought by physicians that enjoined the government from doing so.89 The Bush Administration continued to oppose medical marijuana as useless, despite having patented its medicinal benefits in an application asserting cannabinoids’ usefulness in preventing or treating diseases including stroke, trauma, auto-immune disorders, Parkinson’s, Alzheimer’s and HIV dementia.90

86 MacCoun & Reuter, supra note 46 at 379.
87 Wallace-Wells, supra note 15, at 107.
88 MacCoun & Reuter, supra note 46 at 379.
89 Conant v. Walters, 309 F.3d 629 (9th Cir. 2002).
President Obama has announced a change of federal policy on aspects of marijuana policy at long last, promising not to enforce federal drug law against marijuana treatments undertaken in states that have legalized such use. But as of July, 2009, it is unclear what direction the Administration will take on the broader issue of recreational use. Despite encouraging statements, Obama’s first budget did not reveal much inclination to diminish the law enforcement emphasis of the drug war, proposing an increase in interdiction and law enforcement funding but a decrease for drug education, compared with the last Bush levels; and Drug Czar Kerlikowske says that marijuana has “no medicinal benefit,” and that legalization is out of the question.

II. REFORMING MARIJUANA LAW

A. IS THERE A “MARIJUANA PROBLEM”?

The first step in reforming marijuana laws and policy must be a clear-eyed look at where the real problems lie. This not only requires much more attention to the existing empirical evidence than has been the case in the ONDCP; it also requires properly framing the question. For example, we should not exclude from consideration any possible benefits of the drug in advance; nor should we exclude the harms inflicted by existing or proposed governmental policies designed to deal with marijuana, such as those addressed in part I. Of course, there will be no uncontroversial answer to this policy question, no matter how well the question is framed. Different people will attach different weights to the importance of liberty, privacy, safety, limiting police discretion, and much more. But at least we can attempt to understand the facts in an unbiased and depoliticized way.

How risky is marijuana to the average user? Marijuana use does pose some health risks, although it is surely less dangerous to health than alcohol, nicotine, acetaminophen, fried foods, and downhill skiing. For the unlucky ones, who constitute a significant number, any of these latter activities may prove fatal, whereas there is no known case of marijuana use causing death, and the lethal dose is at least 20,000 times the amount of marijuana in a single cigarette.

91 See supra note 6.


93 ALJ Young Opinion, infra note 115, at 56-57 (noting also that 5,000 years of use have left no record of a single death, and that it is estimated that “in order to induce
Publicly and privately funded studies have mostly concluded that the casual use of marijuana is not harmful to most users. The medical journal Lancet found “cannabis less of a threat than alcohol or tobacco . . . . [O]n the medical evidence available, moderate indulgence in cannabis has little ill effect on health.” Indeed, in recommending that marijuana be moved to Schedule II, one death a marijuana smoker would have to consume 20,000 to 40,000 times as much marijuana as is contained in one marijuana cigarette,” or approximately 1500 pounds within fifteen minutes). See also Lester Grinspoon & James B. Bakalar, Marijuana as Medicine: A Plea for Reconsideration, 273 J. AM. MED. ASS’N 1875, 1876 (1995); Stephen Sidney et al., Marijuana Use and Mortality, 87 AM. J. PUB. HEALTH 585 (1997) (concluding that there is “no association between marijuana and overall mortality” in non-AIDS afflicted patients).


95 Dangerous Habits, supra note 94.
administrative law judge declared marijuana to be “one of the safest therapeutically active substances known to man.”

That last accolade may be overstating it. Marijuana may be relatively safe compared to other commonly used drugs, but its use will compromise the health of some users. Like tobacco, marijuana when smoked can provoke upper respiratory health problems and may even, with long term or frequent use, lead to serious damage to the lungs. Whether marijuana is also a carcinogen is contested, with recent reports even finding that the drug contains a possible anti-tumor mechanism. In terms of mental health, studies suggest that heavy long-term users, but not casual or short-term users, may do some permanent damage to their memory and focus.

96 See Judge Young’s opinion supra note 115, at 58-59
98 See e.g. W. HALL, L. DAGENHARDT ET AL., THE HEALTH AND PSYCHOLOGICAL EFFECTS OF CANNABIS USE xxv (2003); Sarah Aldington et al., Effects of cannabis on pulmonary structure, function and symptoms, 62 THORAX 1058 (Dec. 2007); Su W. Hii et al., Bullous lung disease due to marijuana, 13 RESPIROLOGY 122 (Jan. 9, 2008).
99 Findings of no demonstrated connection between marijuana and cancer include Donald Tashkin et. al., The American Thoracic Society, 102nd International Conference, Presentation, Marijuana Use and Lung Cancer: Results of a Case-Control Study (May 23, 2006); Mia Hashibe et al, Marijuana Use and the Risk of Lung and Upper Aerodigestive Tract Cancers: Results of a Population-Based Case-Control Study, 15 Cancer Epidemiology Biomarkers & Prevention 1829 (October 2006); S Sidney et al., Marijuana Use and Mortality, 87 AM. J. PUB. HEALTH 585 (1997); Julien Berthiller et al., Marijuana Smoking and the Risk of Head and Neck Cancer: Pooled Analysis in the INHANCE Consortium, 18 CANCER EPIDEMIOLOGY BIOMARKERS & PREVENTION 1544 (2009) and JOY, supra note 54. Some recent research concludes that cannabinoids may even have anti-cancer properties that could mitigate the carcinogenic effects of nicotine smoke. Tashkin, op. cit; M. Guzman, Cannabinoids: Potential Anti-cancer Agents, 3 NATURE REVIEWS: CANCER 745 (2003). However, there are also findings that marijuana smoke (but not the plant itself if ingested by vaporization or other smokeless means) may be a carcinogen, see Rajinder Singh et al, Evaluation of the DNA Damaging Potential of Cannabis Cigarette Smoke by the Determination of Acetaldehyde Derived N\(^2\)-Ethyl-2'-deoxyguanosine Adducts, 22 CHEMICAL RES. TOXICOLOGY 1181 (2009); April Dembosky, Marijuana smoke is a carcinogen, California board rules, MERCURY NEWS, June 19, 2009, available at www.mercurynews.com/topstories/ci_12644670?nclick_check=1.
100 The study tested three groups; heavy (daily) long term users averaging 23.9 years use each; heavy short term users; and non-users. The finding was that the heavy long term users performed significantly less well on memory and attention tests than the other two groups, whose performance was essentially identical. Nadia Solowij et al., Cognitive Functioning of Long-term Heavy Cannabis Users Seeking Treatment, 287 JAMA 1123, n.9 (2002). A subsequent study of fifteen heavy users found some loss of brain tissues that are correlated with memory (hippocampus) and emotion
generated conflicting findings on whether adolescent marijuana use is linked to poorer performance in work and school, or to an increased risk of mental disorders. And one study suggests that about 10% of marijuana users, and perhaps half of daily users, experience dependency for some period. But even heavy dependent users experience none of the physiological withdrawal symptoms or extreme dysfunction that afflicts dependent users of addictive drugs like alcohol, cocaine and heroin, and no evidence suggests that

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101 MacCoun and Reuter say the longitudinal evidence on the correlations between marijuana use and educational attainment are mixed, noting that other factors may explain what might appear to be a correlation, supra note 46, at 352.


103 MacCoun & Reuter, supra note 46, at 353-355. The authors note that although a 10% dependency rate may seem small, it is a substantial number of people considering the population base of roughly 70 million Americans who admitted to trying marijuana as of their writing, in 2001. Id. at 355. (The dependency rates for tobacco and alcohol are estimated at 32% and 15% respectively. Joy, et. al., supra note 54, at 95.) However, there are infrequent reports of medical problems among those dependent on marijuana following periods of abstinence. The authors note further that while dependence may be common, it is not very severe, and cite a study in which patients smoked 20 marijuana cigarettes per day for two or three weeks “and showed only minimal tolerance and no abstinence syndrome.” MacCoun & Reuter, supra note 46, at 354-55.

There is a paucity of information about marijuana dependency, which may reflect the uncomplicated and mild nature of the dependence and the treatment users may seek. Id. at 351-53 (summarizing research which the authors describe as “thin,” with highly polarized conclusions). The motivation and tolerance of users appears not to have been extensively studied. One problem with collecting data from treatment centers is that most drug programs are not designed to diagnose and treat marijuana addiction. Also, many of those who enter these programs are there solely due to a court order as part of a sentence or to avoid jail or a criminal conviction, making it difficult to gather helpful statistics. See id. at 356.
marijuana dependency is criminogenic. Most users are young people who give it up as they get older.  

There are also short term effects while on the drug. Marijuana intoxication can cause anxiety and impair motor skills that make it dangerous to drive while under its influence. 

A different public health issue publicized by the ONDCP is the so-called “gateway effect,” by which marijuana is supposed to lead its users to much less benign drugs like heroin and cocaine. The evidence of such an effect is quite limited, however, with contested results on each side. We do not discount the possibility that further research

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104 MacCoun & Reuter, supra note 46, at 15-17 (noting that users appear to age out of the drug as their responsibilities increase, i.e., work, family, marriage, etc.).

105 The Institute of Medicine describes the effects of cannabinoids as “dose-dependent relaxation, disinhibition; alterations of mood, emotion and behavior; inebriation, intoxication. Mild tolerance.” Comm. on Data and Research for Policy on Illegal Drugs, Nat’l Research Council, Informing America’s Policy on Illegal Drugs 41 (Charles F. Manski et al. eds., 2001).

106 MacCoun & Reuter, supra note 46, at 353. However, the authors add that driving while intoxicated is probably not a major problem for marijuana users as a group.

107 MacCoun and Reuter’s review of the research leads them to conclude that there is little evidence that marijuana use increases the risk of using more harmful drugs, but they do not absolutely foreclose the possibility. Id. at 351. For a very good discussion of the arguments and research on the gateway issue, see id. at 345-51. See also Robert J. MacCoun, Competing Accounts of the Gateway Effect: The Field Thins, But Still No Clear Winner, 101 Addiction 473 (2006).

The issue is one of causation versus correlation. No doubt most heroin addicts have used marijuana first, but that doesn’t show marijuana to have caused their addictions. Their life circumstances, psychology, or chemistry may have predisposed them to do both. Controlling for such factors is exceedingly difficult and partly explains both the paucity of convincing data and the divided conclusions. In 2002, scientists at RAND Drug Policy Research Center found that “the primary evidence supporting the marijuana gateway effect can be explained completely by the order in which youths first have the opportunity to use marijuana and other drugs … without any assumption that use of marijuana contributes to the risk of initiating use of hard drugs.” Andrew R. Morral, Daniel F. McCaffrey & Susan M. Paddock, Reassessing the Marijuana Gateway Effect, 97 Addiction 1493, 1493 (2002). See also Press Release, RAND, Study Casts Doubt on Claims that Marijuana Acts as ‘Gateway’ to Use of Cocaine and Heroin (Dec. 2, 2002) (on file with RAND Corporation). A study funded by the National Institute of Medicine at the instigation of former Drug Czar Barry McCaffrey found no causal relationship between marijuana use and use of hard drugs, and nothing inherent in marijuana that makes the user crave or desire the kind of drug experience rendered by heroin or cocaine. Joy et al., supra note 54. See also Ralph E Tarter et al., Predictors of Marijuana Use in Adolescents Before and After Licit Drug Use: Examination of the Gateway Hypothesis, 163:12 Am. J. Psychiatry 2134 (2006) (finding no causal relationship). On the other side, two studies have tried to control for confounding factors and report some evidence of causal impact. See David M. Fergusson et al., Cannabis Use and Other Illicit Drug Use: Testing the Cannabis Gateway
may yet show some clear causal relationship, but such evidence does not exist currently. And whether or not the theory is true, the indisputable fact is that the large majority of marijuana users never go on to use hard drugs. ¹⁰⁸

The bottom line is that despite its significant risks to certain individuals, numerous studies have concluded that the casual use of marijuana is not harmful to most users. ¹⁰⁹ Millions of people have used marijuana sometime in their lives, and very few have harmed themselves or others in ways that are more extreme or different in kind than many other routine activities in modern life. ¹¹⁰

B. SOME BETTER ALTERNATIVES

Nothing that we have said should be read as implying that a variety of drugs have not wrought serious damage to Americans, or that marijuana in particular does not seriously harm a certain number of users and their families. We do believe, however, that these harms have not been ameliorated by our long-running scattershot drug policy. A better policy, and one more consistent with an open, liberal society, would identify and target the most serious risks and seek to minimize them.

One obvious place to start is to reclassify marijuana to conform to the findings of virtually all research studies. As the Supreme Court recently noted, marijuana was placed in Schedule I in 1970 only as a stop-gap until ongoing studies were completed, and there now exists evidence which, if found credible, would cast “serious doubt” on the propriety of Schedule I status. ¹¹¹ According to current knowledge, marijuana satisfies none of the three Schedule I requirements: (1) it

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¹⁰⁸ See ARNOLD S. TREBACH, THE GREAT DRUG WAR 83 (2005) (reviewing several years’ data from the National Household Survey on Drug Abuse and concluding that “if the escalation theory worked for large numbers, then the percentage of users would be higher for other drugs, especially the illegal ones and especially for older users. The opposite was true.”)

¹⁰⁹ See supra note 93 and 94.


¹¹¹ See Gonzales v. Raich, 545 U.S. 1 (2005), at 14 and 28 n. 37.
has a relatively low potential for harm and abuse;\textsuperscript{112} (2) it appears to have therapeutic benefit, as the government itself claimed in its successful patent application;\textsuperscript{113} and (3) according to the American College of Physicians, it may be used safely under appropriate conditions.\textsuperscript{114}

Rescheduling can be accomplished by an act of Congress or by petitioning the Justice Department.\textsuperscript{115} Doing so would protect patients and doctors in the twelve states that have passed medical

\textsuperscript{112} See supra Part II (A).

\textsuperscript{113} See, e.g., J. OY, supra note 54, at 179 (recognizing that “scientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC, for pain relief, control of nausea and vomiting, and appetite stimulation”); U.S. Patent 6,630,507B1, supra note 90 (regarding the patent obtained in 2003 by the U.S. government).

\textsuperscript{114} American College of Physicians, Supporting Research into the Therapeutic Role of Marijuana 1 (2008) http://www.acp.online.org/acp_news/medmarinews.htm. In this position paper, the American College of Physicians (ACP) “urges an evidence-based review of marijuana’s status as a Schedule I controlled substance to determine whether it should be reclassified to a different schedule. This review should consider the scientific findings regarding marijuana’s safety and efficacy in some clinical conditions.”

\textsuperscript{115} 21 U.S.C. § 811(a)(2)(3) (2006). Unfortunately, so far petitions to reclassify marijuana have been unsuccessful; indeed, the first petition took 22 years before being rejected. In 1972 the National Organization for the Legalization of Marijuana (NORML) petitioned the DEA to reschedule marijuana from Schedule I to Schedule II. Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994). The DEA rejected the claim on the grounds that (1) the drug's chemistry must be known and reproducible; (2) adequate safety studies must have been performed on the drug; (3) there must have been adequate and well-controlled studies proving the drug's efficacy; (4) the drug's medicinal value must be accepted by qualified experts; (5) the scientific evidence of the drug's safety and efficacy must be widely available. In subsequent litigation, NORML challenged these factors as unreasonable and also claimed bias on the part of the fact finder. Id. at 1135.

In a second rescheduling case, Administrative Law Judge Francis L. Young found that it would be “unreasonable, arbitrary and capricious” for the DEA to continue to deny marijuana access to seriously ill patients, and concluded that it should be reclassified as a Schedule II substance. In the Matter of Marijuana Rescheduling Petition, Drug Enforcement Administration Docket No. 86-22 (1988), at 68, available at http://www.druglibrary.org/Schaffer/LIBRARY/studies/YOUNG/ As described in Raich, supra note 111, at 15, n. 23,

The DEA Administrator did not endorse the ALJ’s findings, 54 Fed. Reg. 53767 (1989), and since then has routinely denied petitions to reschedule the drug, most recently in 2001. 66 Fed. Reg. 20038 (2001). The Court of Appeals for the District of Columbia Circuit has reviewed petitions to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator’s final order.
marijuana laws from the risk of federal prosecution. It would also permit more unfettered research into marijuana’s health risks and benefits without the necessity of meeting unduly restrictive protocols, and with a greater possibility of obtaining research strains other than the few varieties made available by the government’s only licensed growing facility. To the chagrin of researchers, their requests have been adjudicated by administrations that have consistently insisted that marijuana has no therapeutic benefits.

Raich, supra note 111, at 30-33 (holding that the commerce clause gives Congress authority to prohibit the local cultivation and use of marijuana, despite state law to the contrary). Placing marijuana into Schedule II would allow for medical use of the drug.

British Columbia physicians recommended an alternative public health approach to drug classification in a 2005 report to the Canadian government by the Health Officers Council of British Columbia. They would categorize drugs according to range of benefits and harms beginning with Beneficial Use, Casual/Non-problematic Use, Problematic Use, and Chronic Dependence. The report’s authors look at the spectrum of psychoactive substances with tobacco and alcohol at one end of the present policy regime and illegal drugs, including marijuana, at the other end of the spectrum, consigned to a criminal-prohibition black-market economy. HEALTH OFFICERS COUNCIL OF BRITISH COLUMBIA, A PUBLIC HEALTH APPROACH TO DRUG CONTROL IN CANADA 5 (2005) https://www.cfdp.ca/bchoc.pdf.

According to the American College of Physicians, marijuana research has also been hindered by marijuana’s inclusion in Schedule 1, as well as by a complicated federal approval process, and limited availability of research-grade marijuana. Supporting Research into the Therapeutic Role of Marijuana, Am. College PHYSICIANS, Jan., 2008, www.acponline.org/acp_news/medmarinews.htm (last visited July 20, 2008). The ACP urged review of marijuana’s Schedule 1 status. See id.

The last factor, limited availability of research marijuana, results from DEA decisions denying access, coupled with its policy of affording a monopoly on marijuana manufacture to a single grower. Under federal law the importation and manufacture of Schedule I and II substances must be provided under competitive conditions. 21 U.S.C. § 823(a)(1) (2006); 21 C.F.R. § 1301.33(b) (2009). Yet since the late 60's, the University of Mississippi has grown all the marijuana available for research purposes. In 2001 Lyle Craker, a professor of plant and soil sciences from the University of Massachusetts, filed a petition with the DEA for permission to grow research-grade marijuana to supply government-approved research projects, a petition ultimately supported by 45 Congressmen and dozens of organizations in the medical and scientific community. In Feb. 2007 Professor Craker received a favorable non-binding ruling from DEA Administrative Law Judge Bittner, who found that ending the research marijuana monopoly would be in the public interest, and that government-authorized marijuana research had been thwarted by the National Institute on Drug Abuse’s refusal to provide the substance. But on Jan. 12, 2009 the DEA rejected Judge Bittner’s ruling and Craker’s request. See Bina Venkataraman, UMass Loses Marijuana Lab Bid, BOSTON GLOBE, Jan. 13, 2009, at A10. See also Press Release, ACLU, Bush Administration Deals Eleventh Hour Blow To Scientific Freedom (Jan. 12, 2009), www.aclu.org/drugpolicy/medmarijuana/38300prs20090112.html; In the Matter of
What is needed most, of course, is a sea change in marijuana law, not least in order to end the destructiveness of present policy. There should be major government-funded efforts to devise the most promising alternative legal regime. Our aim in this article is to underscore the need for policy reform, not to argue for a particular policy. But we do want to offer a few provisional thoughts on three possibilities, any one of which would constitute a vast improvement on present policy.

The first is the one that currently exists in parts of the United States: *decriminalization of use and possession*. Decriminalization does not end the ban on use or sale of marijuana, but does remove criminal penalties for individuals found possessing a small amount.

Decriminalization was a successful reform strategy in the 1970s but its momentum ran out soon after. Several states decriminalized possession of small quantities of marijuana in the 1970s, after President Nixon’s commission on marijuana recommended it as national policy.\(^{118}\) These laws, for the most part, remain in effect and take several forms.\(^{119}\) Other states have stopped short of decriminalization, but offered ways to avoid a criminal record, for example, by treating possession of small quantities as a civil infraction resulting in no arrest and no criminal record. Some treat second offender possession cases as criminal, and most treat sale of any quantity as a crime. Several states have decriminalized at least some kinds of marijuana possession offenses.

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example by deferring a first offender’s prosecution for a period of
time and then dismissing the charge if there has been no arrest in the
interim.

Decriminalization has four important factors in its favor: (1) it
puts an end to the worst excesses of current marijuana policy
(including arrest, imprisonment, and the deleterious effect on law
enforcement practices we have discussed); (2) studies show that
decriminalization does not increase the number of marijuana users;\(^\text{120}\)
(3) it is arguably more consistent with international drug treaty
obligations than legalization,\(^\text{121}\) and (4) it may again have a possibility

\(^{120}\) Research in states that decriminalized marijuana possession in the 1970s showed

\(^{121}\) The United States is a party to three international drug treaties that obligate its
parties to control drug use and drug trafficking: (1) the Single Convention on
Narcotic Drugs, Art. 4c (1961) (banning use, possession, and manufacturing of ten
scheduled drugs, but by a 1971 amendment, allowing for treatment instead of
punishment for drug users); (2) the Convention on Psychotropic Substances (1971),
which added hallucinogens such as LSD; and (3) the Convention against the Illicit
Traffic in Narcotic Drugs and Psychotropic Substances (1988) (aimed at drug
traffickers, and including provisions on asset forfeiture, money laundering and
dealing in precursor chemicals.) \textit{See LEITZEL, supra note 9, at 262-267 (discussing
these treaties). If marijuana were legalized and commercially available, this would
appear to violate the Single Convention’s requirement that all scheduled drugs be
illegal, although there is some ambiguity in the conventions that suggests \textit{“their
terms apply only to the extent that they are consistent with national constitutional
principles and legal norms.” Id. at 263.}

However, \textit{decriminalization and/or non-enforcement} are likely consistent
with these treaties. An opinion of the International Narcotics Control Board on the
1988 Convention found that the convention does not require criminal prosecution
for possession of small quantities of drugs. \textit{United Nations Office of Drugs and
Netherlands effectively allows the possession and sale of small amounts of
marijuana while avoiding treaty objections by criminalizing marijuana but not
enforcing provisions of the law. LEITZEL, supra note 9, at 262.}
of success, at least more so than any alternatives. As noted, Rep. Barney Frank last year filed a decriminalization bill for the first time in Congress, saying that after decades of belief in its merits, he now thinks public opinion supports it as well. Recent polls show more popular support for marijuana decriminalization than any time in the last three decades.

Decriminalization retains many of the drawbacks of present policy, however, while jettisoning the worst. It still leaves marijuana production and sale to a black market populated by criminals, and eliminates any government control over the drug or its market. And although removing criminal penalties would liberate marijuana users from the virtually total loss of liberty that may be imposed under current law, preventing use of the substance raises separate liberty concerns we address elsewhere.

122 See supra note 8. Frank’s bill is House Bill 5843, “An Act to Remove Federal Penalties for the Personal Use of Marijuana by Responsible Adults,” submitted April, 2008. The proposed law provides: “Notwithstanding any other provision of law, no penalty may be imposed under an Act of Congress for the possession of marijuana for personal use, or for the not-for-profit transfer between adults of marijuana for personal use. For the purposes of this section, possession of 100 grams or less of marijuana shall be presumed to be for personal use, as shall the not-for-profit transfer of one ounce or less of marijuana, except that the civil penalty provided in section 405 of the Controlled Substances Act (21 U.S.C. § 844a) may be imposed for the public use of marijuana if the amount of the penalty does not exceed $100.”

123 An August 13, 2008 poll showed an extraordinary 72% of Massachusetts voters supporting decriminalization over current criminal penalties. Voters Say Yes to Decriminalizing Marijuana: 7NEWS/Suffolk University Poll, available at http://www.suffolk.edu/30284.html. A 2009 California poll showed 56% of voters in favor of legalizing and taxing marijuana. Cathcart, supra note 7. Judging by successful results in many voter initiatives, see e.g. supra note 4, the public is more reform-minded on the issue than legislators have been. Successful ballot initiatives involved intensive and expensive work advertising and educational campaigns, but point-blank questions in nation-wide polls show a sentiment that may be surprising given the ONDCP’s massive anti-marijuana advertising budget. For example, a 2002 CNN-Time poll found 72% support for eliminating incarceration as a penalty for recreational marijuana use, and 80% for legalized medical marijuana; a 2005 Gallup Poll showed 36% of respondents favoring outright legalization (and in the Western states, 47% versus 49% against); and a Nov. 2004 AARP poll showed 72% of respondents middle-aged or older approved legalizing marijuana when a physician recommends it. See Stein, supra note 10; Gallup Poll, Nov. 1, 2005, available at www.gallup.com/poll/19561/Who-Supports-Marijuana-Legalization.aspx?version=print; Associated Press, AARP Poll Shows Most Support Legalizing Medicinal Marijuana, N.Y. TIMES, Dec. 19, 2004. Regarding drug policy generally, a September, 2008 Zogby poll reported 76% of likely voters deem the drug war a failure. Zogby/Inter-American Dialogue Survey (2008), available at http://www.thedialogue.org/page.cfm?pageID=403

124 Blumenson and Nilsen, supra note 11.
Legalization eliminates the drawbacks just noted but may have many of its own, depending on its form. Unlike decriminalization, it fully respects individual liberty, and it can help the government control the market in harm reducing ways. Legalization should dry up the black market just as ending prohibition did, leaving in its place licensed sellers who would have every business incentive to insure government imposed age limits, purity standards, and labels. It draws a sharp distinction between “soft drugs” and “hard drugs,” and removes the necessity for users to buy from people who sell both; and according to MacCoun and Reuter, to the degree that marijuana became more available and less expensive, it might draw people away from more dangerous drugs they use now.125

Legalization also paves the way for drug education programs that, by recognizing distinctions between drugs and between use and abuse, have the credibility and content to actually educate and safeguard their listeners. The juxtaposition of marijuana use and cigarette use – legal but age-restricted and subject to a massive public education campaign – is informative. In 1991, the U.S. Centers for Disease Control and Prevention commenced measuring the use of both. From then until 2005, cigarette smoking among high school students has declined, while marijuana smoking has increased by 25%.126 Treating cigarettes as a public health problem seems to have worked in ways that the drug war’s law enforcement focus has not.

Finally, legalization at the federal level promotes accelerated scientific research and technological development (for example, smokeless delivery systems) that could result in major improvements in safety.127

Nevertheless, some experts think that legalization could, at least in the short term, substantially increase the use of marijuana both because it would be easier to obtain and because commercialization would effectively proselytize new users.128 The ONDCP warns that

125 MacCoun & Reuter, supra note 46, at 360-62.
126 U.S. Centers for Disease Control and Prevention, Youth Risk Behavior Surveillance – United States, 2005 (June 9, 2006), available at http://www.cdc.gov/mmwr/PDF/SS/SS5505.pdf. The survey also shows that from the highest levels recorded by the survey in the late 1990’s, use of both drugs had significantly declined by 2005, but cigarettes had declined at a significantly steeper rate – approximately 1/3 less vs. ¼ reduction in marijuana smokers.
127 Vaporization may be a way to avoid toxic carbon monoxide and whatever other risks may result specifically from smoking the drug. See D.I. Abrams et al., Vaporization as a Smokeless Cannabis Delivery System: A Pilot Study, 82 Clinical Pharmacology & Therapeutics 572 (2007)
128 See MacCoun & Reuter, supra note 46, at 98-100. Precise use predictions are impossible as many factors influence a person’s decision to try a particular drug,
the message accompanying legalization would do so as well. The end of Prohibition did result in an increase in alcohol consumption. These are real concerns because some percentage of the additional users will ultimately suffer harm from their use.

**A regulatory regime:** Fortunately, the options are not limited to the present zero tolerance policy and a legalization policy that would place marijuana in every corner store and vending machine. Any responsible legalization policy could be carefully circumscribed in ways that would moderate both prevalence and risk. We note three possibilities among many worthy of study.

The first option is the most modest form of legalization, and one favored by several drug policy experts. This model is based on the limited legalization that has existed in Alaska for three decades following the Alaska Supreme Court’s decision that the privacy clause in Alaska’s constitution protects the private use of small quantities of marijuana within the home. In response to this decision, a new law was enacted which allowed adults to grow a limited amount of marijuana or receive it as a gift. Alaska maintained criminal sanctions on sale, however, and thus avoided commercialization.

This model’s success depends on easy access to marijuana for those who want to use it, which in turn depends on allowing commerce in seeds and on the green thumbs of would-be users. If marijuana users turned to home production, the overall harm reduction of this scheme would be considerable: it would reduce black market activity and eliminate the damage inflicted by, and on, the criminal justice system by present policy. There might be some increased risk of marijuana exposure to adolescents in families that grew marijuana, but otherwise use is unlikely to be significantly increased under this model.

A second model draws on the experience of the Netherlands, which has what is sometimes referred to as de facto legalization of

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129 MACCOUN & REUTER, supra note 46, at 168-169.
132 See MACCOUN & REUTER, supra note 46, at 330 (projecting that the Alaska model would not increase prevalence of use but may increase intensity of use).
marijuana. As part of a harm reduction drug policy commenced four decades ago, the Netherlands decided to eschew enforcement of its criminal laws against use or sale of limited quantities of marijuana. Use is still technically illegal, but long-running government policy is to allow the sale of registered quantities of marijuana in licensed coffee houses. There, marijuana can be purchased in small quantities for use either in the coffee house or elsewhere. The policy is designed to separate marijuana users from hard drugs and its criminal subculture, and to minimize adolescent access to all drugs. Use of marijuana did not markedly increase after de facto legalization, and there was no measurable increase in hard drug use. Today, considerably fewer high school students use marijuana in the Netherlands than in the United States.

The third model would permit highly regulated legalized sales of marijuana to adults by licensed stores. Growers, either private or under government contract, would be licensed to sell their product wholesale to processors and distributors. Regulatory commissions would oversee local distribution and promote responsible use. State and federal taxes could be assessed to fund education and treatment, or to pay for any harmful externalities attributable to drug use. This regime would effectively end the black market in marijuana, but, as noted above, it seriously risks increasing use and perhaps increasing the intensity of use. To avoid this, a strict regulatory regime could

133 See http://drugpolicy.org/global/drugpolicyby/westerneurop/thenetherlan/ (discussing the Netherlands’ legal policy with regards to marijuana).
136 Currently, marijuana is grown under NIDA contract by the University of Mississippi’s Marijuana Research project in several grades, ranging from 1% to 10% THC content.
137 See MACCOUN & REUTER, supra note 46, at 363 (suggesting that the history of alcohol and tobacco show that “the legal marijuana industry would be able to keep tax rates modest and thus establish … a price well below current levels.”).
138 Id. at 11 (“Full-scale legalization is much more likely to increase prevalence, and somewhat raise intensity, because promotion could not be controlled in the United States.”). See also id. at 362 (“There are only modest additional gains to counterbalance the increase in prevalence under the commercialization induced by legalization.”).
institute a number of measures.\textsuperscript{139} Marijuana could be treated as an unscheduled over-the-counter drug like Sudafed, with pharmacies requiring identification and proof of age, recording purchases, and limiting amounts sold to any individual.\textsuperscript{140} Advertising restrictions on time, place, and medium, or a complete advertising ban, could limit demand and protect children.\textsuperscript{141} Other forms of regulation could require health warnings on packaging; limits on THC content, or on use in public; and/or specify the number, location, and operating hours of outlets. Drug Policy Foundation founder Arnold Trebach suggests that in the early years of legalization potential users should be licensed and required to pass a test on drug safety.\textsuperscript{142}

We cannot say what the optimal reform regime would look like, but have sketched these three models as ideas worth considering in what we hope will be a concerted effort by scientists and public policy experts to devise an alternative to a bankrupt system.

\textbf{CONCLUSION}

The drug war, in its current incarnation, is now almost four decades old.\textsuperscript{143} From relatively modest beginnings, it has escalated

\begin{itemize}
  \item \textsuperscript{139} See generally \textsc{Leitzel}, supra note 9, at 159.
  \item \textsuperscript{140} Congress passed The Comprehensive Methamphetamine Control Act of 1996 (MCA), creating an exemption for sales of ordinary over-the-counter pseudoephedrine and phenylpropanolamine products even though these drugs contain precursor chemicals used in the production of methamphetamines. In an attempt to strike a balance between the consumer need for over the counter cold medications and the diversion of these drugs for illegal purposes, in 2000 Congress further restricted access to drugs containing these substances by limiting sales by retailers to a small threshold amount suitable for legitimate personal medical use. Products must be sold to walk-in customers with identification or must be sold in face-to-face transactions. See \textsc{Controlled Substances Act}, 21 U.S.C. \S 802(39)(A)(iv)(I), 802(45-46) (2008). \textit{See also} Drug Enforcement Administration 21 C.F.R. \S\S 1300, 1309-1310.
  \item \textsuperscript{141} A total ban on commercial advertising may raise constitutional issues. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (holding that restrictions on cigarette ads were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA) and abridged First Amendment rights of both tobacco growers and adult customers). \textit{See also} \textsc{Maccoun & Reuter}, supra note 46, at 363.
  \item \textsuperscript{142} The proposal to license buyers has been applied to tobacco as well. \textsc{Arnold S. Trebach and James A. Inciardi}, \textsc{Legalize It?: Debating American Drug Policy} 92 (American University Press 1993). \textit{See also} \textsc{Douglas Husak}, \textsc{Drugs and Rights} 228-29 (1992); Evan Silberstein, Smoking Management and Rehabilitation Treatment Act (SMART) (2008) (unpublished, on file with authors) (proposing a licensing program for the purchase of manufactured tobacco products).
  \item \textsuperscript{143} The Nixon Administration launched the “war on drugs” in its first administration. In 1973, the Administration created the Drug Enforcement
exponentially during that time, in terms of arrests, incarceration, federal agencies involved, and state and federal budgets. Each escalation has been justified by the urgency and ambition of the war; a 1988 federal drug act announced that “it is the declared policy of the United States to create a Drug-Free America by 1995.” But like some kind of millennial movement, the new world to come is always just over the horizon.

Nowhere is the failure of present policy more obvious than on the war’s marijuana front. A well-financed effort to interdict marijuana, educate the public about its dangers, and punish its users with criminal sanctions and civil disabilities has failed to stop 15 to 20 million Americans from using it on a regular basis. In light of a growing number of studies showing the relative safety of marijuana, positive medicinal uses, no significant increase in use in states that have decriminalized marijuana, and massive numbers of young people who have been marginalized by marijuana law enforcement, there appears to be an emerging consensus that the extraordinary harms associated with our present marijuana laws far exceed the harm of the drug itself.

There is clear evidence that marijuana can be abused, and poses some health risks. So do alcohol, television, and candy. But because in any non-totalitarian nation the default position must be liberty, something more is needed to justify the criminalization of marijuana –

Administration (“DEA”) to prosecute its “declared[,] all-out, global war on the drug menace.” Message from the President of the United States Transmitting Reorganization Plan No. 2 of 1973, Establishing a Drug Enforcement Administration, H.R. DOC. NO. 69, 93D CONG., 1ST SESS. 3 (Mar. 28, 1973).

144 Anti-Drug Abuse Act of 1988, Sec. 521-B.

145 See supra note 10 and 15-20.,

146 This consensus is reflected in the recommendations of such officials and experts as former President Bill Clinton (see Jann S. Wenner, Bill Clinton, ROLLING STONE, December 28, 2000, at 84); Milton Friedman (see Milton Friedman, An Open Letter to Bill Bennett, WALL ST. JOURNAL, Sept. 7, 1989); Richard A. Posner (see Randall Samborn, 7th Circuit Concludes Drug War is Lost Cause, NAT’L L.J., Jun. 7, 1993, at 6; Michael Massing (see MICHAEL MASSING, THE FIX (1998)); MacCoun and Reuter (see MACCOUN & REUTER, supra note 46 at 358-364 (recommending decriminalization of marijuana); Walter Cronkite (see Walter Cronkite, END PROHIBITION NOW, 2005 (Common Sense for Drug Policy 2005)(DVD recommending legalization)); former police chief Joseph McNamara (see TIME, supra note 10, quoting McNamara supporting decriminalization, partly on grounds that the current system is racist)); former Baltimore Mayor Kurt L. Schmoke (see Kurt Schmoke, FORGING A NEW CONSENSUS IN THE WAR ON DRUGS: IS IT POSSIBLE? 10 TEMPLE POL. & CIV. RTS. L. REV. 351 (2001), suggesting changes in the approach to ending the drug war); Cf. DOUGLAS HUSAK, LEGALIZE THIS! -- THE CASE FOR DECRIMINALIZING DRUGS (Colin McGinn ed., Verso 2002).
something like a high level of risk, or a safer substitute, or irrationality and misinformation on the part of its users. After forty years, there is not merely a lack of evidence that any of these conditions apply, but overwhelming evidence that they do not. Continuing the prohibition of marijuana and the criminalization of its users in the face of this knowledge betrays a lack of respect for the millions of people who choose to use marijuana for the benefits they see in it, and an inhumanity towards the unlucky minority who are arrested, incarcerated, stigmatized, or otherwise caught up in the drug war – perhaps culture war is the more correct term – for doing something that they, and perhaps half the country, do not regard as wrong. No one has satisfactorily explained why the damage to these lives is necessary or proper. The harms attributed to marijuana don’t justify the onslaught against its users, a cure more harmful than the disease.

If liberty is diminished by prohibition and criminalization, so is the safety of all Americans, ironically the flag under which the drug war is waged. It is because we agree that government should play a role in protecting health and safety that we find the current policy towards marijuana to be a default of this governmental obligation. Marijuana criminalization has kept the government from exercising any control over the purity, labeling, or content of marijuana in circulation; it has discouraged educational programs that could distinguish between “soft” and “hard” drugs and between moderate, safer use and abuse; and it has foreclosed any chance of instituting enforceable age limits on purchasers of marijuana by guaranteeing the sellers will be profit-hungry dealers with no license to lose if they sell to children.

All this is well known. After four decades of concern and study, there now exists more than enough information on the effects of marijuana, the wars waged against it at home, and innovative approaches applied abroad. But the findings of researchers and the wisdom of experience have not been brought to bear on government laws and policy, which still retain a striking resemblance, except in scale, to their predecessors at the inception of drug war. As drug policy experts MacCoun and Reuter note, “[t]he arguments for reform seem fairly compelling and the downside risks seem modest, but that has been true for a quarter century.”

Is there any realistic hope for such a reform of marijuana law and policy? After the success of so many state medical marijuana and drug treatment initiatives, and the election of a president open to drug policy reform, significant marijuana law reform is no longer out of the question. We have suggested several alternatives to present policy, but whatever the merits of particular proposals, the important thing at
this point is to commence a serious consideration of any reform that would bring more respect for individuals, more safety to users, and more humane ways of treating the small minority who get into trouble.

Our long encounter with marijuana continues, and so does our government’s 40 year old strategy for dealing with it. The minimal test of the government’s policy is that it respect its citizen’s rights, target real risks or harms, and be successful in reducing them. Present marijuana law and policy fails all three requirements. It is time to work for something better.