

The Future of Marijuana in the United States

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INTRODUCTION

In November 2012, Washington and Colorado voters approved initiatives legalizing use and possession of small quantities of marijuana. Before that, eighteen states had legalized medical use of marijuana with differing levels of regulation. Since then, two more states have approved medical marijuana. Today, many people hope—for a range of reasons—that more states and the federal government will decriminalize and eventually legalize marijuana. However, the pendulums of public opinion and political inclinations have swung this way before. In the mid-1970s, the views of Americans on marijuana were strikingly similar to those views today. Decriminalization of possession and use of small amounts of marijuana at both the state and the federal levels appeared to be imminent and inevitable. A fierce backlash at the beginning of the 1980s, however, produced repeals of decriminalization by the states and sharp increases in federal criminal penalties and prosecutions. Such a change in direction can occur again. It is, however, much clearer today than nearly a half century ago that marijuana prohibition was a tragic mistake. No rational analysis of the costs of marijuana prohibition can support its retention. Unless reform occurs at the federal level, though, state-level reforms face a myriad of limitations and uncertainties. Repeal at the federal level may be constrained by international treaties, which permit decriminalization but may not allow outright legalization. If so, the United States should seek to eliminate marijuana prohibition at the international level as it replaces prohibition with regulation in its own drug laws.

I

MARIJUANA LEGISLATION: PAST, PRESENT, AND UNCERTAIN FUTURE

Now that Colorado and Washington have legalized use and possession of marijuana and twenty states have legalized its medical use, many people, including virtually everyone who has studied the matter, hope that other states will also legalize and ultimately force the federal government to repeal its draconian criminalization of marijuana. The stark contrast between the attitudes about marijuana held by a majority of the citizenry and those reflected in federal criminal law is reminiscent of alcohol Prohibition, when for thirteen years the government tried and failed to keep its people from drinking. We should not be confident, however, that marijuana criminalization will soon go the way of Prohibition. We have been on

the verge of repeal before, only to experience a reversal of policy and escalation of penalties that resulted in the convictions and imprisonment of millions for possessing or distributing marijuana.¹ Today, more people are arrested for marijuana offenses than are arrested for violent crimes.²

In the 1970s, public opinion seemed to favor decriminalization of marijuana. Stanford professor John Kaplan published a cogent critique of marijuana prohibition in 1970.³ President Nixon's Shafer Commission recommended reclassifying and decriminalizing marijuana in 1972.⁴ Oregon was the first state to act on that recommendation, decriminalizing possession of less than an ounce of marijuana in 1973.⁵ Colorado, Alaska, and Ohio followed suit in 1975.⁶ By 1978, California, Mississippi, North Carolina, New York, and Nebraska had some form of cannabis decriminalization.⁷ President Jimmy Carter recommended decriminalization in a message to Congress.⁸ The Justice Department announced that "it would no longer make marijuana prosecution a priority, nor did it 'have the resources to do so.'"⁹ Conservative Congressman (and later Vice President) Dan Quayle announced that he favored reducing the

¹ *Marijuana*, DRUGWARFACTS.ORG, <http://www.drugwarfacts.org/cms/Marijuana#sthash.todVyvYX.dpbs> (last visited Mar. 12, 2013) (showing that from 1980 to 2011, 10,769,582 people were arrested for marijuana possession and 1,457,508 were arrested for marijuana trafficking).

² There were 663,032 marijuana possession arrests in 2011 and 534,704 arrests for violent crime. The precise figure for marijuana possession arrests is determined by multiplying the overall number of drug arrests in 2011 by the percentage of drug arrests from marijuana possession. See *Crime in the United States, 2011: Estimated Number of Arrests*, FED. BUREAU OF INVESTIGATION, www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29 (last visited Mar. 12, 2013); *Crime in the United States, 2011: Arrests*, FED. BUREAU OF INVESTIGATION, www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested (last visited March 12, 2013).

³ See generally JOHN KAPLAN, *MARIJUANA – THE NEW PROHIBITION* (1970).

⁴ FIRST REPORT OF THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, *MARIHUANA: A SIGNAL OF MISUNDERSTANDING* 152, 154 (1972).

⁵ Walter R. Cuskey et al., *The Effects of Marijuana Decriminalization on Drug Use Patterns: A Literature Review and Research Critique*, 7 *CONTEMP. DRUG PROBS.* 491, 491 (1978).

⁶ *Id.*

⁷ *Id.*

⁸ Jean Seligmann & Lucy Howard, *Easing the Pot Laws*, *NEWSWEEK*, Mar. 28, 1977, at 76, 76.

⁹ MARTIN A. LEE, *SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA – MEDICAL, RECREATIONAL, AND SCIENTIFIC* 154 (2012).

penalties for pot.¹⁰ “The American Bar Association, the Consumers Union . . . , the National Council of Churches, [the] National Educational Association, [the] American Public Health Association, and several other influential organizations cued up for marijuana law reform.”¹¹ The “*Ladies Home Journal* described a summer jazz festival on the White House lawn where ‘a haze of marijuana smoke hung heavy under the low-bending branches of a magnolia tree.’”¹² The question widely discussed in the 1970s was not whether marijuana would be decriminalized by the federal government, but when.

As the Vietnam War ended and the counterculture generation aged and settled into conventional lifestyles, an anti-drug “conservatism”¹³ gained ascendance, helped by the rapid increases in the budget of the Drug Enforcement Administration, which had been created in 1970. A movement away from liberal values led to the election of Ronald Reagan in 1980. During his campaign for the Presidency, he asserted that medical researchers viewed marijuana as “probably the most dangerous drug in America.”¹⁴ As President, he declared “war” on drugs and strongly favored increasing marijuana criminalization.¹⁵ He had his entire cabinet submit to urine tests¹⁶ and withdrew his Supreme Court nomination of Judge Douglas Ginsberg when it was revealed that, when a young law professor, Ginsberg had smoked marijuana.¹⁷ Nancy Reagan, as part of her “Just say no” campaign, announced her jurisprudential conclusion that “[t]he casual user may think when he . . . smokes a joint . . . that he’s somehow not bothering anyone. But there is a trail of death and destruction that leads directly to his door . . . if you’re a casual drug user, you are an accomplice to

¹⁰ Jefferson Morley, *When Dan Quayle Favored Legal Pot: And Other Stories the Media Won't Tell*, SPIN, Sept. 1990, at 39, 39.

¹¹ LEE, *supra* note 9, at 154.

¹² *Id.*

¹³ One of the mysteries of drug prohibition is that most of its ardent supporters claim to be “conservatives,” some even adopting the mantle “libertarian.” Drug prohibitionists are neither.

¹⁴ Tony Dokoupil, *Pat Robertson is Latest Supporter as Drive to Legalize Marijuana Heats Up*, DAILY BEAST (Mar. 9, 2012), <http://www.thedailybeast.com/articles/2012/03/09/pat-robertson-is-latest-supporter-as-drive-to-legalize-marijuana-heats-up.html>.

¹⁵ Evan Thomas, *Crack Down: Reagan Declares a War on Drugs and Proposes Tests for Key Officials*, TIME, Aug. 18, 1986, at 12, 12.

¹⁶ *Id.*

¹⁷ Jonathan Alter & Eleanor Clift, *Pot and Politics: After Ginsberg Admits Using Marijuana, His Supreme Court Nomination Goes Up in Smoke*, NEWSWEEK, Nov. 16, 1987, at 46, 46.

murder.”¹⁸ The Reagan administration sponsored the Comprehensive Crime Control Act of 1984, which sharply increased the penalties for possessing, growing, or distributing marijuana.¹⁹ Under that Act, many marijuana distributors are still serving—and some are still receiving—life sentences.²⁰

The direction that future marijuana legislation will take is uncertain.²¹ President Obama is evasive on the subject of drugs. It is conceivable that his Department of Justice will seek a ruling by the Supreme Court that all state laws that decriminalize marijuana are preempted by federal law and are therefore void under the Supremacy Clause. The Supreme Court held (correctly) in *Gonzales v. Raich*²² that federal prosecution of persons who complied with state medical marijuana laws is lawful under the Commerce and Supremacy Clauses. In dissent, Justice O’Connor opined that the Court’s decision upholding federal law “extinguishes [the medical marijuana] experiment.”²³ Others have concluded that as long as federal law criminalizes marijuana possession, state laws that don’t are invalid.²⁴ That view, however, is erroneous. State laws that decriminalize, legalize, or medicalize marijuana are doing little more than withholding their condemnation of those who comply with the conditions specified in the state’s law. They are not purporting to authorize anyone to violate federal law nor are they requiring anyone to do anything contrary to federal law.²⁵ No Supreme Court decision

¹⁸ Stephen Chapman, *Nancy Reagan and the Real Villains in the Drug War*, CHI. TRIB. (Mar. 6, 1988), http://articles.chicagotribune.com/1988-03-06/news/8804050059_1_drug-war-casual-drug-user-wave-of-drug-related-killings.

¹⁹ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, ch. V, § 502, 98 Stat. 1976 (1984).

²⁰ See, e.g., Kristen Gwynne, *5 Senior Citizens Serving Life Without Parole for Pot*, ALTERNET (Dec. 23, 2012), <http://www.alternet.org/5-senior-citizens-serving-life-without-parole-pot>; Allen St. Pierre, *America’s Shameful Prohibition: Life Sentences for Marijuana*, NORML: BLOG (May 10, 2011), <http://blog.norml.org/2011/05/10/americas-shameful-prohibition-life-sentences-for-marijuana/>. In 2004, there were 44,816 persons in prison for marijuana offenses. *Marijuana*, *supra* note 1.

²¹ For elaboration on this question, see Michael Vitiello, *Joints or the Joint: Colorado and Washington Square Off Against the United States*, 91 OR. L. REV. (forthcoming April 2013).

²² *Gonzales v. Raich*, 545 U.S. 1, 29–33 (2005).

²³ *Id.* at 43 (O’Connor, J., dissenting).

²⁴ See, e.g., *Mont. Cannabis Indus. Ass’n v. Montana*, 286 P.3d 1161, 1169 (Mont. 2012) (Nelson, J., dissenting).

²⁵ Accord, *Willis v. Winters*, 350 Or. 299, 317 (2011) (en banc), holding that the sheriff is required to issue or renew gun licenses to qualified medical marijuana users even though federal law prohibits gun possession by a user of illegal drugs. The fact that it is a

holds that federal law may *compel* states to criminalize and prosecute persons who violate federal criminal law. Indeed, several Supreme Court decisions have held that federal law cannot do that.²⁶ Moreover, Congress plainly did not intend to impose such compulsions on the states by enacting federal prohibition statutes.²⁷ A decision voiding state permissiveness would be patently unsound and unenforceable. The Court that decided *Bush v. Gore*²⁸ could render such a decision but it would deserve no respect.

Even if, as is almost certain, federal courts do not invalidate permissive state marijuana laws, an ardent, widespread, and protracted federal campaign of prosecuting marijuana users, growers, and distributors would have a powerful chilling effect on all who use or contemplate using or distributing marijuana, however clearly they might comply with state law. The effects of permissive state laws could be virtually nullified if the federal campaign were to focus its prosecutions on those who *comply* with state law rather than on those who don't.

Absent such a campaign at the federal level, users of marijuana could still be subjected to criticism on moral grounds for violating federal law. It is also conceivable, though I doubt its legality, that a state, while itself legalizing or medicalizing marijuana, could deny or revoke professional or occupational licenses to compliant users for violating federal law. The rights of compliant marijuana users versus other private persons or entities are also in doubt. The Supreme Court of Oregon held that a qualified medical marijuana user who did not use marijuana on the job could still be fired for at-home use of marijuana on the ground he was violating federal law.²⁹ In any event,

violation of federal law to possess a gun did not preclude the state from issuing a license to possess one. *Id.*

²⁶ *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 187-88 (1992).

²⁷ The Controlled Substances Act provides:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a *positive conflict* between that provision of this subchapter and that State law so that the two cannot consistently stand together.

²¹ U.S.C. § 903 (2012) (emphasis added).

²⁸ *Bush v. Gore*, 531 U.S. 98 (2000).

²⁹ *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 348 Or. 159, 190 (2010) (en banc). Some professional ethics panels are of the opinion that a lawyer may not give legal advice to an active distributor of medical marijuana, even if the operation is

as long as federal prohibition remains in place, those who distribute, grow, or possess marijuana are risking severe federal civil and criminal sanctions. The plans of permissive states to tax marijuana transactions may be doomed by that mere possibility. The ultimate objective of reformers should be the removal of cannabis from the federal list of controlled drugs. The case for that is overwhelming.

II

SOME REASONS FOR ENDING MARIJUANA PROHIBITION

Various efforts are underway, in North and South America and in Europe, to ease or eliminate the prohibition of marijuana use and even, in some cases, to ease or eliminate sanctions against distributors of the drug. Here are just some of the considerations undergirding such efforts.

A. *Marijuana Is Far Less Harmful than Many Legal, Regulated Drugs*

In study after study, decade after decade, researchers have found no reliable evidence that marijuana is a serious threat to the physical or psychological health of a normal, adult user.³⁰ Both alcohol and tobacco are far more damaging to the human body, as is obesity.³¹ Unlike alcohol consumption, marijuana use is not chemically linked to violence and crime.³² Millions of marijuana users have decided through experience what the studies suggest: although powerful, marijuana is not a dangerous drug and most of its users lead healthy, productive lives. Absent too is evidence of the so-called “gateway effect,” the theory that marijuana causes the user to move on to stronger drugs.³³ About two out of three marijuana users never even

entirely consistent with the state’s laws because such advice would be assisting the client to commit a federal crime. *See* Connecticut Bar Ass’n Prof’l Ethics Comm., Informal Op. 2013-02 (Jan. 16, 2013), *available at* http://www.ctbar.org/userfiles/Committees/ProfessionalEthics/Opinions/Informal_Opinion_2013-02.pdf; Maine Prof’l Ethics Comm’n, Op. 199 (July 7, 2010), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article.

³⁰ STEVEN B. DUKE & ALBERT C. GROSS, AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 50–52 (1993).

³¹ *See id.* at 29–36, 147–48.

³² ERICH GOODE, DRUGS IN AMERICAN SOCIETY 128–36 (4th ed. 1993).

³³ There is a correlation between the use of marijuana and the use of hard drugs, because virtually every hard drug user has also used marijuana. Marijuana use may also, in most cases, *precede* the use of hard drugs where that use occurs. The claim of prohibitionists, however, is that there is a causal link *from* marijuana *to* hard drugs. That link is entirely unproven. *See* GOODE, *supra* note 32, at 203–07. The strongest argument

try harder drugs like cocaine or heroin, and for every frequent user of cocaine or heroin, there are about eight frequent users of marijuana.³⁴ By satisfying a consciousness-altering appetite, marijuana may in fact prevent many people from using harder drugs. If the availability of marijuana has any effect on the consumption of hard drugs, it more likely acts as a “moat” than as a “gateway” to hard drug use.

B. Regulation of the Drug Is Possible Only If Prohibition Is Repealed

U.S. statutes erroneously refer to drug prohibition as drug “control.” Prohibition is inconsistent with control, because only that which is legal can be regulated by law. Alcohol is both legal and controlled, and thus provides a possible template for legalizing marijuana. Under a regulatory model similar to that for alcohol, the federal government would repeal its prohibition of the possession and distribution of marijuana, but it might retain some restrictions against interstate commerce in drugs that are unlicensed, mislabeled, inadequately identified, or lacking appropriate disclosures and warnings. The federal government would share with the states the power to tax the manufacture and distribution of the product. As with alcohol, most regulation would be left to the individual states. Some states might confine the distribution of the drug to state-owned institutions; other states would license production and distribution to private persons or organizations. All states would doubtless limit the venues where distribution and consumption can occur, as they now restrict alcohol. All states would impose sanctions against providing the drug to minors, using, in addition to criminal punishment, the revocation of licenses, a tool not available to prohibitionists. Among the benefits of regulation is that regulated drugs are far safer than prohibited drugs: users can rely upon the quality and stated potency of the product, which is unlikely to be either poisonous or contaminated.

for the “gateway” proponents is that since marijuana is illegal, one has to go to illegal drug markets to get it where one is likely to encounter the users and distributors of hard drugs. The causal link there, however, is the illegality.

³⁴ U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2008 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 242 (2009) reports that 102,404,000 Americans have used marijuana in their lifetimes, but only 36,773, 000 have used cocaine and 3,788,000 have used heroin at least once in their lifetimes. Of frequent users (those who have used in the past month), about fifteen million used marijuana, fewer than two million used cocaine and only 213,000 used heroin. *Id.*

C. Prohibition Breeds Crime and Supports Criminal Organizations

However strongly its supporters may deny it, marijuana prohibition inevitably produces crime and violence. The ongoing wars between drug cartels and the Mexican government furnish grisly proof. Fueled by billions of dollars from drug markets in the United States, Mexican gangsters have murdered more than ten thousand people in the past few years, fighting for territory both among themselves and with the government.³⁵ In the United States, large criminal organizations maintained by violence and bribery increasingly control the networks that distribute marijuana. Ironically, although marijuana has never been shown to trigger violent propensities in its users, the billions earned by suppliers generate a great deal of violence, both in the United States and elsewhere. Internationally, many terrorist organizations obtain much of their financing from drug distribution.³⁶ By being the world's leader in drug prohibition, the United States is indirectly helping to finance the terrorist organizations that are trying to destroy us.

D. Prohibition Distracts Police from Investigating Serious Crime and Thereby Encourages Such Crime

Violent and property crime rates today are about the same as they were in the 1970s and are down about thirty-six percent from their peaks around 1990.³⁷ Those rates should be down much more than that.³⁸ Crime rates are highest among teenagers who are diminishing as a share of the population.³⁹ The median age of Americans has increased more than thirty percent in the past four decades.⁴⁰ This

³⁵ Howard LaFranchi, *Obama's Overtures Seek to Help a Spiraling Mexico*, CHRISTIAN SCI. MONITOR (Mar. 5, 2009), <http://www.csmonitor.com/USA/Foreign-Policy/2009/0305/p02s01-usfp.html>.

³⁶ See generally MARK. A.R. KLEIMAN, CONG. RESEARCH SERV., RL 313340, ILLICIT DRUGS AND THE TERRORIST THREAT: CAUSAL LINKS AND IMPLICATIONS FOR DOMESTIC DRUG CONTROL POLICY (Apr. 20, 2004); OFF. OF INT'L INFO. PROGRAMS, U.S. DEP'T OF STATE, WASHINGTON FILE: TERRORIST GROUPS INCREASINGLY LINKED TO DRUGS, OFFICIALS SAY (2002), available at <http://www.au.af.mil/au/awc/awcgate/state/epf304.htm>; Robin Yapp, *South American Drug Gangs Funding al-Qaeda Terrorists*, TELEGRAPH (Dec. 29, 2010), <http://www.telegraph.co.uk/news/worldnews/southamerica/colombia/8230134/South-American-drug-gangs-funding-al-Qaeda-terrorists.html>.

³⁷ See Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 19–20 n.21 (2009).

³⁸ For sources on this and additional data, see *id.* at 19–22.

³⁹ *Id.* at 20.

⁴⁰ *Id.*

alone should account for much of the reduction in crime rates during that period (reduced murder rates are also attributable in part to better medical care). We also employ two and a half times as many police as we did in 1972, while the population has increased only about forty-five percent.⁴¹ Today's police are equipped with an arsenal of electronic devices that assist them in solving crime and in apprehending perpetrators. Cameras in every private and publically owned cell phone, every police car and in many public areas, in addition to being in millions of businesses and homes, make it risky to commit a theft, a robbery, or a burglary successfully and thus add powerful deterrents to such crime. Those deterrents, however, are undercut by police preoccupation with drugs. Police spend an inordinate amount of their time accosting people for suspected drug possession, a practice that is quite unproductive. Most drug arrests occur during motor vehicle stops or stop-and-frisks, of which New York City Police committed five million since 2004.⁴² Eighty-eight percent of those stop-and-frisk searches produced no evidence of criminality.⁴³ The enforcement lure and ease of drug arrests is the most likely explanation for the fact that, despite the proliferation of police and the enormous assistance provided them by technological advances, the efficiency of the police, as measured by their clearance rates, has headed downward for decades. In 1961, the homicide clearance rate in the United States was 93.1%.⁴⁴ By 1974, it was down to 80%.⁴⁵ By 2010, it had dropped to 64.8%.⁴⁶ The clearance rate for all violent offenses was 79% in 1958, nearly halved to 47.2% in 2010.⁴⁷ The clearance rate for property crimes was 24% in 1958 and 18.3% in 2010.⁴⁸ Only 12.4% of burglaries and 11.8% of car thefts were cleared in 2010.⁴⁹ A thief, robber, rapist, or murderer has a

⁴¹ *Id.*

⁴² Joseph Goldstein, *Trial to Start in Class Suit on Stop-and-Frisk Tactic*, N.Y. TIMES (Mar. 17, 2013), http://www.nytimes.com/2013/03/18/nyregion/stop-and-frisk-trial-to-open-this-week-in-federal-court.html?_r=0.

⁴³ *Id.*

⁴⁴ JOHN EDGAR HOOVER, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS – 1961, at 83 tbl. 8 (1962).

⁴⁵ CLARENCE M. KELLEY, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1974: UNIFORM CRIME REPORTS 42 (1975).

⁴⁶ *Crime in the United States, 2010: Uniform Crime Reports*, FED. BUREAU OF INVESTIGATION, at tbl. 25, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl25.xls> (last visited Apr. 9, 2013).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

much better chance of getting away with his crime today than he would have had a few decades ago.

E. Prohibition Damages and Destroys Lives

The most frequent charge for which a person is arrested in the United States is a drug offense.⁵⁰ In 2010, 1,638,846 people were arrested for drug violations.⁵¹ In about forty-six percent of the cases, a total of about 800,000 arrests, the charge was simple marijuana possession.⁵² This pattern of drug arrests has never been much higher.⁵³ At least fifteen million Americans have been arrested for marijuana possession since prohibition went into effect. New York City alone arrested more than fifty thousand in 2011 for marijuana offenses despite the fact that simple possession of a small amount of marijuana is not a criminal offense in New York.⁵⁴ Police were able to convert a nonoffense into an arrestable misdemeanor by asking the arrestee to open his pockets, thus making his offense possession of marijuana “open to public view.”⁵⁵ About half a million men and women are currently incarcerated in U.S. jails and prisons for drug violations.⁵⁶ Nearly thirty thousand of them are in prison for nothing more serious than marijuana possession.⁵⁷ American prisons inevitably damage and scar their inmates, rendering many of them antisocial and unemployable. Families are ripped apart and children are neglected or abandoned. People with criminal records, even for arrests not leading to conviction, have trouble finding jobs or housing, gaining admission to college, receiving college loans, and otherwise

⁵⁰ *Crime in the United States, 2010: Arrests*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested> (last visited Apr. 9, 2013).

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Ryan S. King and Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, HARM REDUCTION J., Feb. 9, 2006, 6, 6–12.

⁵⁴ Hakeem Jeffries, *Marijuana Law Just Creates Criminals*, CNN (June 6, 2012), <http://www.cnn.com/2012/06/06/opinion/jeffries-marijuana-law>.

⁵⁵ HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, *MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997-2007*, at 38–42 (Apr. 2008).

⁵⁶ MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, *A 25 YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2* (2007).

⁵⁷ King & Mauer, *supra* note 53, at 20.

living productive lives.⁵⁸ As Professors Harry Levine and Deborah Small observed, arresting Black and Latino teenagers for petty offenses “function[s] as a Head Start for unemployment.”⁵⁹

Some of those now imprisoned for marijuana offenses would be there for other offenses were marijuana legalized, but tens of thousands would not be. U.S. marijuana prosecutions severely damage thousands of young lives every year and are cruel, unnecessary, and, probably, criminogenic.⁶⁰

F. Prohibition Exacerbates Racism

Racism is an element of virtually every legislative effort to prohibit drugs, from alcohol to cocaine to marijuana. It continues to play a role in drug enforcement. Blacks and Latinos are arrested for drug offenses at a disproportionately higher rate than are whites.⁶¹ Although Blacks and Latinos account for no more than twenty percent of the drug-using population, they comprise eighty-six percent of those who are arrested for marijuana possession in New York City.⁶² This disparity appears to be the result of racially motivated law enforcement and the broad discretion that prohibition regimes give to the police. To solve a traditional crime such as theft or burglary, the police have to conduct an investigation, which entails interviewing witnesses and gathering physical or forensic evidence. This is work. It takes time. In contrast, to make a drug arrest, police need only conduct a search of the person.⁶³ If they find drugs, they ipso facto have a solid case and can make an immediate arrest. They can throw

⁵⁸ For a lengthy list of collateral damage from marijuana arrests, see RICHARD GLEN BOIRE, CTR. FOR COGNITIVE LIBERTY & ETHICS, LIFE SENTENCES: COLLATERAL SANCTIONS ASSOCIATED WITH MARIJUANA OFFENSES 5 (2007).

⁵⁹ LEVINE & SMALL, *supra* note 55, at 51.

⁶⁰ See *id.* at 48–49; Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Arrests in New York City, 1989–2000*, 6 CRIMINOLOGY & PUB. POL’Y 165, 166 (2007).

⁶¹ See Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 263, 265 (2002); John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 609–11 (1991); see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

⁶² Matthew Fleischer, *New York City’s Stop and Frisk: 5 Million Served With a Side of Racism*, YAHOO NEWS (Mar. 15, 2013), <http://news.yahoo.com/york-city-stop-frisk-5-million-served-side-193518536.html>.

⁶³ Actually, they don’t even have to conduct a search. They can trick the arrestee into opening his pockets and thus producing the drug. See *supra* text accompanying note 55.

the arrestee in a paddy wagon and keep him there until they get a full load before taking their prisoners to jail. Few middle- and upper-class whites would stand for indiscriminate searches of their persons nor would they put up with being arrested for a petty offense. Minority victims, on the other hand, rarely have remedies for such abuses.⁶⁴ The racially disproportionate pattern of police searches and arrests foments fear and mistrust of police and of the society that tolerates or condones such behavior.

G. Prohibition Is Extremely Costly

The costs to state and federal governments of investigating, arresting, prosecuting, and imprisoning persons for marijuana offenses are enormous. Arrests for marijuana possession in New York City alone allegedly cost the City \$60 to \$100 million per year.⁶⁵ Although one conservative estimate is \$8 billion per year for the United States alone,⁶⁶ that figure could be much larger if the external costs, such as increased crime, are considered. Harvard Professor Jeffrey Miron argues that we could not only save enforcement costs by eliminating prohibition, we could also raise \$6 billion or so annually by taxing the sale of marijuana.⁶⁷ California, a national leader in legalizing medical marijuana, is considering a tax on all marijuana distribution. As long as the federal government criminalizes the possession and distribution of marijuana, however, such a tax would likely be as unproductive as the Marihuana Tax Act of 1937. Few dealers will file reports and pay taxes that would expose them to federal prosecution. Effective reform requires decriminalizing marijuana at the federal level as well as at the state level.

H. Prohibition Impairs International Relations

Prohibited drugs are typically produced in different countries than they are consumed. The consumer countries blame the producer country and often bully or bribe the producer to enforce its drug laws more effectively. The United States takes such a position with

⁶⁴ See King & Mauer, *supra* note 53, at 11; Bob Herbert, *Jim Crow Policing*, N.Y. TIMES (Feb. 2, 2010), http://www.nytimes.com/2010/02/02/opinion/02herbert.html?_r=0.

⁶⁵ LEVINE & SMALL, *supra* note 55, at 47.

⁶⁶ Cynthia S. Duncan, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 CONN. L. REV. 1701, 1712 (2009).

⁶⁷ JEFFREY A. MIRON, THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION 2-3 (June 2005), available at <http://www.prohibitioncosts.org/mironreport/>.

Mexico, whose cartels supply a large portion of the marijuana and other illicit drugs that Americans consume. Mexico, on the other hand, attributes its internal violence to the U.S. appetite for Mexico's drugs. The United States repeatedly pressures other countries to more aggressively punish producers of drugs for export. Indeed, the United States customarily intervenes and objects when any country, even one as small as Jamaica, considers liberalizing its prohibition laws.⁶⁸

Not only would the creation of legal drug markets throughout the world allow for enormous drug prohibition resources to be spent productively on something else and would reduce international crime, it would also greatly diminish the international blame game and help rid the United States of its reputation as an international bully.⁶⁹

III

THE ARGUMENTS FOR RETAINING MARIJUANA PROHIBITION

There appear to be only two serious arguments against legalizing marijuana. One is predictive, the other legal.

A. If Marijuana Is Legalized, More People Will Use More of It

This is surely true but not weighty. Decriminalization at the state level during the 1970s did not lead to significant increases in the usage of marijuana.⁷⁰ Nor did that occur in the Netherlands where marijuana was de facto decriminalized decades ago.⁷¹ Nor has it happened in Portugal, which in 2001 decriminalized possession and use of small quantities of all drugs.⁷² Because no country has yet actually legalized the distribution of marijuana, however, these examples of decriminalization are of limited value in predicting the increases in consumption that are likely when both distribution and use of the drug are lawful. Marijuana distribution will be more efficient and the drug far less costly when producing and distributing

⁶⁸ See David Gonzalez, *Panel Urges Legalization of Marijuana in Jamaica*, N.Y. TIMES (Sept. 30, 2001), <http://www.nytimes.com/2001/09/30/world/panel-urges-legalization-of-marijuana-in-jamaica.html>.

⁶⁹ See generally Ted Galen Carpenter, *Ending the International Drug War*, in HOW TO LEGALIZE DRUGS 293 (Jefferson M. Fish ed., 1998).

⁷⁰ MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 268–69 (1992).

⁷¹ DUKE & GROSS, *supra* note 30, at 242.

⁷² GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 11–12 (2009); Duncan, *supra* note 66, at 1735.

it is no longer a black-market operation, as it is even in those countries that have decriminalized or legalized the use and possession of marijuana.

The failure of marijuana prohibition, both in the United States and globally,⁷³ is due in part to the plant's ease of cultivation. It can be grown virtually anywhere, indoors and out, requiring little horticultural expertise or significant financial investment. In this respect it resembles alcohol, which was widely homemade during Prohibition and can likewise be produced almost anywhere at little expense. Thus, with both marijuana and alcohol, it is impossible to eradicate the drug's source, and efforts to interdict the smuggling of the drug have only marginal effects on price and consumption.

Because marijuana is so easy to produce, the price of legalized marijuana to the consumer could not be maintained at anywhere near its current level by imposing high taxes. High taxes would create another black market and defeat many of the objectives of legalization. The price of legalized marijuana would have to be a fraction of its present black market price. Also, when marijuana is regulated, as it would be under full legalization, the consumer will feel more comfortable, morally and otherwise, in buying and consuming the drug. Thus, it is almost certain that legalizing both the use and the distribution of marijuana would substantially increase consumption.

Even if marijuana use were to triple under a legalized regime, which no prohibitionist predicts, this would be a small price to pay for the benefits of legalization. Not only would the drug be safer and less potent,⁷⁴ its increased use would likely reduce the consumption of alcohol, a far more harmful drug. Even though the physical and psychological effects of alcohol and marijuana are quite different, there is substantial evidence that drinkers who take up marijuana drink less alcohol.⁷⁵ It also seems likely that the consciousness-alteration obtained with cheaper and lawful marijuana would reduce

⁷³ The United Nations estimates that up to five percent of the world's adult population has used marijuana in 2010, a figure that dwarfs the usage of all other illicit drugs combined. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *WORLD DRUG REPORT 2012*, at iii (2012).

⁷⁴ Under prohibition, the potency of drugs tends to increase, reflecting the clandestine nature and high cost of the distribution network. *See* MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 89–110 (1991). Marijuana potency has allegedly increased dramatically in recent years.

⁷⁵ KAPLAN, *supra* note 3, at 293–95.

the appetite for heroin, cocaine, amphetamines, and other illegal, dangerous drugs. Increased consumption of legalized marijuana could prove to be a benefit of legalization, not a cost.⁷⁶

B. Legalizing Marijuana Is Prohibited by International Treaties

“Decriminalization” is the mechanism of choice for the countries and most states that have sought to de-escalate drug prohibition. Decriminalization entails sharply reducing to the equivalent of a traffic offense or completely eliminating criminal penalties for the possession and use of small amounts of the drug. No government, however, has ever legalized the drug’s distribution, even if that distribution is small-scale and not for profit. Although decriminalization reduces some of the dreadful costs of full-scale prohibition, it retains and could even encourage black-market distribution.⁷⁷ Reducing or eliminating penalties for consumers while failing to legalize and regulate distribution could even exacerbate the violence and corruption that are inherent in illegal distribution networks. Alcohol Prohibition criminalized only the manufacture and distribution of alcohol, not its possession or use.⁷⁸ It was, therefore, a model of decriminalization. Though a good start toward legalization, decriminalization cannot be the ultimate solution.

There is a common belief that the drug control treaties, chiefly the 1961 United Nations Single Convention on Narcotic Drugs,⁷⁹ prohibit any signatory state from legalizing the drugs covered by the treaty, one of which is cannabis. That is why it is often said that the Netherlands does not legalize the distribution of marijuana but merely

⁷⁶ Notably absent from this list of the benefits of marijuana legalization is the pleasure derived from the drug by its users. That pleasure is sufficient to cause nearly half of the U.S. population over the age of twelve to use the drug at least once, despite the risk of arrest and imprisonment. Those hedonic benefits justify the legalization of alcohol and they should exist as weighty considerations in the marijuana debates as well. One need not even include such benefits, however, to make an overwhelming case for marijuana legalization.

⁷⁷ A contrary claim, sometimes made to justify decriminalization, is that it allows law enforcers to “focus their attention on traffickers rather than small-time users.” David Luhnnow & José de Cordoba, *Mexico Eases Ban on Drug Possession*, WALL ST. J. (Aug. 22, 2009), <http://online.wsj.com/article/SB125086054771949269.html>.

⁷⁸ EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 78–79 (1996); KLEIMAN, *supra* note 70, at 268.

⁷⁹ Single Convention on Narcotic Drugs, *opened for signature* Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151, *as amended by* Protocol Amending the Single Convention on Narcotic Drugs, 1961, *opened for signature* Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3.

declines to prosecute the “coffee houses” that openly serve the drug to consumers.⁸⁰

Whether the Convention prohibits all efforts to legalize marijuana is debatable. The provision that is often read as prohibitory is Article 4(c), which states that the parties shall take such measures as may be necessary, “[s]ubject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”⁸¹ That clearly allows “medical” liberalization. Article 33 provides that the parties “shall not permit the possession of drugs except under legal authority.”⁸² This is either meaningless or contemplates the granting of “authority.” Article 36 says that the parties shall make intentional possession, use, et cetera, of drugs “contrary to the provisions of this Convention” punishable and that “serious offenses” should be “liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.”⁸³ This obligation, however, is subject to the parties’ “constitutional limitations.”⁸⁴ Article 28 permits the cultivation of cannabis, provided it is controlled and the parties seek to “prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.”⁸⁵ Article 30 requires that the trade in drugs exist “under license” except when carried out by a state enterprise.⁸⁶ These provisions appear to have been written by someone devoted to ambiguity. Some provisions seem to invite legalization rather than precluding it. Nonetheless, the prevailing view is that legalization of marijuana, other than for medical or scientific uses, is contrary to the 1961 Convention and later treaties as well.⁸⁷

Some countries, most recently Portugal, Mexico, and Argentina, have decriminalized or legalized the small-scale possession and consumption of marijuana and other drugs. If the UN Convention

⁸⁰ “[T]he Netherlands is technically in compliance with the Single Convention: the Netherlands criminalizes possession and sale of cannabis, as is necessitated, but it chooses not to enforce those laws. The Single Convention does not address the extent of enforcement required for rules criminalizing possession or sale.” JIM LEITZEL, *REGULATING VICE: MISGUIDED PROHIBITIONS AND REALISTIC CONTROLS* 262 (2008).

⁸¹ Single Convention on Narcotic Drugs, *supra* note 79, at 4.

⁸² *Id.* at 17.

⁸³ *Id.* at 18.

⁸⁴ *Id.*

⁸⁵ *Id.* at 14.

⁸⁶ *Id.* at 15.

⁸⁷ LEITZEL, *supra* note 80, at 264.

requires these states to make marijuana possession criminally punishable, then these reforms, desirable as they are, violate the Convention. Surprisingly, however, the UN Office on Drugs and Crime praises the Portugal experiment and opines that it does not violate the Convention. Decriminalizing drug use “falls within the Convention parameters” because “drug possession is still prohibited, but the sanctions fall under the administrative law, not the criminal law.”⁸⁸ Apparently, therefore, an unenforced ten dollar civil fine would satisfy the Convention. Perhaps full legalization with regulation would also suffice, leaving only *laissez-faire* prohibited.

CONCLUSION

Millions of marijuana users and anti-prohibitionists are increasing the pressure to legalize both medical and nonmedical uses of the drug. Marijuana prohibition cannot remotely withstand a cost-benefit analysis. Anti-prohibitionists should intensify their reform efforts and not assume that the merits of their arguments, although unanswerable, are sufficient in themselves to produce desired reforms. Many of the costs of prohibition can only be eliminated by legalization at the federal level. If UN antidrug treaties are construed as prohibiting federal legalization, they should be amended to eliminate provisions that produce such a reading. Short of that, the federal government is not constrained by the treaties from decriminalizing marijuana, which it should quickly do. Decriminalization is a step toward legalization rather than the ultimate objective. Each country should remain free to make its own decisions about which drugs, if any, to prohibit, which to control, and how. This is the principle of the Twenty-First Amendment, which freed us from national alcohol Prohibition but allowed the states to make their own decisions on the subject. The same principle should spur both the U.S. government and the United Nations to withdraw from marijuana prohibition.

⁸⁸ UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2009 WORLD DRUG REPORT 168 (2009).