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The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana

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THE QUAGMIRE THAT NOBODY IN THE FEDERAL GOVERNMENT WANTS TO TALK ABOUT: MARIJUANA

MELANIE REID*

I. INTRODUCTION

Marijuana has piqued human interest since the beginning of recorded history. Public opinion on approving or disapproving marijuana use has waxed and waned over the centuries. The ancient Chinese discovered marijuana's healing properties,¹ used it in tea or an edible extract, and depicted the herbal medicine in symbolic form—麻—as two plants in a drying shed.² Marijuana is still used in China today as an appetite stimulant and for relief from diarrhea and dysentery.³ In ancient India, Ayurvedic healers used marijuana to improve sleep, appetite, and digestion.⁴ The ancient Greek and Roman physicians were not as pleased with its healing properties, and they cautioned that an excess of marijuana could “dampen sexual performance.”⁵ Muslim clerics long ago determined that, hashish, a drug made from marijuana resin, should be forbidden for recreational use, but permitted for medical use.⁶

Marijuana use did not flourish in western civilizations during medieval times, although it was common to use hemp, marijuana's cousin, to make rope, cloth, and paper.⁷ In the 1830s, one Irish doctor learned of

* Associate Professor of Law, Lincoln Memorial University-Duncan School of Law. I want to thank the participants at the Oxford Round Table on Critical Public Issues in Oxford, England, where I presented *The Marijuana Dilemma in the United States: the Government's Quagmire and the Impact of the Legalization Movement*, a precursor to this article. I would like to thank Adam Bullock, Katherine Marsh, Charlie Olachea, Carl Beckett, and Bob Reid for their invaluable assistance on this article.

1. See ALISON MACK & JANET JOY, MARIJUANA AS MEDICINE? THE SCIENCE BEHIND THE CONTROVERSY 14 (2001) (explaining marijuana was used as a cure in Ancient Chinese medicine for “gout, rheumatism, malaria, and absentmindedness”).

2. *Id.*

3. *Id.*

4. See *id.* at 14 (explaining that in 1985, India prohibited the production of cannabis resin and flowers except for use in religious ceremonies).

5. *Id.*

6. *Id.* at 15.

7. *Id.*

marijuana's healing properties while in India, and prescribed it to patients to treat pain and muscle spasms.⁸ In 1860, the United States held its first conference on the clinical use of marijuana, where "physicians reported success in using marijuana to treat chronic cough, gonorrhea, pain, and a variety of other conditions."⁹ By 1930, pharmaceutical companies such as Parke-Davis and Eli Lilly began manufacturing extracts of marijuana to be used as a painkiller or sedative. In addition, Grimault & Company manufactured marijuana cigarettes to treat, of all things, asthma.¹⁰ During this time, recreational use of marijuana as an intoxicant spread as travel and commerce began to flow freely from Mexico to the United States.¹¹

Concerned with controlling interstate crime caused by an increase in the use of marijuana, the federal government passed the Uniform Narcotic Drug Act of 1932 that encouraged states to prohibit its use.¹² By 1937, every state had some law on the books restricting marijuana use, and thirty-five states had criminalized it.¹³ Production of marijuana-based drugs also came to a halt after Congress passed the Marijuana Tax Act of 1937, which restricted marijuana sales to only those individuals who held prescriptions.¹⁴

Despite its illegality, marijuana use was widespread in the 1960s.¹⁵ In response, Congress passed the Controlled Substances Act ("CSA") in 1970,¹⁶ which prohibited the importation and distribution of drugs considered to have a high potential for abuse, and little-to-no medicinal value.¹⁷ A variety of drugs were organized into five schedules based upon the likelihood the drug would be abused, its medical usefulness, and the physical and psychological consequences of its abuse.¹⁸ The substances placed in Schedule I, such as marijuana, LSD, and heroin, were deemed to have no medical use and a high potential for abuse.¹⁹

8. *Id.*

9. *Id.* at 16.

10. *Id.* at 17.

11. Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1035 (1970).

12. *Id.* at 1036; see JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 19 (2012).

13. Bonnie & Whitebread, *supra* note 11, at 1034.

14. CAULKINS ET AL., *supra* note 12, at 19; MACK & Joy, *supra* note 1, at 17.

15. MACK & Joy, *supra* note 1, at 18.

16. Controlled Substances Act (CSA), Pub. L. No. 91-513, Title II, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801-904).

17. 21 U.S.C. § 812 (2012).

18. *Id.*

19. *Id.*

Forty years after the passage of the CSA, thirty million Americans reported using marijuana.²⁰ Between 124 million and 300 million people—3 to 4 percent of the world’s population—have reported using marijuana every year, which makes marijuana the most widely used illegal drug on the planet.²¹ Colorado and Washington have legalized marijuana use for recreational purposes.²² Twenty states and the District of Columbia have approved marijuana use for medical purposes.²³ Table 1 provides a current listing of states that have approved limited use of marijuana.

20. CAULKINS ET AL., *supra* note 12, at 16. Another study reported that “[r]oughly 17.4 million people in the United States admitted use of marijuana in the previous month in 2010’s National Survey on Drug Use and Health, compared to just 7 million who illegally used prescription drugs, 1.5 million who used cocaine, 353,000 who used methamphetamine and 200,000 who used heroin.” *Criminal Commodities: Marijuana*, STRATFOR GLOBAL INTELLIGENCE (Mar. 15, 2012), http://www.opeak.net/index.php?option=com_k2&view=item&id=10495:criminal-commodities-marijuana&Itemid=123&tmpl=component&print=1.

21. *Id.*

22. See generally Raquel Villaneuva, *Colorado voters pass pot legalization Amendment 64*, THE COLORADOAN (Nov. 7, 2012), <http://www.coloradoan.com/viewart/20121106/NEWS11/121106007/Colorado-voters-pass-pot-legalization-Amendment-64>. Colorado legalized the recreational use, possession, and distribution of up to one ounce or six marijuana plants. Amendment 64 requires the state to begin issuing licenses for recreational marijuana stores by Jan. 1, 2014. John Ingold, *Colorado pot legalization: 30 questions (and answers)*, THE DENVER POST (Dec. 13, 2012), http://www.denverpost.com/breakingnews/ci_22184944/colorado-pot-legalization-30-questions-and-answers. With the passage of Initiative 502, Washington had a deadline of Dec. 6, 2013 to set up regulations and a system of licenses for the production, distribution, and sales of marijuana. Jack Healy, *In Colorado, No Playbook for New Marijuana Law*, N.Y. TIMES (Nov. 29, 2012), <http://www.nytimes.com/2012/11/30/us/colorado-authorities-look-way-forward-on-marijuana.html>. See also *Initiative 502 Adopted Rules*, WASHINGTON STATE LIQUOR CONTROL BOARD, available at http://liq.wa.gov/marijuana/initiative_502_proposed_rules (outlining rules adopted for I-502 implementation). “Both laws prohibit driving under the influence of marijuana, the sale of marijuana by unlicensed facilities, and the use of marijuana by persons under the age of 21.” Barbara L. Johnson, *Out of Joint: How the Growing Disconnect Between Federal and State Marijuana Laws Impacts Employers*, BLOOMBERG LAW (2013), <http://about.bloomberglaw.com/practitioner-contributions/out-of-joint-how-the-growing-disconnect-between-federal-and-state-marijuana-laws-impacts-employers/>.

23. *20 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG (last updated Sept. 16, 2013), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (showing six of the states passed the law via a ballot measure while fifteen states passed the law via the state legislature).

Table 1. Current Listing of States That Have Enacted Marijuana Legislation.

State	Year	Type of Legalization
Alaska ²⁴	1998	Medical
Arizona ²⁵	2010	Medical
California ²⁶	1996	Medical
Colorado ²⁷	2000	Medical/Recreational
Connecticut ²⁸	2012	Medical
District of Columbia ²⁹	2010	Medical
Delaware ³⁰	2011	Medical
Hawaii ³¹	2000	Medical
Illinois ³²	2013	Medical
Maine ³³	1999	Medical
Massachusetts ³⁴	2012	Medical
Michigan ³⁵	2008	Medical
Montana ³⁶	2004	Medical
Nevada ³⁷	2000	Medical
New Hampshire ³⁸	2013	Medical
New Jersey ³⁹	2010	Medical

24. ALASKA STAT. § 17.37.030 (2013).

25. ARIZ. REV. STAT. ANN. §§ 36-2801-36-2819 (2013).

26. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2013).

27. COLO. REV. STAT. §§ 12-43.3-101-12-43.3-106 (2013). Recreational: COLO. CONST. art. XVIII, § 16.

28. CONN. GEN. STAT. §§ 21a-408a-21a-408q (2013).

29. D.C. CODE §§ 7-1671.01-7-1671.13 (2013).

30. DEL. CODE ANN. tit. 16, §§ 4901A-4926A (2013).

31. HAW. REV. STAT. §§ 329-121-329-128 (2013).

32. 410 ILL. COMP. STAT. 130/1-130/999 (effective Jan. 1, 2014, repealed four years after the effective date).

33. ME. REV. STAT. tit. 22, §§ 2421-2430-B (WestlawNext current with emergency legis. through Chapter 427 of the 2013 First Reg. Sess. and Chapter 434 of the First Spec. Sess. of the 126th Leg.).

34. MASS. GEN. LAWS ch. 94C, §§ 1-1-1-17 (2013).

35. MICH. COMP. LAWS §§ 333.26421-333.26430 (2013).

36. MONT. CODE ANN. §§ 50-46-301-50 46-344 (2013).

37. NEV. REV. STAT. §§ 453A.010-453A.810 (2012).

38. H.R. 337, 2013 Leg., 163rd Sess. (N.H. 2014).

39. N.J. STAT. ANN. §§ 24:6I-1-24:6i-16 (West 2013).

New Mexico ⁴⁰	2007	Medical
Oregon ⁴¹	1998	Medical
Rhode Island ⁴²	2006	Medical
Vermont ⁴³	2004	Medical
Washington ⁴⁴	1998	Medical/Recreational

Other states have considered passing laws that loosen marijuana restrictions or have submitted referendums to voters to determine the popularity of new marijuana legalization resolutions.⁴⁵

The federal government's response so far has been muted. As a result, law enforcement officers might reasonably question whether they should lay their lives on the line to investigate and arrest marijuana traffickers, dealers, dispensaries, or growers. Medical marijuana business owners are looking over their shoulders wondering whether their assets could be subject to forfeiture under federal law while profiting from the lack of regulation and/or enforcement of the same federal laws. Is it time for the federal government to clamp down on marijuana use again? Should it criminalize or legalize this most polarizing of substances?

The United States has three options: (1) legalize marijuana's production and use, (2) change marijuana from a Schedule I substance under the CSA, to a Schedule II substance, which would permit marijuana use for medical purposes, or (3) enforce current federal laws under the CSA that criminalize the production and use of marijuana. This article explores the consequences of these three options. To give some context to marijuana production and use, Part II first examines the theories behind why marijuana was criminalized, whether it should stay illegal, and when private conduct should be regulated by the government in order to protect against public harm. Part III then explores the legalization of marijuana's production and use (Option 1) and criminalization (Option 3). Part IV addresses the medical marijuana movement (Option 2), and describes

40. Lynn and Erin Compassionate Use Act, NMSA 1978, §§ 26-2B-1-26-2B-7 (2013).

41. OR. REV. STAT. §§ 475.300-475.346 (2013).

42. The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. GEN. LAWS §§ 21-28.6-1-21-28.6-13 (2013).

43. VT. STAT. ANN. tit. 18, §§ 4472-4474I (2013).

44. Medical: WASH. REV. CODE §§ 69.51A.005-69.51A.903 (2013). Recreational: Initiative Measure—Marijuana—Legalization And Regulation, 2013 Wash. Legis. Serv. Ch. 3 (I.M. 502) (West).

45. Paul Szoldra, *The Next 8 States That Could Legalize Marijuana*, BUSINESS INSIDER (Mar. 23, 2013), <http://www.businessinsider.com/legalize-marijuana-2013-3?op=1>.

why this option is not viable and should be eliminated from consideration at both federal and state levels. Consequently, the Federal Government must choose between Option 1 and Option 3. Part V describes the practice of other nations and suggests that the pros and cons of these practices can inform the federal government's decision.

II. MARIJUANA PRODUCTION AND USE: A SOCIETAL HARM?

The purpose of criminal law, at its core, is to protect society from harm.⁴⁶ The CSA follows suit and tracks the following purpose: “[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”⁴⁷ Forty years after the CSA's passage, we as a society should examine whether we believe that marijuana's manufacture and use still create a “detrimental effect on the health and general welfare of the American people.”⁴⁸ Is the victim the nation at-large, or the user of marijuana? If marijuana production and use only endanger users, then it is more difficult to argue that society as a whole will be harmed. Marijuana use may simply become a personal responsibility issue, which would require individuals to make their own decisions on whether or not to use marijuana, just as they currently do with tobacco and alcohol. However, if there is no societal harm, there can be no crime.⁴⁹ If marijuana manufacture and use do not create societal harm, is it the government's responsibility to protect users from themselves, or should users rely on their personal judgment to decide whether or not to use marijuana?

A United States National Institutes of Health (“NIH”) monograph series shows that violence is inherent in the illegal drug distribution business, but those distributors that exclusively sell marijuana experienced less violence than those that exclusively sold crack or cocaine.⁵⁰ Violence and domestic abuse are also associated with illegal drug use. “Tobacco

46. THOMAS E. McCLURE & THOMAS E. EIMERMANN, *FUNDAMENTALS OF CRIMINAL PRACTICE: LAW AND PROCEDURE* 5 (2012).

47. 21 U.S.C. § 801(2) (2013).

48. *Id.*

49. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES, 2002 (2005), available at <http://www.bjs.gov/content/pub/pdf/sdatji02.pdf>.

50. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, & NATIONAL INSTITUTE ON DRUG ABUSE, *DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES*, NIDA RESEARCH MONOGRAPH 103, at 8, 25, and Table 6 (1990).

(nicotine) and alcohol are frequently viewed as ‘gateway’ drugs, and marijuana as a ‘stepping stone,’ to other drugs, which greatly increases the likelihood that marijuana use will progress to the problematic use of other illicit drugs.”⁵¹ Studies reported in the monograph series demonstrate that “as illegal drug use increases, so will violence.”⁵² However, when studying marijuana use on its own, researchers have found that the psychopharmacologic effect of marijuana has “been attributed to ‘mellowing out’ or causing individuals to ‘nod out,’ conditions that are likely to ameliorate violent tendencies.”⁵³ Researchers find it difficult to correlate marijuana use and crime “because marijuana is often used in conjunction with other drugs.”⁵⁴ However, some studies that were completed when marijuana was the only drug that was being used, revealed that marijuana use had no correlation to violent crime.⁵⁵ Therefore, it is unclear whether marijuana’s use, by itself, creates a detrimental effect on the health and general welfare of society. It is much easier to argue that marijuana use, when viewed as a stepping-stone to other drug use, contributes to violence and crime, which are clearly societal harms.

Another factor to consider in examining the link between marijuana use and societal harm is whether the opinions and beliefs of the community have changed since 1970. Do communities condemn marijuana use? A poll conducted in 2013 indicated that a majority (52 percent) supported the idea of legalizing marijuana.⁵⁶ If society deems marijuana use to be an

51. *Id.* at 140.

52. *Id.* at 141. “Progressing from marijuana to other illegal drugs, these youth increasingly engage in delinquent behavior including violent delinquency.” *Id.* at 153. Furthermore,

[t]oday’s drug problem has reopened the discussion of legalization of drugs. Alcohol and tobacco are frequently cited as examples of the positive effects of legalization, such as producing a legitimate trade, reducing crime, and yielding revenue. One negative consequence of the legalization of alcohol and tobacco is the high availability of both drugs for youth. Even where law prohibits sale of alcohol and tobacco to minors, the simple acceptance and use of the drugs throughout society makes them attractive to youth with problems and makes them more available in the home and community. Imagine the effects on youth if marijuana, cocaine, or heroin were more easily accessible than they are now. While this Nation currently is experiencing a drug abuse epidemic among young people, the future for American youth would be catastrophic if even more drugs with destructive effects were readily available.

Id. at 156.

53. *Id.* at 187.

54. *Id.* at 232.

55. *Id.*

56. David Lauter, *Marijuana legalization wins majority support in poll*, L.A. TIMES (Apr. 4, 2013), <http://articles.latimes.com/2013/apr/04/news/la-pn-marijuana-legalization-majority-support-20130404> (discussing that a survey by the Pew Research Center found that 52 percent of adult Americans would support legalization).

acceptable risk of harm such as tobacco or alcohol use, it would be difficult to label marijuana use as a crime.

Therefore, when considering the legalization or criminalization of marijuana, it is important to determine if marijuana production or use lead to direct or indirect societal harm. Increased marijuana use may indirectly impact society through increased societal health costs, employment costs, and drug treatment and therapy costs. If marijuana is a stepping-stone to other drugs, then it directly harms society. However, marijuana production and use should not be considered crimes if they lead to no societal harm.

III. TO LEGALIZE OR CRIMINALIZE MARIJUANA PRODUCTION AND USE

A. *Legalization (Option 1)*

Legalizing the production and use of marijuana is a viable way out of the current quagmire. Legalization assumes that society is not harmed by the production and use of marijuana. It assumes that adults who are responsible enough to decide whether to consume alcohol or use tobacco, can also decide whether to use marijuana. The sections below discuss (1) legalization of marijuana in the United States, (2) public health issues, (3) security concerns associated with localized growing of marijuana, (4) requirement for regulations and enforcement, (5) taxation, and (6) the international impact of marijuana legalization in the United States.

1. Legalization of Marijuana in the United States

Legalization could become a reality in the United States. U.S. Representatives Barney Frank and Ron Paul first brought this issue to the forefront as they lobbied for the Ending Federal Marijuana Prohibition Act of 2011. This legislation would have limited the application of federal laws to the distribution and use of marijuana.⁵⁷ The U.S. House of Representatives is currently considering several bills, such as the Ending Federal Marijuana Prohibition Act of 2013,⁵⁸ Marijuana Tax Equity Act of

57. Ending Federal Marijuana Prohibition Act of 2011, H.R. 2306, 112th Cong. (2011). The sponsor of the bill was Rep. Barney Frank. Past presidential candidate Rep. Ron Paul, along with nineteen others, cosponsored the bill. The bill died before being voted on.

58. Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013), Representative. Jared Polis sponsored the bill with sixteen cosponsors. The bill now sits in a subcommittee. According to Rep. Polis' website, this legislation removes marijuana from Schedule I of the Controlled Substances Act; requires marijuana producers to purchase a permit, as commercial alcohol pro-

2013,⁵⁹ the Industrial Hemp Farming Act of 2013,⁶⁰ the States' Medical Marijuana Patient Protection Act,⁶¹ and the States' Medical Marijuana Property Rights Protection Act.⁶²

On November 6, 2012, Colorado and Washington voted to legalize recreational marijuana use for people over twenty-one years of age.⁶³ If the federal government follows Colorado's and Washington's lead, what would be the consequences? Critics argue that legalization would lead to an increased demand for marijuana and a corresponding need for treatment programs for those who would become dependent on the drug.⁶⁴ In one study, nine percent of those who used marijuana became clinically

ducers do; ensures that federal law distinguishes between individuals who grow marijuana for personal use and individuals who are involved in commercial sale and distribution; and, reassigns jurisdiction of marijuana regulation for the Drug Enforcement Administration to the newly-renamed Bureau of Alcohol, Tobacco, Marijuana, Firearms, and Explosives.

Congressman Jared Polis, *Ending Federal Marijuana Prohibition Act*, POLIS.HOUSE.GOV, http://polis.house.gov/uploadedfiles/fact_sheet_-_ending_federal_marijuana_prohibition_act.pdf.

59. Marijuana Tax Equity Act of 2013, H.R. 501, 113th Cong. (2013). Rep. Earl Blumenauer of Oregon introduced the bill. There are eight cosponsors backing Rep. Blumenauer and the bill is in subcommittee. This bill would amend the Internal Revenue Code to provide for the taxation of marijuana.

60. Industrial Hemp Farming Act of 2013, H.R. 525, 113th Cong. (2013). The bill's sponsor was Rep. Thomas Massie. Forty-one cosponsors joined Rep. Massie in support of the bill. Currently, the bill is in subcommittee. The bill would amend the Controlled Substances Act to exclude industrial hemp from the definition of marijuana.

61. States' Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. (2013), The sponsor of the bill, Rep. Earl Blumenauer, was supported by twenty cosponsors. As of today, the bill is in subcommittee. This bill would provide for the rescheduling of marijuana and for the medical use of marijuana in accordance with the laws of the various states.

62. States' Medical Marijuana Property Rights Protection Act, H.R. 784, 113th Cong. (2013). This bill, sponsored by Rep. Barbara Lee, would amend the Controlled Substances Act so as to exempt real property from civil forfeiture due to medical-marijuana-related conduct that is authorized by state law.

63. *Colorado, Washington OK recreational marijuana use*, USA TODAY (Nov. 07, 2012), <http://www.usatoday.com/story/dispatches/2012/11/07/colorado-washington-legalize-recreational-marijuana-tourism/1689269/>. Oregon's ballot measure to legalize marijuana for recreational use was defeated on the same day. *Marijuana legalization: Oregon Measure 80 fails; Washington, Colorado pass*, THE ASSOCIATED PRESS (Nov. 7, 2013), <http://www.kval.com/politics/Marijuana-legalization-Oregon-Measure-80-failing-Colo-Wash-passing-177587181.html>.

64. AMERICAN SOCIETY OF ADDICTION MEDICINE, WHITE PAPER ON STATE-LEVEL PROPOSALS TO LEGALIZE, MARIJUANA (2012), available at <http://www.asam.org/docs/public-policy-statements/state-level-proposals-to-legalize-marijuana-final2773DD668C2D.pdf?sfvrsn=2>.

dependent on it.⁶⁵ If availability of marijuana increases, it is plausible to conclude that this would lead to increased usage and therefore increased addiction.⁶⁶ On the other hand, criminal enforcement of marijuana possession laws has been minimal in recent years, which supports the idea that increasing supply will not necessarily increase demand, or from a different perspective, increased supply will not lead to higher levels of egregious criminal behavior. Current marijuana users would not have to drive to a high-crime area in the middle of the night to obtain the drug, because marijuana would be readily available. Anyone who desired user-amounts of marijuana could access it without fear from law enforcement outside of driving impairment (DUI) regulations. For many, the benefits of using marijuana would be realized with little or no risk.

Marijuana sentences have been minor compared to that of possessing or selling cocaine or heroin.⁶⁷ Federal mandatory minimum sentences are triggered for amounts of over 100 kilograms of marijuana, compared to 100 grams of heroin, or more than 500 grams of powder cocaine.⁶⁸ Marijuana possession for personal use is considered to be a misdemeanor, or civil infraction in many states.⁶⁹ Less than 1 percent of state and federal inmates are serving time for marijuana possession alone.⁷⁰ This would indicate the demand for marijuana has already been met due to the lack of fear of government reprisal and light sentences.

Further, marijuana related prosecutions at the federal level have significantly decreased.⁷¹ Criminal prosecution guidelines, while discretionary and varying depending upon the jurisdiction, limit prosecutions to

65. CAULKINS ET AL., *supra* note 12, at 58.

66. "In 2011, the national average for youth 12 to 17 years old considered 'current' marijuana users was 7.64 [percent] which was the highest average since 1981. [In Colorado where marijuana use was legalized for medicinal purposes until last year when it was legalized for recreational use,] [t]he Colorado average percent was 10.72. . . . In 2011, the national average for young adults ages 18 to 25 considered current marijuana users was at 18.7 percent. The Colorado average was 27.26 percent. . . . From 2005 through 2008 there was an average of 741 visits per year to the emergency room in Colorado for marijuana-related incidents involving youth. That number increased to 800 visits per year between 2009 and 2011." ROCKY MOUNTAIN HIDTA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT ii (2013), <http://nrfocus.org/wp-content/uploads/2013/08/Legalization-of-MJ-in-Colorado-The-Impact.pdf>.

67. 21 U.S.C. § 841(b)(1)(D) (2013).

68. 21 U.S.C. § 841(b)(1)(B)(i),(ii), & (vii) (2013).

69. CAULKINS ET AL., *supra* note 12, at 50.

70. *Id.*

71. *See, e.g.*, Amy Lynn Sorrell, *Medical marijuana use to incur less federal prosecution*, AMER. MED. NEWS (Oct. 28, 2009), <http://www.amednews.com/article/20091028/government/310289998/8/>.

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those trafficking in extremely large amounts.⁷² Two memoranda issued by the U.S. Deputy Attorney General left prosecutors and agents alike confused and unsure how to proceed. In October 2009, the Ogden memorandum implied that federal prosecutors should look the other way when faced with “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁷³ In contrast, in June 2011, the Cole memorandum stated that “[t]he Ogden Memorandum was never intended to shield [medical marijuana dispensaries] even where those activities purport to comply with state law.”⁷⁴ Further, it stated that those “who engage in transactions involving the proceeds of such activity [cultivating, selling, or distributing marijuana] may also be in violation of federal money laundering statutes and other federal financial laws.”⁷⁵ These conflicting Department of Justice (“DOJ”) memoranda have caused prosecutors to be wary of marijuana related investigations and have caused them to focus their attention on investigating violations related to other types of narcotics. Legalization would eliminate prosecution of marijuana’s production and use and would reduce the current burden and uncertainties imposed on state and federal law enforcement.

Recently, the DOJ released a third memo hoping to ameliorate some of the conflicts that arose from its previous two memos.⁷⁶ The August 29, 2013 memorandum clarified that the DOJ wants federal prosecutors to only pursue cases that are consistent with the government’s top priorities; that is, prosecute only if it will

prevent[] the distribution of marijuana to minors; prevent[] revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; prevent[] the diversion of marijuana from states where it is legal under state law in some form to other states; prevent[] state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs

72. Memorandum from the California United States Attorney’s Office to DEA, HIDTA, *available at* http://www.gocca.org/docs/CA_US_Attornys_Marijuana_Prosecution_Guidelines_Leaked.pdf.

73. Memorandum from David W. Ogden, Deputy Attorney General, to Selected United States Attorneys (Oct. 19, 2009), *available at* <http://blogs.usdoj.gov/blog/archives/192>.

74. Memorandum from James M. Cole, Deputy Attorney General, to United States Attorneys (June 29, 2011), *available at* <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.

75. *Id.*

76. Memorandum from James M. Cole, Deputy Attorney General, to United States Attorneys (Aug. 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/305201382913275685_7467.pdf.

or other illegal activity; prevent[] violence and the use of firearms in the cultivation and distribution of marijuana; prevent[] drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; prevent[] the growing of marijuana on public lands; and prevent[] marijuana possession or use on federal property.⁷⁷

If marijuana-related conduct does not fall under any of these categories, the memorandum directed that prosecutors should leave enforcement and regulation of that conduct to the states.⁷⁸ This presumes that the states that have legalized marijuana use for recreational or medical purposes will be “sufficiently robust to protect against the harms”⁷⁹ that the DOJ warns against. The DOJ seems to concede that there may be situations in which marijuana use, if sufficiently regulated, is acceptable. However the DOJ memorandum reiterates the DOJ’s long-held belief that marijuana cultivation can lead to significant criminal activity.⁸⁰ The memorandum does not concede federal supremacy on this issue or suggest that legalization at the federal level would materialize in the near future.⁸¹

2. Public Health Issues

Negative consequences of legalization may include:

1. a higher incidence of emphysema and other respiratory problems, and increased effects of second-hand marijuana smoke;⁸²
2. increased use of more potent drugs by those who use marijuana as a potential gateway drug, impaired mental health based upon prolonged use;⁸³
3. adverse education and employment outcomes, and higher rate of automobile crashes,⁸⁴

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. In 2010, California attempted to ban indoor marijuana smoking in places where tobacco smoking is banned. CAULKINS ET AL., *supra* note 12, at 148.

83. Katie Kerwin McCrimmon, *Research shows adverse effects of marijuana on teens*, EDNEWS PARENT (June 15, 2013), <http://www.ednewscolorado.org/parent/research-shows-adverse-effects-of-marijuana-on-teens>. Specifically, this article states that “New research shows adolescence is a crucial time for brain development and marijuana use can permanently change the teen brain.”

84. “From 2006 to 2011, traffic fatalities decreased in Colorado 16 percent, but fatalities involving drivers testing positive for marijuana increased 114 percent.” ROCKY MOUNTAIN HIDTA PRELIMINARY REPORT, *supra* note 66, at i.

4. increased secondary effects on children that ensue from parental use of marijuana;⁸⁵ and,
5. “impair[ed] short-term memory and motor coordination, slow[er] reaction time, alter[ed] mood, judgment, and decision-making, and . . . severe anxiety (paranoia) or psychosis (loss of touch with reality).”⁸⁶

However, compared to alcohol, marijuana is less toxic, has a lower addiction risk,⁸⁷ and has a weaker link to traffic accidents and violence.⁸⁸

Further, an increase in indoor-cultivation of marijuana could result in a higher carbon foot-print, and in a massive increase in energy use resulting in greenhouse-gas pollution:

[I]ndoor cannabis production results in energy expenditures of [US]\$6 billion each year—[six] times that of the entire U.S. pharmaceutical industry—with electricity use equivalent to that of [two] million average U.S. homes. This corresponds to 1% of national electricity consumption, or 2% of that in households. The yearly greenhouse-gas pollution (carbon dioxide) from the electricity plus associated transportation fuels equals that of [three] million cars. Energy costs constitute a quarter of wholesale value.⁸⁹

85. CAULKINS ET AL., *supra* note 12, at 54.

86. NATIONAL INSTITUTE ON DRUG ABUSE, DRUG FACTS: IS MARIJUANA MEDICINE? (July 2012), available at <http://www.drugabuse.gov/publications/drugfacts/marijuana-medicine>.

87. By review of a multitude of scientific literature on the topic, Leslie L. Iverson, professor of pharmacology at the University of Cambridge, determined that between ten to thirty percent of regular users will develop a dependency on marijuana and nine percent will develop a serious addiction. Jann Gumbiner, *Is Marijuana Addictive?* PSYCHOLOGY TODAY (June 15, 2013), <http://www.psychologytoday.com/blog/the-teenage-mind/201012/is-marijuana-addictive>. Additionally, “[a] 2004 study in the Journal of the American Medical Association suggested that the stronger cannabis is contributing to higher addiction rates.” Sarah Kershaw and Rebecca Cathcart, *Marijuana Is Gateway Drug for Two Debates*, N.Y. TIMES (July 17, 2009), available at <http://www.nytimes.com/2009/07/19/fashion/19pot.html>.

88. CAULKINS ET AL., *supra* note 12, at 135. “Cocaine and heroin are more physically harmful and nicotine is much more addictive.” Gumbiner, *supra* note 87.

89. Evan Mills, *Energy up in Smoke: The Carbon Footprint of Indoor Cannabis Production*, EVAN-MILLS.COM (April 18, 2012), <http://evan-mills.com/energy-associates/Indoor.html>. The legalization of marijuana would thus possibly be a boon for the environment because growers would then be allowed to make use of solar energy for photosynthesis. *See id.* (“Shifting cultivation outdoors eliminates most energy uses (aside from transport), although the practice can impose other environmental impacts, such as poisoning of animals by rodenticides and other chemicals used by growers.”)

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Pesticides used in hydroponic grow-systems can be toxic to animals and pollute local rivers and streams. Because there is “significant use of water”⁹⁰ in indoor grow operations, it is not uncommon for water-main breaks to occur, and leaking water could seep into adjacent homes and businesses, causing mold to grow. As a byproduct of growing marijuana indoors, large amounts of mold can form in the residence, creating a hazard for current and future residents.⁹¹

3. Security Concerns

In addition to these public health issues, there are considerable security concerns. Frequently, electricity that is required to sustain an indoor grow-house is stolen, and the methods used to steal electricity cause significant fire hazards.⁹² In Colorado, adults are currently permitted to cultivate six plants per person in their homes.⁹³ Home growers worry about installing alarm systems to thwart potential burglars from stealing their plants. Marijuana can be cultivated outdoors and indoors, in a variety of climates, and it can flourish in three seasons (spring, summer, and fall), and produce three harvests a year.⁹⁴ Some believe that a nation that allows the cultivation and use of marijuana must:

[E]xpect marijuana brownies and marijuana butter sold at the grocery store, tetrahydrocannabinol (“THC” or “delta-9-THC”) laced lollipops that may be accidentally or purposefully placed in a child’s Halloween bag, and marijuana clippings, shake, and trimmings inadvertently left in the front yard where home growers run the risk of neighborhood children or dogs playing in the trimmings and getting stoned.⁹⁵

90. JOHN W. MARTYNY, ET AL., HEALTH EFFECTS ASSOCIATED WITH INDOOR MARIJUANA GROW OPERATIONS 20 (2010), available at http://www.calea.org/sites/default/files/Indoor%20Marijuana%20Grow%20Effects.report%20_1b.pdf.

91. *Id.* at 4.

92. Interview with Robert Reid, DEA Supervisory Special Agent, in Knoxville, Tenn. (April 30, 2013). Telephone Interview with Charles Olachea, DEA Special Agent (June 25, 2013). See JOHN W. MARTYNY, ET AL., HEALTH EFFECTS ASSOCIATED WITH INDOOR MARIJUANA GROW OPERATIONS 2 (National Jewish Health) (2010), available at http://www.calea.org/sites/default/files/Indoor%20Marijuana%20Grow%20Effects.report%20_1b.pdf.

93. Vicky Uhland, *Marijuana: The truth about growing your own pot*, THE DENVER POST (Feb. 22, 2013), http://www.denverpost.com/grow/ci_22646080/marijuana-truth-about-growing-your-own-pot.

94. *Criminal Commodities: Marijuana*, STRATFOR, *supra* note 20.

95. “From 2005 through 2008 there was an average of 741 visits per year to the emergency room in Colorado for marijuana-related incidents involving youth. That number increased to 800 visits per year between 2009 and 2011. . . . From 2005 through

4. Regulations and Enforcement

Legalization will only become successful if marijuana distribution and use are heavily regulated. An age limit can be imposed, in line with the current practice in Colorado and Washington.⁹⁶ Marijuana is currently widely used, and minimal, or no rules and regulations are in place across the United States. Alcohol and tobacco are just as, or more harmful than marijuana,⁹⁷ but both of these products are heavily regulated. Regulations provide peace of mind to users, because product quality and contamination levels in the production process—e.g., levels of pesticides and mold growth⁹⁸—are routinely checked. As to home production, adults are permitted to brew up to 200 gallons of wine and beer in their home, but moon-shining is illegal under federal law, unless the brewer is using moonshine for fuel, and has a permit from the Bureau of Alcohol, Tobacco, and Firearms (“ATF”).⁹⁹ The Federal Trade Commission, the ATF, and the Drug Enforcement Administration (“DEA”) would have to establish and enforce strict regulations that govern the production and use of marijuana. The Food and Drug Administration (“FDA”) would have to participate in the process, if marijuana enters the food supply-chain. The ATF could reduce marijuana smuggling and contraband-marijuana trafficking, thereby divesting criminal and terrorist organizations of monies derived from illicit activity, and minimize tax revenue losses to the states, and to the federal government.

In addition, State Alcoholic Beverage Commissions and Liquor Control Boards would have to regulate the marijuana industry through the issuance of licenses to suppliers/manufacturers/growers, wholesalers/

2008, the yearly average number of marijuana-related exposures for children ages 0 to 5 years was 4. For 2009 through 2012, that number increased 200 percent to an average of 12 per year.” *ROCKY MOUNTAIN HIDTA PRELIMINARY REPORT*, *supra* note 66, at ii. The reason for the explosion in marijuana-related incidents and exposure coincides with a local judge’s ruling that allowed caregivers to expand their patient base. *Id.* at 3–4.

96. Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES (Nov. 7, 2012), <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html>. In Colorado and Washington State adults twenty-one years and older may possess up to an ounce of marijuana.

97. “Tobacco is thought to kill about 440,000 Americans each year and alcohol 100,000.” CAULKINS ET AL., *supra* note 12, at 114.

98. At harvest, the plant’s buds must be dried within 12 hours of being trimmed off the plants in order to avoid mold or fungus formation. *Criminal Commodities: Marijuana*, STRATFOR, *supra* note 20.

99. 27 C.F.R. § 24.75 (2013) (wine for personal or family use); 27 C.F.R. § 25.205 (2013) (beer for personal or family use); 27 C.F.R. § 19.726 (prohibited uses of distilled spirits).

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processors, and retailers. They would also have to educate citizens on the dangers of marijuana use and enforce marijuana laws and regulations that are in place. It is possible that tobacco or pharmaceutical companies will take over the marijuana cottage industry and establish their own regulatory standards. For example, R.J. Reynolds has repeatedly denied rumors that it intends to purchase land in California expecting that the federal government would legalize marijuana, which would inevitably lead to regulations that may force mom-and-pop growers out of business.¹⁰⁰

Marijuana use would no longer be a crime, but would remain a special needs or administrative issue. Police, government officials, and school officials would have to conduct searches with or without a warrant in an administrative capacity, as long as those searches were deemed to be reasonable and their benefits outweighed the invasion of privacy.¹⁰¹ Investigations would be necessarily non-criminal in nature.¹⁰² Inspections of commercial premises, or closely regulated businesses, would protect against code violations that may arise from marijuana production and distribution.¹⁰³ Officers at Driving under the Influence (“DUI”) checkpoints would also screen drivers for marijuana intoxication without a warrant, because road safety for the public at-large takes precedence over the intrusion on the motorist’s right to privacy.¹⁰⁴ School officials would be able to search students they had reasonable suspicion that a student possessed marijuana.¹⁰⁵ Suspicionless, random, urine testing would still be permitted for screening students in schools, employees in the workplace who violate safety rules, and those who are required to carry a firearm or handle classified materials.¹⁰⁶ Those interested in using marijuana may have to weigh the benefits and the negative consequences of marijuana use if they wish to apply for a job with government agencies such as the DEA, or the

100. Sasha Abramsky, *Altered State: California’s Pot Economy*, THE NATION (Dec. 27, 2010), <http://www.thenation.com/article/157001/altered-state-californias-pot-economy>.

101. Since marijuana has not been legalized at the federal level, I can only assume the Supreme Court would follow administrative search rules set forth in *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523 (1967), and school search rules set forth in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and *Safford Unified Sch. Dist. #1 v. Redding*, 129 S.Ct. 2633 (2009).

102. See *South Dakota v. Opperman*, 428 U.S. 364 (1976).

103. See *Camara*, 387 U.S. at 523, and *New York v. Burger*, 482 U.S. 691 (1987).

104. See *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 447, 455 (1990).

105. Once initiated, the search could not be “excessively intrusive in light of the age and sex of the student, and nature of the infraction.” *New Jersey v. T.L.O.*, 469 U.S. 325 at 342.

106. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 633–34 (1989); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989).

military. As a result, those who misuse marijuana would have to face one or more negative consequences that may restrict their subsequent use of marijuana.

5. Taxation

Taxation follows regulation, and is another benefit of legalization. Colorado proposed limiting taxes to no greater than 15 percent,¹⁰⁷ and California proposed a tax of US\$50 per ounce of purchased marijuana.¹⁰⁸ According to a report by Jeffrey Miron, a visiting professor of economics at Harvard University, “a system of taxation would produce combined savings and tax revenues of between US\$10 billion per year and US\$14 billion per year.”¹⁰⁹ However, taxation could spawn the potential growth of a black market. Higher taxes increase the risk that users would try to buy marijuana from the black market; these drugs may be of inferior quality, but cheaper than marijuana sold by regulated businesses.¹¹⁰ Thus, legalization may not eliminate all criminal activities and elements associated with the production and use of marijuana.

107. “Section 280E of the tax code denies tax deductions for any business trafficking in controlled substances.” Robert W. Wood, *Medical Marijuana Goes Even More Corporate*, *FORBES* (Mar. 26, 2013), <http://www.forbes.com/sites/robertwood/2013/03/26/medical-marijuana-goes-even-more-corporate/>. However, the states that have legalized marijuana will see a significant boost in tax revenue; for example, “the change could produce as much as \$60 million in combined annual tax revenue and savings for the state [Colorado] budget.” Tim Sprinkle, *High There: Potheads Eyed as Big Business*, *YAHOO* (June 16, 2013 1:08 AM), <http://finance.yahoo.com/blogs/the-exchange/high-potheads-eyed-big-business-233656926.html>.

108. CAULKINS ET AL., *supra* note 12, at 162.

109. Jeffrey Miron, *The Budgetary Implications of Marijuana Prohibition*, *PROHIBITIONCOSTS.ORG* (June 2005), <http://www.prohibitioncosts.org/> (“Revenue from taxation of marijuana sales would range from \$2.4 billion per year if marijuana were taxed like ordinary consumer goods to \$6.2 billion if it were taxed like alcohol or tobacco.”).

110. Others disagree. The authors of one RAND paper believe that “legalizing marijuana in California would effectively eliminate Mexican Drug Trafficking Organizations’ (“DTOs”) revenues from supplying Mexican-grown marijuana to the California market. . . even with taxes, legally produced marijuana would likely cost no more than would illegal marijuana from Mexico and would cost less than half as much per unit of THC.” BEAU KILMER, ET AL., *RAND CORP., REDUCING DRUG TRAFFICKING REVENUES AND VIOLENCE IN MEXICO: WOULD LEGALIZING MARIJUANA IN CALIFORNIA HELP?* (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP325.pdf. A recent study done by the Mexican Competitiveness Institute reported that legalization of the recreational use of marijuana would allow state growers to produce marijuana relatively cheaply and permit the drug to be made available at cheaper prices and higher quality than the current Mexican supply. *Study: U.S. marijuana legalization would hurt Mexican cartels*, *CBSNEWS.COM* (Oct. 31, 2012), http://www.cbsnews.com/8301-201_162-57543378.html.

6. International Impact of Marijuana Legalization in the United States

Legalizing marijuana at an international level could be problematic. In 1961, 170 countries, including the United States, signed the United Nations Single Convention on Narcotic Drugs.¹¹¹ This convention required signatory nations to make the production, trade, and possession of marijuana for non-medical reasons a punishable offense.¹¹² The United States is also a participant in the United Nations Convention on Psychotropic Substances of 1971 and the United Nations Convention against Illicit Traffic of 1988. According to these conventions, possession of any prohibited substance for non-medicinal or nonscientific use was to be made a criminal offense under domestic law.¹¹³ The International Narcotics Control Board monitors adherence to these Conventions.¹¹⁴ According to Caulkins et al.:

The United States imposes economic sanctions against countries that have illegal drug production and/or trafficking issues within their countries and are not making progress combating drugs and cooperating with the United States (including Brazil, Colombia, and Mexico). Those who are not cooperating with the United States to combat drugs¹¹⁵ are “decertified” and ineligible for certain types of bilateral assistance from the United States to include removal of U.S. trade preferences.¹¹⁶

The United States has given millions of dollars to Plan Colombia and the Merida Initiative in Mexico to combat the trafficking of cocaine, heroin, and marijuana.¹¹⁷

111. See THE UNITED NATIONS, SINGLE CONVENTION ON NARCOTIC DRUGS (1961), available at http://www.unodc.org/pdf/convention_1961_en.pdf.

112. *Id.*

113. See THE UNITED NATIONS, CONVENTION ON PSYCHOTROPIC SUBSTANCES (1971), available at http://www.unodc.org/pdf/convention_1971_en.pdf; THE UNITED NATIONS, CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (1988), available at http://www.unodc.org/pdf/convention_1988_en.pdf.

114. THE INTERNATIONAL NARCOTICS CONTROL BOARD, <http://www.incb.org/incb/en/about.html> (last visited July 16, 2013).

115. For example, in 2012, Venezuela, Burma, and Bolivia failed to comply with international counternarcotics agreements under 706(2)(A) of the Foreign Relations Authorization Act. Pres. Determ. No. 2012-15, 77 Fed. Reg. 58,917 (Sept. 14, 2012).

116. CAULKINS ET AL., *supra* note 12, at 148.

117. The United States legalization movement caused former Mexican Foreign Minister Jorge Castaneda to state on Mexican radio, “Why are we busting trucks of marijuana in Mexico when they are selling it over the counter in some U.S. states? There is no logic to it. It is schizophrenic.” Ioan Grillo, *From Mexico to Moscow, the*

If the United States chooses to legalize marijuana production and use, it runs the risk of appearing hypocritical in the face of its international treaty obligations. In addition, legalizing marijuana in the United States would be in conflict with its current practice of giving aid to Mexico and Colombia. On the other hand, other countries such as the Netherlands have overlooked treaty obligations without penalty or international condemnation.

B. Criminalization (Option 3)

As shown in Table 2, federal drug sentences can be extremely severe and are dependent on the quantity of marijuana production and use. Distributing a small amount of marijuana for no remuneration is considered a simple possession offense under 21 U.S.C. § 844(a), and the statutory penalty for this offense is not more than one year of imprisonment.

Table 2. Federal Drug Sentences: Possession with Intent to Distribute or Manufacture Marijuana, Heroin and Cocaine.

Possession with intent to distribute or manufacture (Marijuana)	Possession and Use (Heroin)	Possession and Use (Cocaine)	Penalty (min/max)
1,000 kg or 1,000 plants ¹¹⁸	> 1 kg	> 5 kg	10 years/life
100 kg to 999 kg; 100 to 999 plants ¹¹⁹	100 g to 999 g	500 g to 4,999 g	5 years/40 years
50 kg to 99 kg; 50 to 99 plants ¹²⁰	< 100 g	< 500 g	No minimum/20 years

In addition, the penalty for 1,000 kg of marijuana possession or use is similar to that possible under 18 U.S.C. §2251(e) for the sexual exploitation of children, and the production of child pornography; these crimes carry a mandatory minimum of fifteen years of imprisonment, and a maximum of thirty years of imprisonment. The penalty for possessing or using 100 kg to 999 kg of marijuana is similar to the penalty imposed by 18 U.S.C. §2252(b)(1), which criminalizes the transportation of child pornography in interstate or foreign commerce and carries a minimum sentence of five years of imprisonment, and a maximum sentence of twenty

World Turns On to U.S. Marijuana Legalization, TIME (Nov. 8, 2012), <http://world.time.com/2012/11/08/from-mexico-to-moscow-the-world-turns-on-to-u-s-marijuana-legalization/>.

118. 21 U.S.C. § 841(b)(1)(A)(vii) (2006); 21 U.S.C. § 841(b)(1)(A)(i)–(ii).

119. 21 U.S.C. § 841(b)(1)(B)(vii).

120. 21 U.S.C. § 841(b)(1)(C).

years of imprisonment. In contrast, those who commit white-collar crimes fare much better. White-collar crimes such as wire fraud and tax evasion carry no mandatory minimum sentence; a person who commits wire fraud can receive no more than twenty years of imprisonment,¹²¹ and a person who commits tax evasion can receive no more than five years of imprisonment.¹²² These stiff penalties should cause us to question whether punishment for marijuana related offenses creates sufficient positive consequences, such as deterrence, that outweigh the harm that is typically linked to punishment. Despite these stiff penalties for possession, distribution, and production of marijuana, marijuana sellers and users do not seem to be deterred, possibly in-part due to a lack of government enforcement.¹²³

Jeremy Bentham stated that punishment ought not to be inflicted:

1. Where it is *groundless*: where there is no mischief for it to prevent; the act not being mischievous upon the whole.
2. Where it must be *inefficacious*: where it cannot act so as to prevent the mischief.
3. Where it is *unprofitable*, or too expensive: where the mischief it would produce would be greater than what it prevented.
4. Where it is *needless*: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate.¹²⁴

Under Bentham's matrix, the punishment for marijuana production and/or use may prove to be "groundless," if marijuana use is not considered a crime; "inefficacious," since users are not deterred by the potential punishment; "unprofitable," if punishment is greater than the deterrence it might produce; and perhaps "needless," if users choose not to smoke again on their own accord regardless of any potential punishment.

If society finds more harm than good in the production and use of marijuana, the government should focus its attention on investigating and prosecuting marijuana traffickers, producers, and users. Criminalizing the production and use of marijuana would prove to be an easier option than legalization, since there are underlying state and federal laws that could simply be more strictly enforced. However, the longer the government

121. 18 U.S.C. § 1343 (2012).

122. 26 U.S.C. § 7201 (2012).

123. LYNN ZIMMER & JOHN P. MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE (1997). "Despite the increase in civil and criminal sanctions—and higher rates of arrest and imprisonment for marijuana offenses than ever before in history—adolescent marijuana use has been rising, and adult marijuana use has remained steady." *Id.* at 46.

124. JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 33 (6th ed. 2012) (emphasis added).

waits to enforce these laws, the more difficult it will be to reduce the importation, cultivation, distribution, and use of marijuana. The federal government would have to take the lead, pursuant to the Supremacy Clause,¹²⁵ (i.e., the U.S. Constitution and federal laws take precedence over state laws) and crack down on marijuana trafficking, and enforce the CSA. In *Gonzales v. Raich*, the Supreme Court stated that the federal government may criminalize home-production of marijuana, even in states that permit its medical use.¹²⁶

Strict enforcement by the DEA would significantly cripple most dispensary owners via administrative forfeiture. Organizations that profit from marijuana sales in states that have legalized medical or recreational use would close when owners find out that the federal government has placed marijuana trafficking back on its priority list. A nation-wide round up, to include simultaneous searches and seizures by the DEA, would likely cause states to reconsider their laws, because local assets and state taxes would be seized. With the ensuing publicity, the public would know that the federal government is firmly enforcing marijuana laws.

An added benefit to rigorous enforcement of marijuana trafficking laws would be the decrease in the illegal migration of some Mexican drug trafficking organizations (“DTOs”) into the United States. Many DTOs have set-up shop in Colorado and California, in an attempt to avoid the risk associated with importing marijuana, and subsequently increase their profit margin.¹²⁷ In the past, DTOs earned US\$1.1 billion to US\$2 billion from exporting marijuana in to the United States.¹²⁸ However, DTOs are now kidnapping and forcing Mexican nationals to work in cultivation operations in areas such as Northern California. The DTOs then sell their products to marijuana dispensaries or smuggle their product to another

125. U.S. CONST. art. VI, cl. 2.

126. *Gonzales v. Raich*, 545 U.S. 1, 23–33 (2005).

127. Proponents of legalization would argue that nationwide legalization would go a long way towards eliminating (or at least weakening) the Mexican DTOs since 40 to 70 percent of marijuana used in the United States is imported from Mexico. Grillo, *supra* note 117.

128. BEAU KILMER, ET AL., RAND CORP., REDUCING DRUG TRAFFICKING REVENUES AND VIOLENCE IN MEXICO: WOULD LEGALIZING MARIJUANA IN CALIFORNIA HELP? 19 (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP325.pdf. Several of the drug cartels, “including Los Zetas, the Sinaloa Federation, the Gulf cartel and La Familia Michoacana, traffic marijuana into the United States.” *Criminal Commodities: Marijuana*, STRATFOR GLOBAL INTELLIGENCE, *supra* note 20. In Canada, Vietnamese criminal organizations and outlaw motorcycle gangs control production and distribution in British Columbia. CAULKINS ET AL., *supra* note 12, at 34.

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state for illegal sale.¹²⁹ This cost-effective business venture has generated millions of dollars in cash for the DTOs, who then transfer cash back to Mexico.¹³⁰ Marijuana production levels in the United States have become comparable to that in Mexico.¹³¹ Law enforcement could use tools such as wiretaps, informants, and forfeitures to keep criminal elements at bay, instead of being frustrated in the face of governmental indecision and inaction.

Subsequently, the federal government should completely re-evaluate its marijuana policies, laws, and sentences. If the government determines that marijuana production or use is criminal, then it must implement suitable punishment measures to deter it. More importantly, the federal government would have to enforce its current criminal laws. Although the most recent DOJ memorandum continues to be effective in all fifty states, the practical result is that forty-eight states must abide by the federal government's current prohibition on marijuana, while two states, Washington and Colorado, may create their own marijuana laws on use, regulation, and enforcement with little fear of a federal crack-down.¹³² This disparity creates confusion among federal law enforcement agents. The federal government must apply a marijuana policy that is uniform and fair to all fifty states. The federal government must act now if it chooses criminalization of marijuana as the path forward.

IV. MEDICAL MARIJUANA: NOT A VIABLE OPTION (OPTION 2)

Many plants have healing attributes, and the cannabis plant is no exception. The flowers of the *cannabis sativa* and *cannabis indica* (generally known as marijuana) plants contain THC, which is classified as a psychotropic substance in the 1971 United Nations Convention on

129. U.S. JUSTICE DEPARTMENT, THE DEA POSITION ON MARIJUANA 25 (2011), http://www.justice.gov/dea/pr/multimedia-library/marijuana_position.pdf.

130. *Id.*

131. *Criminal Commodities: Marijuana*, STRATFOR GLOBAL INTELLIGENCE, *supra* note 20. See also Olga Khazan, *How marijuana legalization will affect Mexico's cartels, in charts*, WASH. POST (Nov. 9, 2012), <http://www.washingtonpost.com/blogs/world-views/wp/2012/11/09/how-marijuana-legalization-will-affect-mexicos-cartels-in-charts/>. Mexican DTOs tend to dominate the New Mexico and Texas markets more than the Oregon and Washington markets. The sale of marijuana makes up only 17 percent of the cartels profits compared to cocaine, which makes up more than a third.

132. See Memorandum from James M. Cole, Deputy Attorney General, to United States Attorneys (June 29, 2011), available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.

Psychotropic Substances.¹³³ THC is found in the resin produced by the flowering marijuana buds, and typically makes up 1 to 4 percent of the resin.¹³⁴ THC causes marijuana users to become intoxicated. Certain cannabis plants can produce up to 20 percent THC depending upon the plant’s genetics, the climate when cultivated, and the harvesting process.¹³⁵ Thus, the potency of cannabis products depends upon its THC content. Due to selective breeding and hydroponic growing processes, THC levels have increased by 50 percent since the 1960s.¹³⁶

The federal government should not legalize marijuana for medicinal use for two reasons. First, it is impossible to reclassify marijuana from a Schedule I substance to a Schedule II substance under the CSA. Second, legalizing marijuana for medicinal purposes is merely a stepping-stone towards legalizing marijuana outright, regardless of any other claimed purpose. The only organizations that would profit from Option 2 are the dispensaries, retailers, and growers of marijuana. Without increased regulation or taxation that is possible through outright legalization, the medical marijuana option would merely exchange one drug-trafficking organization for another.¹³⁷

133. *Criminal Commodities: Marijuana*, STRATFOR GLOBAL INTELLIGENCE, *supra* note 20; CAULKINS ET AL., *supra* note 12, at 7. *See also* U.S. Department of Health and Human Services, National Institute on Drug Abuse, *Is Marijuana Medicine?*, NIDA DRUG FACTS, July 2012, at 2, <http://www.drugabuse.gov/sites/default/files/drugfactsmedicalmarijuana.pdf> (“Along with THC, the marijuana plant contains over 400 other chemical compounds, including other cannabinoids that may be biologically active and vary from plant to plant. This makes it difficult to consider its use as a medicine even though some of marijuana’s specific ingredients may offer benefits.”).

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134. CAULKINS ET AL., *supra* note 12, at 7.

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135. *Criminal Commodities: Marijuana*, STRATFOR GLOBAL INTELLIGENCE, *supra* note 20.

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136. CAULKINS ET AL., *supra* note 12, at 9–10. Most marijuana sold in the 1960s consisted of stems and leaves; today, it is more common to purchase the flowering buds which contain higher amounts of THC. *Id.* Hashish, which is the resin extracted from the cannabis plant, can contain concentrations of THC that exceed 40 percent and is, therefore, more potent than marijuana which typically consists of the buds and leaves of the plant. *Id.*

137. San Diego County District Attorney Bonnie M. Dumanis stated that “these so-called ‘marijuana dispensaries’ are nothing more than for-profit storefront drug dealing operations run by drug dealers hiding behind the state’s medical marijuana law.” U.S. JUSTICE DEPARTMENT, *supra* note 129, at 20. Rev. Scott T. Imler, coauthor of Proposition 215, the 1996 ballot initiative that legalized marijuana for medical use in California, stated that “[w]e created Prop. 215 so patients would not have to deal with black market profiteers. But today it is all about the money. . . . Most of the dispensaries operating in California are little more than dope dealers with storefronts.” *Id.* at 13.

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A. Futility in Reclassifying Marijuana as a Schedule II Substance Under the CSA

Schedule I substances have a high potential for abuse, have no accepted medical use in the United States, and lack accepted safety data for use under medical supervision.¹³⁸ On the other hand, Schedule II substances are approved for medical use, but have a high potential for abuse.¹³⁹ The problem with transferring cannabis from Schedule I to Schedule II lies in the fact that marijuana plants vary in potency, because each plant produces different quantities and compositions of THC and cannabidiol (“CBD”).¹⁴⁰ On one day, a smoker might inhale marijuana with a 3 percent THC concentration, and on another day, might inhale marijuana with a 20 percent concentration. It would be virtually impossible for the FDA to regulate the doses of active ingredients such as THC and CBD, or create a method of growing and blending marijuana so that the substance has “well-defined and measureable ingredients that are consistent from one unit (such as a pill or injection) to the next. This consistency allows doctors to determine the doses and frequency.”¹⁴¹ It would be impossible to meet quality control standards, and the standardization requirements pertaining to purity and potency when filing for a New Drug Application.¹⁴²

In order to place a drug on Schedule II, the FDA would have to determine the correct dosage for medicinal use. In 1989, the DEA denied the National Organization for Reform of Marijuana Laws’ (NORML) pe-

138. 21 U.S.C. § 812(b)(1) (2006).

139. *Id.* § 812(b)(2).

140. *Cf.* Miller, *infra* note 148 (noting that in 1999, the Institute of Medicine determined that smoked, herbal cannabis (or marijuana) would never be considered a safe and effective medicine for widespread use).

141. U.S. Department of Health and Human Services, National Institute on Drug Abuse, *Is Marijuana Medicine?*, NIDA DRUG FACTS, July 2012, at 2, <http://www.drugabuse.gov/sites/default/files/drugfactsmedicalmarijuana.pdf>.

142. Marijuana Scheduling Petition; Denial of Petition, 54 Fed. Reg. 53,767, 53,774 (Dec. 29, 1989). “A new drug . . . may not be distributed in interstate commerce (except for clinical studies under an investigational new drug application) until a sponsor, usually the drug manufacturer, has submitted and FDA has approved a new drug application (NDA) or a biologics license application (BLA) for the product. For approval, an NDA or BLA must contain sufficient scientific evidence demonstrating the safety and effectiveness of the drug for its intended uses.” *Potential Merits on Cannabinoids for Medical Uses: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the H. Comm. of Gov’t Reform*, 108th Cong. 24 (2004) (statement of Dr. Robert Meyer, Director of the Office of Drug Evaluation II, Federal Drug Administration).

tition to reschedule marijuana plant material from Schedule I to Schedule II.¹⁴³ The findings of fact revealed that

Cannabis or marijuana cannot be defined chemically, nor can it be easily standardized. . . . [S]moking as a dosage form to deliver marijuana to the human body is unsuitable for medical treatment due to: (1) lack of standardization of the marijuana, (2) lack of knowledge of the amounts of each constituent available, (3) lack of knowledge of the activity of the chemicals while burning, (4) amount of product ingested being dependent on the individual's smoking technique, and (5) possible carcinogenic effect of smoking. There are no drugs which are delivered by smoking which are medically used in the United States.¹⁴⁴

Currently, no prescribed medicines are ingested by smoking. Opium poppy is not smoked for medical purposes; instead, opium is extracted from the plant, and a variety of opiate products (e.g., morphine and paregoric) are produced and listed under the CSA's Schedule II.¹⁴⁵ Under government regulations, "[i]n contrast to variations in cannabinoid content evident in cannabis, naturally occurring opium derivatives remain quantitatively stable and the potency can be chemically standardized."¹⁴⁶ Thus, Marinol,¹⁴⁷ and Sativex,¹⁴⁸ but not marijuana for smoking, or raw marijuana for eating, can be placed on Schedule II, because the latter two forms are an imprecise and dangerous way to ingest CBD, and serve no medicinal purpose. Using pure extracts of CBD already produced by the pharmaceutical companies would be the safer method to ingest CBD for medicinal purposes.

143. Marijuana Scheduling Petition; Denial of Petition, 54 Fed. Reg. at 53,773.

144. *Id.* at 53,773–74.

145. Miller, *infra* note 148.

146. Marijuana Scheduling Petition; Denial of Petition, 54 Fed. Reg. at 53,774.

147. Marinol, is used to treat nausea and vomiting associated with cancer chemotherapy and to stimulate appetite in patients with severe weight loss. It is an FDA-approved drug that contains synthetic THC in capsule form. CAULKINS ET AL., *supra* note 12, at 101. Synthetic THC is no different from the THC isolated from cannabis. Marijuana Scheduling Petition; Denial of Petition, 54 Fed. Reg. at 53,774

148. Sativex, a mixture of THC and cannabidiol (CBD), another cannabis compound, is used to treat anxiety disorders and relieve muscle spasticity in patients with multiple sclerosis and is an approved drug in Canada, New Zealand, and eight European countries. CAULKINS ET AL., *supra* note 12, at 101; Henry Miller, *The Real Dope on Marijuana*, FORBES (Mar. 28, 2012), <http://www.forbes.com/sites/henrymiller/2012/03/28/the-real-dope-on-medical-marijuana/>.

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B. Issues with Passing and Enforcing State Medical Marijuana Laws: Why Federal Medical Marijuana Laws Will Not Work

If Congress decides to re-classify marijuana as a Schedule II substance, and implements Option 2, it must examine the efficacy of medical marijuana legalization in the states that have adopted this option, before it amends the CSA without DEA and FDA approval.¹⁴⁹ To this end, the medical marijuana movements in California, Colorado, and New Mexico are discussed below.

Congress should examine which groups or individuals comprise the majority of the users in the states that have legalized marijuana for medicinal purposes. Are the girls in bikinis who are twirling hand-held signs on the side of the road for advertising and promoting a particular marijuana dispensary really targeting cancer patients undergoing chemotherapy, or the patient suffering from AIDS? Can a caregiver under California law really have 4,000 sick patients who need marijuana for medical purposes?¹⁵⁰ The Internet is awash with websites depicting women in nursing uniforms who offer discounted 99-cent marijuana joints. Are the thirty-year-old men with marijuana cards, who make up the majority of the users in California market,¹⁵¹ really suffering from muscle spasms? The medical marijuana business—which includes growers, dispensaries, doctors, and a large number of peripheral businesses, such as magazines, radio shows, insurance companies, schools created to help students start marijuana businesses, hemp expositions and trade shows—has become quite profitable.¹⁵² A 2010 study revealed that “the marijuana

149. It is the DEA’s responsibility to grant or deny petitions to reschedule. Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 76 Fed Reg. 40,551, 40,552–66 (July 8, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-07-08/pdf/2011-16994.pdf#page=1>.

150. California’s Medical Marijuana Program Act allows patients and caregivers to associate for purposes of collectively or cooperatively cultivating marijuana without being subject to state law enforcement if their aims are consistent with medical purposes. CAULKINS ET AL., *supra* note 12, at 218. These cooperatives seem to operate more like businesses with full time paid staff selling to anyone with a recommendation rather than caring for sick patients receiving health care services. *Id.* California allows medical marijuana for any “illness for which marijuana provides relief” which would include pain relief, improvement of sleep, the need to relax, etc. *Id.* at 219.

151. Kim Raney, *Proposition 19: California’s Marijuana Legalization Debate*, THE POLICE CHIEF (Oct. 2010), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=2210&issue_id=102010.

152. Medbox sells machines which dispense set doses of the drug to patients. Quentin Fottrell, *How to Invest in Legalized Marijuana*, THE WALL STREET JOURNAL (Nov. 13, 2013), <http://www.marketwatch.com/story/how-to-invest-in-marijuana-2012-11-13>. Medical Marijuana (MJNA) “offers more than 50 ways to ingest marijuana, from Dixie Elixir soda to Dixie Chill ice cream and a range of Dixie Edibles, like

market in America is probably about [US]\$40 billion a year, with the potential to grow to [US]\$100 billion per year in the event of widespread legalization.”¹⁵³ The real beneficiaries of the medical marijuana movement are the doctors who hand-out marijuana medical cards like candy¹⁵⁴ and the business owners who avoid paying federal taxes and who follow little-to-no state regulations.¹⁵⁵

Further, regulations related to medical marijuana are difficult to enforce. For example, in Colorado, marijuana business owners pay the salaries of seven employees of the state’s Medical Marijuana Department who are responsible for taxing, licensing, and enforcing all regulatory laws.¹⁵⁶ In California, “robodoctors” set up offices equipped with a nurse and Skype capabilities.¹⁵⁷ These doctors charge each patient US\$50 to listen to their medical complaint for only a few minutes via Skype, “recommend” marijuana for their “condition,” and issue them a medical

chocolate truffles and crispy rice treats.” *Id.* A company called weGrow, an Oakland-based 15,000 square foot retail warehouse that sells everything a marijuana grower would need, especially for a hydroponic grow house, is expected to gross more than US\$1 million in its first year of operation. Tom McNichol, *The Big Business of Marijuana*, *THE ATLANTIC* (Oct. 27, 2010), <http://www.theatlantic.com/business/archive/2010/10/the-big-business-of-marijuana/65264/>.

153. Rich Smith, *Marijuana Legalization: 3 Legit Angles to Profit from Decriminalized Pot*, *DAILY FINANCE* (Nov. 17, 2012), <http://www.dailyfinance.com/2012/11/17/marijuana-legalization-3-legit-angles-to-profit-from-decriminal/>. Another estimate was much more conservative, stating that the growing medical marijuana industry is estimated to be worth about US \$1.7 billion as of 2011. Fottrell, *supra* note 152.

154. Gumbiner, *supra* note 87.

155. Marijuana business owners are required to pay federal taxes and seem to be penalized by the IRS under section 280E of the federal tax code, which denies tax deductions for any business trafficking in controlled substances. *See* Letter from Andrew J. Keyso, Deputy Associate Chief Counsel, IRS, to U.S. House Representatives (Dec. 16, 2010), *available at* <http://www.irs.gov/pub/irs-wd/11-0005.pdf>. However, a dirty little secret exists in the marijuana business world: At least one dispensary keeps two different sets of books, one containing their true profits and another listing significant losses to avoid having to pay federal taxes. Zusha Elinson, *Marijuana Dispensaries are Facing New Scrutiny*, *N.Y. TIMES* (Jan. 8, 2011), http://www.nytimes.com/2011/01/09/us/09bcharborside.html?pagewanted=all&_r=0.

156. Interview with Robert Reid, DEA Supervisory Special Agent, in Knoxville, Tenn. (April 30, 2013). Telephone Interview with Charles Olachea, DEA Special Agent (June 25, 2013). *See* COLORADO DEPARTMENT OF REVENUE, MARIJUANA ENFORCEMENT DIVISION, <http://www.colorado.gov/cs/Satellite/Rev-MMJ/CBON/1251592985120> (last visited Dec. 8, 2013).

157. Dan Morain, *Dr. Skype’s Pot Exams: Quick, hazy*, *THE SACRAMENTO BEE* (May 26, 2013), <http://www.sacbee.com/2013/05/26/5446820/dr-skypes-pot-exams-quick-hazy.html>.

marijuana card that is valid for six months.¹⁵⁸ Patients must then pay an additional US\$50 to US\$60 to renew their card.¹⁵⁹ A doctor with five hundred patients or a doctor working via Skype from 8 a.m. to 5 p.m. every day would have an extremely profitable business. Legislators or voters who passed relevant medical marijuana referenda did not intend this outcome.

In 2007, New Mexico passed Senate Bill 523, the “Lynn and Erin Compassionate Use Act” and became the twelfth state to legalize medical marijuana.¹⁶⁰ Medical marijuana patients who register with the New Mexico State Department of Health (“NMDOH”) and who have been diagnosed with a specific disease or illness¹⁶¹ are legally protected from criminal prosecution.¹⁶² Compared to other states that have approved marijuana use for medical purposes, New Mexico’s program is “a much more controlled system.”¹⁶³ It differs from most states in that the NMDOH oversees the production and distribution of marijuana.¹⁶⁴ Producers and distributors must apply to the NMDOH for a license to pro-

158. In 1996, John Ashcroft threatened to revoke the federal drug prescribing license of any physician who wrote a recommendation for marijuana use by a patient; courts later ruled that that type of action would violate the doctors’ free speech protections of the First Amendment. CAULKINS ET AL., *supra* note 12, at 191; *see also* LA COUNTY MEDICAL MARIJUANA IDENTIFICATION PROGRAM, <http://publichealth.lacounty.gov/mmip/>.

159. LA COUNTY MEDICAL MARIJUANA IDENTIFICATION PROGRAM, <http://publichealth.lacounty.gov/mmip/>. *See also* CALIFORNIA DEPARTMENT OF PUBLIC HEALTH MEDICAL MARIJUANA PROGRAM <http://www.cdph.ca.gov/programs/MMP/Pages/MMPFees.aspx> (discussing application fees for a medical marijuana card).

160. *See* Lynn and Erin Compassionate Use Act, NMSA 1978, §§ 26-2B-1–7 (2013).

161. A medical advisory board “consisting of eight practitioners representing the fields of neurology, pain management, medical oncology, psychiatry, infectious disease, family medicine and gynecology” determines what medical conditions qualify a patient for the program. NMSA 1978, § 26-2B-6. The following medical conditions have been approved by the New Mexico Department of Health: arthritis, severe and chronic pain, painful peripheral neuropathy, intractable nausea/vomiting, severe anorexia or cachexia, hepatitis C for which they are currently receiving antiviral treatment, Crohn’s disease, Post-Traumatic Stress Disorder, amyotrophic lateral sclerosis, cancer, glaucoma, multiple sclerosis, damage to nerve tissue of the spinal cord with intractable spasticity, epilepsy, HIV/AIDS, and hospice patients. MARIJUANA CAREGIVER.COM, http://www.marijuana-caregiver.com/New_Mexico.htm (last visited Nov. 1, 2013).

162. *See* NMSA 1978, § 26-2B-4.

163. Milan Simonich, *Medical Marijuana: a Growth Industry in N.M.*, ALBUQUERQUE JOURNAL (Dec. 13, 2011), <http://www.abqjournal.com/74639/abqnewsseeker/medical-marijuana-a-growth-industry-in-n-m.html>.

164. *See* NMSA 1978, § 26-2B-7.

duce and distribute medical marijuana.¹⁶⁵ Marijuana production facilities are limited to growing 150 plants at any one time.¹⁶⁶ Currently, approximately twenty-five companies serve as licensed producers of marijuana.¹⁶⁷

The “Lynn and Erin Compassionate Use Act” protects patients if they first seek a doctor to certify that they have one of the approved medical conditions, that standard treatment would not work, and that the benefit of using marijuana for that particular patient outweighs the risk of marijuana use.¹⁶⁸ Upon receiving this certification, a patient should then apply to the state for a registry card and, upon approval, will receive a registry card that contains information on how to contact non-profit growers licensed to supply marijuana.¹⁶⁹ Patients also have the option of growing up to sixteen marijuana plants (four mature plants and twelve immature plants) for their personal use.¹⁷⁰

As of August of 2013, 9,607 New Mexico residents were approved to use marijuana under the NMDOH program.¹⁷¹ For comparison, Colorado’s population is two and a half times that of New Mexico’s, and has 88,000 marijuana “medical” users, approximately twenty times the number of users in New Mexico.¹⁷² Despite the smaller number of patients and growers, and increased state oversight, New Mexico is experiencing problems similar to those experienced in Colorado and California. Information surfaced at a recent state Medical Board disciplinary hearing in April 2013 that “[s]ome patients approved for the program may not have met the criteria to legally use medical marijuana to ease debilitating pain or illness.”¹⁷³ One doctor who certified patients under the NMDOH pro-

165. Vince Kong, *Medical Marijuana Sales Applicant Sues State*, ALBUQUERQUE JOURNAL (July 7, 2012), <http://www.abqjournal.com/117101/north/medical-marijuana-sales-applicant-sues-state.html>. According to a lawsuit filed by an applicant in June of 2012, “only 23 licensees are available to serve about 6,000 New Mexicans who have been approved to use medical marijuana.” *Id.*

166. MARIJUANA CAREGIVER.COM, http://www.marijuana-caregiver.com/New_Mexico.htm (last visited Nov. 1, 2013).

167. Simonich, *supra* note 163.

168. Jeri Clausing, *UPDATED: State’s Medical Marijuana Program Flourishing*, ALBUQUERQUE JOURNAL (Dec. 8, 2011), <http://www.abqjournal.com/74039/abqnew-sseeker/state%e2%80%99s-medical-marijuana-program-flourishing.htm>.

169. *Id.*

170. MARIJUANA CAREGIVER.COM, http://www.marijuana-caregiver.com/New_Mexico.htm (last visited Nov. 1, 2013).

171. Colleen Heild, *New light shed on N.M. medical marijuana*, ALBUQUERQUE JOURNAL (Aug. 11, 2013), <http://www.abqjournal.com/245506/news/new-light-shed-on-nm-medical-marijuana.html>.

172. Simonich, *supra* note 163.

173. Heild, *supra* note 171.

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gram approved 98 percent of his patients for certification.¹⁷⁴ The Board also discovered that some patients received certification over the phone or via Skype, and “at least one clinic did not examine patients before attesting to their eligibility for the program.”¹⁷⁵ An evaluation by a doctor to determine eligibility for the NMDOH program typically costs from US\$135 to US\$170 for a single evaluation, and US\$300 for two evaluations; the latter may be required for patients with severe chronic pain.¹⁷⁶ In response to these findings, “[s]tate regulators are proposing new rules with requirements for doctors and other health care providers who certify patients to use medical marijuana” to include requiring patients to be periodically re-diagnosed and to require providers to notify a patient’s health care provider.¹⁷⁷ It is unclear whether this re-diagnosis would prevent the reported abuses by certain doctors. Perhaps notifying the patient’s healthcare provider might force these doctors to examine patients prior to issuing the required certification.

In addition to doctors profiting from the medical marijuana business, during the first three months of 2013, licensed producers and distributors of marijuana in New Mexico reported US\$3.3 million in total sales.¹⁷⁸ In fact, one producer drives across the state selling various strains of marijuana, Black Temple hashish, marijuana cookies, triple strength “Bang Bar” chocolate brownies, lollipops, candy gems (similar to gummy worms), bottled soft drinks with cannabis tinctures, and US\$70-a-gram Butane hash oil.¹⁷⁹ The medical marijuana business is lucrative even in New Mexico, where state law is designed to maintain a tighter grip on patients, distributors, and producers alike.

In other states with lesser oversight than in New Mexico, not only does the medical marijuana movement appear to be a farce, but because there is little-to-no regulation, users are unsure as to where marijuana is grown, whether it contains pesticides, and whether the listed THC concentration can be trusted. Too many businesses and doctors are taking advantage of lack of regulations, users are unsure of the product they receive, and both state and federal law enforcement are unclear as to whether or not marijuana dispensaries should be investigated.

174. *Id.*

175. *Id.*

176. *Id.*

177. *N.M. regulators propose new medical marijuana rules*, ALBUQUERQUE JOURNAL (Aug. 5, 2013), <http://www.abqjournal.com/242650/news/nm-regulators-propose-new-medical-marijuana-rules.html>.

178. Peter St. Cyr, *No Easy Ride*, SANTA FE REPORTER (July 9, 2013), <http://www.sfreporter.com/santafe/article-7540-no-easy-ride.html>.

179. *Id.*

Therefore, if a state or the federal government wishes to legalize marijuana, it should ignore the medical marijuana option, and legalize marijuana outright for any type of use.

V. CONSIDERING WORLDWIDE PUBLIC OPINION AND MAKING AN INFORMED DECISION

The 1961 United Nations Single Convention on Narcotic Drugs prohibits the production and supply of drugs, other than those used for medical purposes or scientific research, making it difficult for countries to legalize marijuana.¹⁸⁰ In Uruguay however, marijuana possession has always been legal, and in 2012, President Jose Mujica proposed legislation to legalize marijuana commerce and cultivation in order to “weaken drug smuggling gangs and fight petty crime.”¹⁸¹ On December 10, 2013, Uruguay passed legislation legalizing marijuana and regulating its use and sale.¹⁸² Uruguayans will be permitted to grow up to six marijuana plants, join marijuana clubs (who are permitted to grow up to ninety-nine plants), and purchase up to 40 grams of marijuana a month for personal use.¹⁸³ Peru, on the other hand, has decriminalized the possession of 8 grams or less of marijuana, but has “no plans [to] legalize the selling or production of marijuana.”¹⁸⁴

Most European countries have decriminalized marijuana, instead of legalizing it. As a result, the possession of a small amount of marijuana for personal use is only subject to a civil penalty, such as a fine.¹⁸⁵ Those

180. *Uruguay's Cannabis Law: Weed all about it*, THE ECONOMIST (Dec. 11, 2013), <http://www.economist.com/blogs/americasview/2013/12/uruguays-cannabis-law>

181. Philip Smith, *Uruguay to Begin Debate on Legal Marijuana Sales*, DRUG WAR CHRONICLE (Mar. 25, 2013 04:57 pm), http://stopthedrugwar.org/chronicle/2013/mar/25/uruguay_begin_debate_legal_marij. The legislation would create a National Cannabis Institute to regulate commercial marijuana production and distribution and create penalties for rule breakers and design programs to warn of the risks of marijuana smoking. *Id.* Private households would be able to grow up to six plants and possess up to 17 ounces. *Id.*

182. *Uruguay's Cannabis Law: Weed all about it*, THE ECONOMIST (Dec. 11, 2013), <http://www.economist.com/blogs/americasview/2013/12/uruguays-cannabis-law>.

183. *Id.*

184. Manuel Vigo, *Peru rules out proposals to legalize marijuana*, PERU THIS WEEK (Jun. 3, 2013), <http://www.peruthisweek.com/news-peru-rules-out-proposals-to-legalize-marijuana-100053>.

185. *Legal topic overviews: possession of cannabis for personal use*, EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION (Jan. 26, 2012), <http://www.emcdda.europa.eu/legal-topic-overviews/cannabis-possession-for-personal-use>. See also, Press Release, United Nations Office on Drugs and Crime, 2013 World Drug Report notes stability in use of traditional drugs and points to alarming rise in new

countries that have decriminalized marijuana might prohibit the production and sale of marijuana, but would apply civil or administrative sanctions for use or possession of small quantities.¹⁸⁶ Portugal decriminalized marijuana possession in 2001.¹⁸⁷ Possession can lead to seizure of marijuana, and use and possession of up to a ten days' supply are considered administrative offenses.¹⁸⁸ A commission consisting of a doctor, lawyer, and social worker will recommend treatment options which may include a fine, community service, revocation of the user's professional license, or an injunction.¹⁸⁹ In Spain, possession and use are still illegal, but not a criminal offense, so long as the marijuana is intended for personal use and the user is in possession of small quantities.¹⁹⁰ In Italy, only the selling of the drug is criminal, and it is unclear whether drug-sharing cooperatives are legally acceptable.¹⁹¹

Dutch laws prohibit the production, trafficking, and possession of marijuana, but the Netherlands has pursued a longstanding policy of tolerance, and lack of enforcement.¹⁹² The Netherlands ratified the U.N. Convention on Narcotic Drugs, with reservation, as to the clause that would make possession a criminal offense.¹⁹³ This reservation coincides with the fact that Dutch coffee shops throughout the Netherlands are famous for selling hashish and marijuana to tourists.¹⁹⁴ Surprisingly, in 2012, the Dutch government passed measures that require its citizens to obtain

psychoactive substances (June 26, 2013), <http://www.unodc.org/unodc/en/press/releases/2013/June/2013-world-drug-report-notes-stability-in-use-of-traditional-drugs-and-points-to-alarming-rise-in-new-psychoactive-substances.html> (stating that, according to the 2013 World Drug Report by UNODC, while cannabis use in Europe has declined over the past decade, in 2013 there was a slight increase in cannabis users (possibly as a result of the decriminalization)).

186. In reality, many European countries did not even ban marijuana until the 1920s. CAULKINS ET AL., *supra* note 12, at 139. In 1890, Greece was one of the first countries to ban production and use due to "concerns about hashish use among the poor." *Id.*

187. *Id.* at 210.

188. *Id.*

189. *Id.* The objective is behavior change. *Id.* at 211.

190. *Id.*

191. *Id.*

192. *Id.* at 147.

193. THE UNITED NATIONS, UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (1988), available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201582/volume-1582-I-27627-English.pdf>.

194. David Jolly, *Law Could Hamper Drug Tourism in the Netherlands*, N.Y. TIMES (Apr. 02, 2012), http://www.nytimes.com/2012/04/03/world/europe/dutch-law-would-stop-sale-of-marijuana-to-tourists.html?pagewanted=all&_r=0.

a “weed pass” for admission to these coffee shops, effectively banning non-citizens from these coffee shops.¹⁹⁵ Members of parliament who supported the new measure argued that a drug tourism had created a large criminal element, unwelcome visitors, and the creation of an expansive black market in the Netherlands that supplied drugs to the rest of Europe.¹⁹⁶

In Russia, President Vladimir Putin signed an amendment to the Criminal Code in December 2003, stating that possession of no more than ten times the amount of a “single dose,” (twenty grams of marijuana or five grams of hashish) would be considered an administrative infraction rather than a criminal offense (fine of no more than 40,000 rubles—US\$1,380— or community service).¹⁹⁷ Under previous standards in Russia, someone caught with 0.1 g of marijuana could be punished with incarceration.¹⁹⁸

In the Australian Capital Territory, South Australia, and in the Northern Territory, minor cannabis offenses have been decriminalized, and a civil penalty system has been instituted for the possession of small amounts of cannabis with fines ranging from AUS\$50 to AUS\$200.¹⁹⁹ In other Australian states, all cannabis offenses are criminal offenses and those charged with possession could receive a large fine or jail time and a criminal record.²⁰⁰

The United Kingdom has also tightened its laws in recent years, and has classified marijuana as a Class B drug, instead of a Class C drug,

195. Andrew Bender, *Amsterdam to Weed Smokers: Party On*, FORBES (Nov. 2, 2012), <http://www.forbes.com/sites/andrewbender/2012/11/02/amsterdam-to-weed-smokers-party-on/>.

196. Jolly, *supra* note 194 (“The impetus for changing the policy originated with, of all things, a parking shortage. In the southern city of Maastricht, sandwiched between the German and Belgian borders, hundreds of drug tourists drive in daily from elsewhere in Europe to purchase marijuana, creating an infuriating traffic nuisance.”). Amsterdam is the only Dutch city that has decided not to enforce the new measures. Bruno Waterfield, *Tourists exempted from ban on smoking cannabis in Amsterdam*, THE TELEGRAPH (Dec. 12, 2012), <http://www.telegraph.co.uk/news/worldnews/europe/netherlands/9740463/Tourists-exempted-from-ban-on-smoking-cannabis-in-Amsterdam.html>.

197. Carl Schreck, *No More Jail Terms for Drug Possession*, CANNABIS NEWS (May 13, 2004), <http://cannabisnews.com/news/18/thread18853.shtml>.

198. *Id.*

199. *Cannabis and the Law*, NATIONAL CANNABIS PREVENTION AND INFORMATION CENTER (June 1, 2008), <http://ncpic.org.au/ncpic/publications/factsheets/pdf/cannabis-and-the-law>.

200. *Id.*

because stronger forms of the drug have become more prevalent.²⁰¹ In Canada, possession of marijuana is a criminal offense under the Controlled Drugs and Substances Act; however, there are medical exceptions—doctors may exempt patients from the ban on marijuana, but many doctors have refused to prescribe the drug on the grounds that its benefits are not scientifically proven.²⁰²

Some Asian countries have focused on punishment as a deterrent. Malaysia, China, and Singapore carry a mandatory death penalty for trafficking, and high prison sentences exist for consumption and use.²⁰³

Thus, while some countries practice a wide range of restrictions on marijuana use, others approve a stronger reclassification of the drug, and still others favor a loosening of restrictions on marijuana. Some focus on punishment, and others focus on drug treatment. These strategies are as different as the public opinion on marijuana in ancient times.

VI. CONCLUSION: WHY CONGRESS MUST ACT NOW

The United States is currently in a precarious state caused by a lack of leadership on the marijuana legalization issue. State and federal laws are in conflict. In two states, a citizen can possess marijuana, but cannot grow, distribute, or import marijuana without risking federal prosecution. There is sufficient overlap between federal and state laws that the issue can be no longer ignored. Congress is aware that:

Controlled substances manufactured and distributed interstate cannot be differentiated from controlled substances manufactured and distributed intrastate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate. . . . Federal control of the intrastate in-

201. The maximum sentence for the possession of marijuana is five years. In general, for a first offense (for adults over eighteen), the penalty for possession is a warning; for a second offense, a Penalty Notice for Disorder, with an £80 fine; and arrest, conviction, and a criminal record for a third offense. For supplying cannabis, it could be a 14-year prison sentence and an unlimited fine. AdriJadey, *Marijuana Laws in the UK and its legal implications*, CRIMINALDEFENCEBLAWG (June 20, 2012), <http://www.criminaldefenceblawg.com/misuse-of-drugs/marijuana-laws-in-the-uk-and-its-legal-implications>.

202. Controlled Drugs and Substances Act, S.C. 1996, c. 19 (Can). For a first conviction the maximum penalties for 30 grams of marijuana or less are a fine of CAN \$1000 or six months in jail or both and a possible criminal record. *Id.*

203. *Death for Cannabis?*, CANNABIS CAMPAIGNERS' GUIDE, <http://www.ccguide.org/deathpenalty.php> (last visited July 5, 2013).

cidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.²⁰⁴

Moreover, it would not be sensible to amend federal laws that currently prohibit simple possession under 21 U.S.C. § 844 to allow possession of small amounts of marijuana, if there are state laws that criminalize its use. Demand for marijuana invariably leads to its cultivation and production, and yet, in some states, selling and manufacturing marijuana is labeled as a crime, while possession is not.²⁰⁵

In this current environment, Colorado and Washington may become the Amsterdam of the United States. In 2012, in Colorado alone, “there were 274 marijuana interdiction seizures destined for other states, compared to 54 of such seizures in 2005. This is a 407% increase.”²⁰⁶ Citizens from other states will take marijuana vacations to these two states, perhaps giving rise to the same effects witnessed by Dutch coffee shops catering to international tourists—too many visitors bringing in a criminal element to the state, creating a black market for marijuana. Colorado and Washington could overtake Mexico to become the leading suppliers of marijuana to the rest of the United States. One grower in California dreams of “bud’n’breakfast inns” and “tasting rooms”—“[t]ourism in Mendocino could be bigger than pot tourism in Amsterdam.”²⁰⁷ Legaliza-

204. 21 U.S.C. § 801(5)–(6) (2006). *See also* *Gonzalez v. Raich*, 545 U.S. 1 (2005) (confirming that the federal government was justified via the Commerce Clause in regulating local growth and use of marijuana).

205. Massachusetts has had a difficult time reconciling the state’s decriminalization of possession of up to an ounce of marijuana with its criminalization of the selling, manufacturing or trafficking in marijuana. *Court Rejects Justifications for Searches Following Decriminalization of Marijuana*, 93 CrL 41, BNA Criminal Law Reporter, News Archive, Apr. 10, 2013. In three separate search and seizure cases, the Massachusetts Supreme Court attempted to answer questions involving whether it is a crime to distribute marijuana even when the amount is less than an ounce. *Commonwealth v. Keefner*, 961 N.E.2d 1083 (Mass. 2012) (whether the social sharing of marijuana is simple possession or drug distribution); *Commonwealth v. Jackson*, 985 N.E.2d 853 (Mass. 2013); *Commonwealth v. Daniel*, Mass., 985 N.E.2d 843 (Mass. 2013) (determining whether possession of a small amount of marijuana in two baggies, which is a civil infraction, would support a reasonable belief that an occupant of the vehicle possessed a criminal amount of marijuana).

206. ROCKY MOUNTAIN HIDTA, *supra* note 66, at 38 (“Of the 274 seizures in 2012, there were 37 different states destined to receive marijuana from Colorado. The most common destinations were Kansas (37), Missouri (30), Illinois (22), Texas (18), Wisconsin (18), Florida (16), and Nebraska (13). . . . In 2012, there were 7,008 pounds of Colorado marijuana seized by interdictions that were destined for other states in the country.”)

207. Abramsky, *supra* note 100.

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tion in one state, and criminalization in the others simply does not work.²⁰⁸

Professor Sam Kamin has suggested that a type of “cooperative federalism” could result from state-level legalization, where the federal government looks the other way, and states that have legalized marijuana effectively regulate marijuana within its own borders.²⁰⁹ However, this proposed solution flies in the face of the rule of law:

A collection of legal principles that all relate to the placement of limitations on the exercise of political power and the operation of government. Those principles include (1) government must follow its own rules; (2) government must apply the law impartially; and (3) government must provide due process for those accused of breaking the rules.²¹⁰

The federal government violates the rule of law when it chooses to apply federal laws without impartiality by prosecuting federal marijuana cases in states that have not legalized marijuana and turning a blind eye in states that have legalized marijuana.

The federal government must either legalize and regulate or criminalize and prohibit marijuana production and use. As to legalization (Option 1), two bills, the Ending Federal Marijuana Prohibition Act of 2013²¹¹ and the Marijuana Tax Equity Act of 2013,²¹² are currently before

208. *Id.*

209. As Professor Kamin states,

Congress could conclude that the CSA applies—that marijuana is a prohibited substance—unless a state is able to convincingly regulate marijuana within its own borders. Congress could say to the states: Can you find a way to keep kids from buying? Can you find a way to make sure it is being sold in-state to people who are authorized to buy it? Can you find a way to make sure that organized crime is kept out of it? That the drugs do not end up on the streets? Can you track marijuana from seed to sale all of these pieces? If you can do those things we will allow you to do so and we will leave you alone. If you can come up with a sufficiently robust state regulatory regime we will allow you to use that regime, rather than us coming in from Washington and enforcing our own.

Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 89 *DENV. U. L. REV.* 977, 994 (2012). Apparently, President Obama tends to agree, telling a reporter that “[i]t does not make sense from a prioritization point of view for us to focus on recreational drug users in a state that has already said that under state law that’s legal. . . . [A]s it is, the federal government has a lot to do when it comes to criminal prosecutions.” Pete Yost, *Obama Won’t Go After Marijuana Use in 2 States*, *ASSOCIATED PRESS* (Dec. 14, 2012), <http://bigstory.ap.org/article/obama-will-not-go-after-states-where-pot-legal>.

210. McCLURE & EIMERMANN, *supra* note 46, at 11.

211. Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013).

212. Marijuana Tax Equity Act of 2013, H.R. 501, 113th Cong. (2013).

Congress that would effectively make the transition from criminalization to legalization a reality at the federal level. States should enlist federal agencies to provide expertise and oversight in handling licensing, quality control, and enforcement of regulatory laws. States are incapable of independently handling this issue.

There is some indication that Congress might be moving in this direction. In June 2013, the House of Representatives voted to approve an amendment to the Federal Agriculture Reform and Risk Management Act of 2013 (the FARRM bill). This Act would allow colleges and universities to grow and cultivate industrial hemp for research purposes, as long as it is legal in the particular state and the hemp plant contains no more than a 0.3 percent THC content.²¹³ Advocates for hemp and marijuana see this as a positive step in the marijuana legalization movement at the federal level.²¹⁴

As to criminalization (Option 3), since Washington and Colorado have legalized recreational use of marijuana, the federal government must act soon if it chooses to enforce the CSA. Otherwise, it will find it difficult to stop the momentum in favor of legalization that the marijuana industry has fought so hard to create.

State and federal governments should not consider the legalization of marijuana for medical use (Option 2) as a stepping-stone towards outright legalization. Thus, the States' Medical Marijuana Protection Act²¹⁵ and the States' Medical Marijuana Property Rights Protection Act,²¹⁶ should not be considered, because they merely advocate continued conflict between the states who have approved marijuana use for medical purposes and the federal government. States that are considering legalizing marijuana for medical use should choose to legalize marijuana for all types of use (Option 1).

213. Amendment to the Rules Committee Print of H.R. 1947, June 17, 2013, http://amendments-rules.house.gov/amendments/POLIS_044_xml617131354135413.pdf.

Colorado, Kentucky, Maine, Montana, North Dakota, Oregon, Vermont, Washington, and West Virginia have all legalized industrial hemp production in their respective states. *FARRM Bill Passes with Polis, Massie, Blumenauer Pass Amendment to Protect State Rights to Grow Hemp for Research* (July 11, 2013), <http://polis.house.gov/news/documentsingle.aspx?DocumentID=342302>.

214. *FARRM Bill Passes with Polis, Massie, Blumenauer Pass Amendment to Protect State Rights to Grow Hemp for Research* (July 11, 2013), <http://polis.house.gov/news/documentsingle.aspx?DocumentID=342302>.

215. States' Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. (2013).

216. States' Medical Marijuana Property Rights Protection Act, H.R. 784, 113th Cong. (2013).

The options outlined here have been considered or implemented on numerous occasions since the discovery of marijuana. What is important today is a decision on the legality of marijuana production and use. Unfortunately, there are no happy middle grounds, and no workable compromises between Option 1 and Option 3. Under the current status quo, the true beneficiaries are the profiteering, opportunistic owners of the medical marijuana clinics, and the doctors who recommend medical cards. They work in an environment free of taxes and strict regulations. Meanwhile, we continue to hear crickets, adding many more years of silence, uncertainty, and damage to both sides of the debate.²¹⁷

The federal government must take a stand and either crack down on the growing marijuana business, or legalize it, and begin the arduous task of regulating and taxing marijuana production and use, while at the same time advocating for minimal use. The United States can examine the policies of other countries while determining an effective path forward. The federal government must act, because this current quagmire cannot be sustained.

217. In the opinion of this author, it is highly likely the federal government is consciously or unconsciously waiting for a growing acceptance (or at least tolerance) by a majority of the states towards legalizing marijuana for recreational use and production, before it decides to make its move.