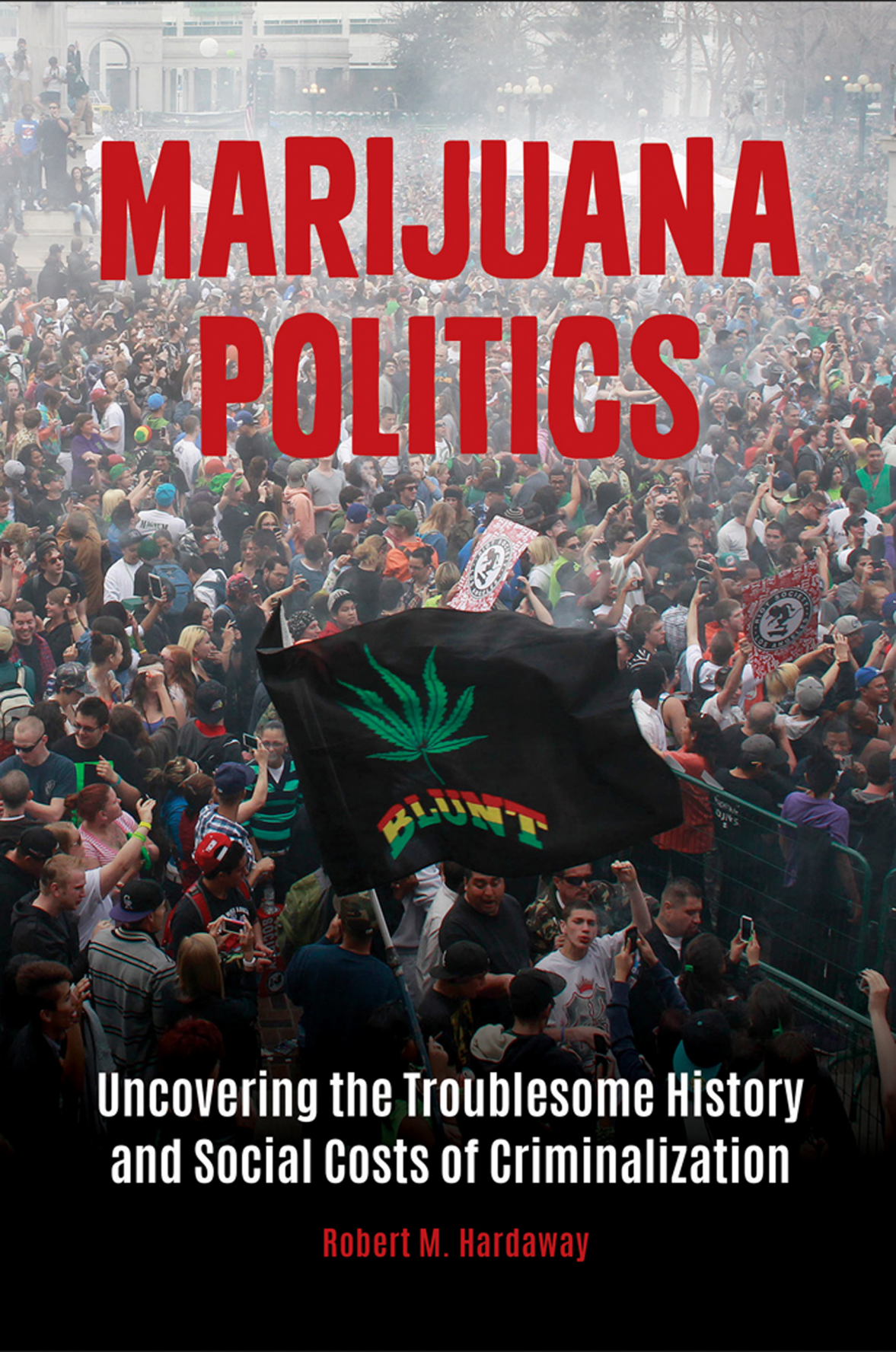
MARIJUANA
POLITICS
BLUNT
Uncovering the Troublesome History
and Social Costs of Criminalization
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Marijuana Politics

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Robert M. Hardaway

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Dedicated to
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Preface

In 2003, Praeger Publishers, now a part of ABC-CLIO, published my book *No Price Too High: Victimless Crimes and the Ninth Amendment*, which set forth the history of marijuana criminalization and provided an overview and analysis of then-current laws regulating its use in the context of the Ninth Amendment of the U.S. Constitution. Since that time, many states have legalized marijuana use for medical purposes, and others have also legalized its use for recreational purposes. As of the publication date of this book, 29 states have legalized the former and eight the latter.

Because of the many legal developments that have occurred since 2003, this book was conceived as an update of this earlier work, with particular attention to the most recent laws representing the accelerating trend toward legalization that occurred during the 2016 election in the form of popular initiatives and referenda. For this reason, much of the history and legal developments in the area of marijuana law that occurred before 2003 has been carried forward from the earlier work, and in some cases entire relevant sections have been reproduced, often verbatim, in the pages that follow. This has been made possible by the fact that I wrote the previous work and the copyright of *No Price Too High* is now held by ABC-CLIO, the publisher of this book.

As noted in the previous work's foreword by former New Mexico Governor Gary Johnson, "The title of *No Price Too High* sarcastically implies that, to our law and judicial system, there is 'no price too high' to make something illegal, even if that only makes the problem worse. Using extensive references, Hardaway proves that the drug problem has only increased since its criminalization."

Certainly the premise of that title has not changed since 2003, as society continues to be afflicted by the horrifying spectacles of tens of thousands of murders committed by drug cartels, mass graves, extravagant

expenditure of resources diverted from rehabilitation to enforcement, the release of thousands of violent criminals from our prison systems to make room for drug offenders, the de facto diversion to and financing of organized crime, an increase in drug use, and not least the corruption of government—all on the purported rationale of keeping people from possibly jeopardizing their health by using marijuana, even for medicinal purposes.

Likewise, federal Judge John L. Kane wrote in a separate foreword to my previous work: "We are indebted to professor Hardaway for bringing together the common effects of (drug crimes) . . . and demonstrating quite persuasively that such laws produce unintended consequences far more damaging to our society than the defined crimes."

Although my name appears as author, this book is in large part the product of a collaborative effort of a small army of research assistants, students at the University of Denver's Sturm College of Law. Their names appear in the acknowledgments. Two of them—Kyle Bershok Ames and Taylor Hart-Bowlan—were particularly productive, and their contributions not only to underlying research but also to drafting several of the chapters herein are recognized by their bylines in those chapters.

A final note of confession. I myself have never even tried or experimented with marijuana, and have never had the slightest inclination to do so. Although this may seem to set me at a disadvantage in writing a book on marijuana, I believe it has allowed me to be more objective by focusing on the societal, rather than personal, effects of marijuana criminalization.

Acknowledgments

This book would not have been possible without the contributions of many dedicated people. First, there were the contributions of my two primary research assistants, Kyle Bershok Ames and Taylor Hart-Bowlan, both outstanding students at the University of Denver's Sturm College of Law, whose contributions were so substantial they are named as authors of Chapters 4 through 6, and 7 and 8, respectively.

The project was supported by a small army of dedicated law students, who enthusiastically volunteered for research assistant duties, meticulously scouring the libraries and databases as well as checking sources and citations. For this demanding, tedious, and labor-intensive work they deserve the most honorable mention: Josephine Bunker, Lindsay Gardner, Nicholas Gross, Michael Hartman, Megan Herr, Greg Huckaby, Caterina Lovell, Daniel Woodbridge, Zachary Schiffler, and Sahin Singh, who assisted Taylor Hart-Bowlan; and Mathew Spangler, Gracen Short, Mark Kollasch, Christopher Barbera, Hunter Heidrich, and Lindsey Idelberg, who assisted Kyle Bershok Ames.

Finally, much thanks to the entire staff at the University of Denver's College of Law, who labored diligently assisting in the preparation of the manuscript, and to Jessica Gribble of ABC-CLIO, whose scrupulous primary editing helped tighten the manuscript to a more readable size.

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CHAPTER ONE

Marijuana: Politics, Partisanship, and Demagoguery

> He who knows only his side of the case, knows little of that . . . (but) wrong opinions and practices gradually yield to fact and argument.
>
> —John Stuart Mill[1]

Every year, more than 480,000 Americans die as a result of using tobacco.[2] In 2014, alcohol use resulted in the deaths of 88,000 Americans,[3] including 9,967 people killed in alcohol-related traffic collisions.[4] Alcohol was used before 32 percent to 50 percent of all homicides[5] and was a major factor in more than 33 percent of sexual assaults,[6] nearly 25 percent of violent crimes,[7] and 66 percent of intimate violence.[8] According to the Cato Institute, when these figures are translated into deaths per 100,000 users, "tobacco kills 650, alcohol 150, heroin 80, cocaine 4."[9] To date, there have been no reports of marijuana as the primary cause of death.[10]

If a Martian were to visit the United States tomorrow and be shown these statistics, he might be surprised to learn that of three substances—tobacco, alcohol, and drugs—only drugs, including marijuana, are criminalized. The Martian might also be surprised, indeed bewildered, to learn that even though alcohol and tobacco were legal substances and even subsidized, American society was willing to lose $180 billion annually,[11] arrest and incarcerate hundreds of thousands of American citizens for drug offenses (further overcrowding prisons already beyond capacity and

necessitating the release of offenders, many of them violent),[12] conduct thousands of wiretaps, impose sentences up to and including life imprisonment without parole for possession of less than a pound and a half of drugs,[13] forfeit billions of dollars of potential tax revenues to organized crime,[14] and tolerate the corruption and undermining of the political system—all to implement a drug war that has seen greater drug use after criminalization than before.

We might first be tempted to try to explain to the Martian that the extravagant human, social, and financial costs of criminalization (including the thousands of illegal drug-related murders and assaults) are fully justified in order to keep some Americans from possibly jeopardizing their health. But when we concede that the harm done to most of those Americans who use illegal drugs resulted more from the effects of drug prohibition (including contaminated drugs and unsterilized needles) than from the drug itself, the Martian might express even greater amazement.

In order not to completely bewilder the Martian, we would probably not dare to advise him of such additional facts as that over a fifth of all property crime (exceeding $4 billion in 1974) was committed by addicts seeking money for drugs made artificially expensive by prohibition (the profits going to finance organized crime and to corrupt public officials).

> A 1980 study (Ball et al., 1980) found that a random sample of 243 addicts from the streets of a large U.S. city admitted to committing 473,738 offenses over an 11-year period. This is consistent with the previously cited study of state prison inmates done in 1974 (Barton, 1974), and a follow-up study by [the Law Enforcement Assistance Administration] done in 1978. This study showed that 55 percent of prisoners admitted to being under the influence of drugs or alcohol while committing the crime for which they were imprisoned.[15]

Should we dare to advise the Martian, we might attempt to lessen the strain on credibility by simply stating the moral conviction that no price is too high to pay to protect those Americans who use illegal drugs from doing what they want to do by getting high and possibly jeopardizing their own health. (One observer has whimsically remarked that whoever those privileged Americans are, they have launched more ships, and caused the mobilization of more resources, than the legendary Helen of Troy.)

Although America's marijuana laws might be difficult to explain to a Martian, American policy makers in the past have had little difficulty explaining them to American voters, the majority of whom overwhelmingly

supported such laws—until recently. By 2016, a majority of Americans supported legalization of marijuana.[16] The fact that 49 percent of Americans have tried marijuana[17] (including a former president and former vice president of the United States, and a former speaker of the House of Representatives)[18] and that 24.6 million Americans have used illegal drugs in the past month[19] finally appears to have affected the degree of support for legalization.

In fact, as the chapters within will reveal, the vast majority of researchers and scholars who have addressed the issue of the criminalization of victimless crimes have concluded that the costs of criminalization are too great and the results not only minimal but actually counterproductive to the professed goal to be achieved.[20] Indeed, the research for this book revealed 10 times more scholarly articles advocating marijuana legalization and prostitution than articles opposing them.

Professor James Inciardi of the University of Delaware, one of the few American academics to oppose drug legalization, recently complained that former federal "drug czar" William Bennett "has virtually no [scholars] helping him" in opposing drug legalization.[21] Ethan Nadelmann, a Princeton professor, complains that it is getting harder and harder to find opponents to drug legalization to debate him.[22]

But politicians hardly need the support of academics to curry the favor of the electorate in opposing drug law reform. Simplistic slogans are far easier for politicians to dispense to constituents than the results of extensive empirical and scholarly research, and comparative studies. In 1994, former President Clinton was obliged to fire his surgeon general, Jocelyn Elders, for, among other offenses, suggesting that the scholarly debate over drug reform and legalization be openly discussed as a matter of public policy. Former secretary of state under President Reagan, George Schultz, gave a speech on October 7, 1989, in which he advocated that, "we need at least to consider and examine forms of controlled legalization of drugs."[23] Secretary Schultz was not fired for this sin, but he later added, "I find it very difficult to say that. Sometimes at a reception or cocktail party I advance these views and people head for somebody else. They don't even want to talk to you."[24]

So politically sensitive has the issue of drug legalization become that when a congressional fact-finding committee was convened in 1979 to look into the properties of cocaine, a congressman interrupted a testifying expert who was about to volunteer his opinion about drug legalization by snapping, "I won't ask you that."[25] The risk that an expert's opinion on drug legalization expressed at a congressional hearing might be reported in the press was apparently too great for the congressman.

In view of current public perceptions, the evolution of sound policy for marijuana legalization may take as long as or even longer than the evolution of the legalization of alcohol and tobacco. Today's generation may take the legalization of liquor and tobacco for granted, but it should be recalled that the prospects for the legalization of liquor were once considered to be far more remote than the prospects for drug legalization are today. The 18th Amendment to the Constitution, which helped to establish national prohibition of alcohol, passed on a wave of popular support. In 1930, Senator Morris Shepherd (D-Tex.) scoffed at those who urged alcohol legalization by asserting, "There is as much chance of repealing the [18th] Amendment as there is for a hummingbird to fly to the planet Mars with the Washington Monument tied to its tail."[26] Similar pronouncements were made with regard to the legalization of tobacco by officials in those 16 states that prohibited the use of tobacco before 1922.[27] Nevertheless, the path toward legalization of alcohol and tobacco in those states that banned its use was long, arduous, and completed only when the most obstinate opponents were finally convinced that the costs to society of prohibition were too high and the rewards of criminalization to organized crime too great.

Unlike the end of federal alcohol prohibition, which took place suddenly with the ratification of the 21st Amendment in 1933, the legalization of marijuana is likely to occur more gradually but inexorably as state after state either legalizes or decriminalizes the medicinal and recreational use of marijuana. As of the writing of this book, Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington, and the District of Columbia have legalized the recreational use of marijuana, and another 20 states have decriminalized its use or approved its use for some medical purposes.[28] Overhanging this liberalized state regulation of marijuana, however, is federal law; as of the date of this book, federal law continues to criminalize all use of marijuana, both recreational and medicinal.[29] Before we address these legal, economic, and social conflicts that arise between federal and state law in states where marijuana is legalized, an overview of the unsuccessful constitutional challenges to marijuana laws is in order.

The question remains, how do we explain the American policy on victimless crimes, of which drug policy—specifically, marijuana policy—is but one? Many books and articles have been written on the social effects of the enforcement of laws against other victimless crimes such as prostitution, alcohol consumption, and gambling. All three of these societal problems have been vigorously debated and whether the criminalization of each serves the interests of society. However, few of the scholarly and

popular works now available have looked at all three problems from a common perspective. We therefore must compare the policy rationales for the criminalization of marijuana with the rationales for the prohibition of the use of tobacco, contraception, homosexual conduct, alcohol, prostitution, and gambling with a view toward identifying a common rationale for all of them and then evaluating that common rationale in terms of its economic and social consequences. On the issue of decriminalization, proponents and opponents alike usually begin with a general discussion of the alleged harm each victimless crime inflicts on society. We take a quick peek at some of them here while reserving for the next chapter a more comprehensive comparison with alcohol prohibition in Chapter 3.

For some time, the policy of the U.S. government with regard to drug use is that governmental actions to intervene on our behalf help protect us against ourselves.[30] In fighting the war on drugs, the U.S. government has spent billions of dollars, but this staggering price does not even reflect a far greater price being paid in the sacrifices of our constitutional rights. The war on drugs has severely eroded everyone's Fourth Amendment rights, with the Supreme Court's holdings in this area commonly known as "the drug exception to the Fourth Amendment."[31] These eroded rights include the relaxation of criteria that must be satisfied by law enforcement officers and courts to secure a search warrant. The Supreme Court has also permitted the issuance of search warrants based on anonymous tips and tips from informants, some of whom have proven corrupt and unreliable;[32] permitted warrantless searches of fields, barns, and private property near a residence;[33] permitted warrant-less surveillance of a home;[34] lowered the permissible ceiling for aerial warrant-less searches to 400 feet; and upheld the use of evidence obtained under the color of defective search warrants on the ground the officers executing the warrant were acting in "good faith."[35] Other cases can be cited that also show how the Court has expanded the war on drugs at the expense of individual rights. These examples of government action clearly show how courts at both the state and federal levels will allow governments to act paternalistically when the government is at war, whether it be with another sovereign nation or with its own people. As long as the fight against drugs is termed the "war on drugs," the government, with the aid of the courts, will continue to violate, erode, and simply abandon individuals' liberty and autonomy. Recent history should be a dire warning against both the soundness of this rhetoric and the kinds of reactive measures it allows the government to pursue.[36]

With this erosion of Fourth Amendment rights in the realm of drugs having been solidified by the government and courts of this country, we must look to other constitutional sources for protection from government

intrusion into an individual's privacy or autonomy. This constitutional source is the Ninth Amendment, which stipulates that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"[37] As Associate Justice Arthur Goldberg is quoted as saying in *Griswold*:

> The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protections or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.[38]

Justice Goldberg's comments and the noted historical review of the Ninth Amendment clearly show that Madison and the founders understood the importance of individual privacy and personal autonomy. Thus, it is not surprising that James Madison described protection of the diversity of human faculties as "the first object of Government."[39] This objective of government protecting individual rights and personal autonomy is precisely why the Ninth Amendment is part of the Constitution—it protects the diversity of human faculties. The government best protects these rights by not allowing itself to become involved in them.

The government has no place in determining an individual's self-definition; this principle is perhaps the most basic tenant of a republic style of government. In certain areas of the privacy realm, the courts have supported this notion and refused to allow the government to interfere. However, this being said, the courts have limited their support of this important principle to certain realms of privacy—most notably in the context of sexuality[40] but also in limited circumstances of other important privacy matters[41]—but it is at this point that the Court has drawn the line. There can be no doubt that the privacy rights just discussed and that have been awarded protection from government intrusion by the courts play a major role in an individual's self-definition. The choices an individual makes when relating to matters of sexuality between oneself and another consenting adult are intertwined with the concept of self-determination to the point that the government cannot and should not play any role. However, the government continues to interfere in certain aspects of this privacy right.[42]

Another aspect the Court has protected is that of family rights and the privacy matters that relate to them. The household you are raised in, the values you are taught, and the education that is chosen and provided for you are basic building blocks of self-determination, and the courts have

recognized and protected these rights from government intrusion as well. The courts have drawn a line at this point in restricting governmental interference with the concept of an individual's self-determination. The privacy doctrines supported by the courts under the guise of substantive due process and the limited application of the Ninth Amendment go no further than the rights just discussed. But there is far more to the concept of self-determination than the limited rights protected by the courts, and the Ninth Amendment is the vehicle that provides protection for these other rights that are fundamental to an individual's self-determination.

An individual's decision to use drugs is one of these rights that go to the heart of the concept of self-determination. Many other rights are included in the self-determination realm, but most of them are less controversial, such as the choice of what or how much food to eat or whether to eat at all, and therefore receive little attention. The point to be made, however, is that the choice one makes about how to affect one's level or state of consciousness and the choice one makes in eating habits that affect one's body and appearance should be treated as one and the same. Provided the choice only affects the individual, there is no room for the government or society to step in and make these choices for the individual. This is the most basic and fundamental principle of the self-determination concept, which includes an individual's right to privacy and autonomy. The principle of the right to privacy is not freedom to do particular acts determined to be fundamental through some ever-progressing normative lens. It is the fundamental freedom not to have one's life totally determined by a progressively more normalizing state.[43] The Supreme Court is aware of this threat. Consider the words of Associate Justice Robert H. Jackson in *West Virginia State Board of Education v. Barnette*.[44] During World War II, the Court held that a law requiring school children to salute the flag and profess allegiance to the United States was unconstitutional. As Justice Jackson argued:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. . . . As first and moderate attempts to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity . . . down to the fast failing efforts of our present totalitarian enemies.[45]

The *Barnette* holding and other Supreme Court decisions are clear examples of the Court recognizing the problems of standardization and paternalism through intrusive government actions. This idea was clear in 1943 when *Barnette* was decided and has continued in recent years in *Roberts v. United States Jaycees*,[46] quoting the "ability independently to define one's identity that is central to any concept of liberty,"[47] and the dissent in *Bowers v. Hardwick* claiming the right to privacy is a right to "self-definition."[48] Even though the Court recognizes the problem, it has done little to fashion a solution.

The final argument in support of the self-determination concept and its relationship to drug use is that of *pervasiveness*. In a 1992 book titled *Our Right to Drugs: The Case for a Free Market*,[49] Professor Thomas Szasz concludes that the pervasiveness argument supports the self-determination theory in the privacy and autonomy situations relating to drug use. Professor Szasz also notes that the Supreme Court in its historical privacy case of *Griswold v. Connecticut*[50] accepts the pervasiveness theory, and the concurring opinion by Associate Justice Arthur Goldberg in fact relies heavily on it. In *Griswold*, Goldberg refused to find the state's argument regarding anti-extramarital relations as the basis for the law as compelling in light of "admitted widespread availability to all persons in the state of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease. . . ." [51] This widespread availability and implied public demand supports the Connecticut public's recognition of a right to nonprocreational sexual relations as a pervasive right, a right that a significant portion of contemporary society believes is inextricably connected with the inherent dignity of the individual.[52] Based on this recognition, Professor Szasz provides two considerations that the right to self-determination is inherent in the right to drugs, a pervasive right recognized by society. In the first consideration, the relationship between the exercise of an individual's free will to use drugs and the concepts of autonomy, dignity, and moral responsibility provides support for this claim. According to Professor Szasz, this recognition of the relationship satisfies the criterion of pervasiveness.[53] The second consideration comes from the data on drug use in the United States, which provides ample support for the significant recognition of a right to drugs. Both casual drug users and addicts alike are understood to be asserting a right to drugs by their acts of defying current prohibitionist laws.[54] The 21 million to 25 million Americans who have used cocaine and the 70 million Americans who have used some type of illegal drug can be counted in calculating the pervasiveness of this recognition of self-determination and the right to drugs.[55] Just as the widespread availability of contraceptives in Connecticut in 1964 (despite

the state's ban on all forms of contraceptives) was viewed as an argument significant for the claim that the right to nonprocreational sexual relations was a pervasive right, so too can we view the widespread availability and use of controlled and illegal drugs as significant support for the claim that a larger portion of society recognizes that the right to drugs is a fundamental right.[56]

The concept or theory of the "harm principle" is traced back to John Stuart Mill's classic essay "On Liberty" in which he phrases the concept as the "harm to others" principle.[57] According to Mill's theory, individuals may locate within their personal domain decisions that are "self-regarding," meaning decisions that primarily affect only the interests of the decision maker. Beyond this sphere of personal domain are the decisions considered other-regarding, which is to say decisions that affect the interest of other persons. The other-regarding acts have consequences on the public and can be regulated, therefore the right to self-determination is not absolute and only those self-regarding acts should be allowed in a republic style of government. There is no fine line between these two concepts, as is such in many realms of law, theory, and policy. However, simply because there is a gray area, that alone is not enough to discard the theory in its entirety. Professor Joel Feinberg,[58] in his book titled *Social Philosophy,*[59] provides an example of an individual performing self-regarding acts. Professor Feinberg expands Mill's theory relating to the harm principle in that no one should be punished simply for being drunk but a policeman should be punished for being drunk on duty.[60] Feinberg states:

> A hard working bachelor who habitually spends his evenings hours drinking himself into a stupor, which he then sleeps off, rising fresh in the morning to put in another hard day's work. His drinking does not *directly* affect others in any of the ways of the drunken policeman's conduct. He has no family; he drinks alone and sets no direct example; he is not prevented from discharging any of his public duties; he creates no substantial risk of harm to the interests of other individuals. Although even his private conduct will have some effects Mill would call "indirect" and "remote." First, in spending his evenings the way he does, our solitary tippler is *not* doing any number of things that might be of greater utility to others. In not earning and spending more money, he is failing to stimulate the economy (except for the liquor industry) as much as he might. Second, he fails to spend his evening time improving his talents and making himself a better person. . . . Third, he may make those of his colleagues who liked him sad on his behalf. Finally, to those who know of his habits he is a bad example.[61]

This example from Professor Feinberg clearly shows an individual committing self-regarding acts. As noted, the "indirect" or "remote" effects on outsiders are minimal and do not change the fact that the actions of the individual do not violate the "harm to others" principle cited by Mill. The basic contention of this concept is to examine the relationship between the individual and the state and determine who should make the decisions regarding the best interests of an individual. Mill himself answers this question by noting that even when the state acts in a good faith, the action is self-defeating; an adult's own good is "best provided for by allowing him to make his own means of pursuing it."[62] In essence, the harm principle allows the individual the right to define oneself even in opposition to widespread, traditional, "normal" values,[63] assuming the defining acts are self-regarding.

The "right to be let alone" that has become a standard phrase in privacy jurisprudence should only be circumscribed by the state when the harm principle has been violated. However, this is not the case today, and under the guise of the police power the state violates this "right to be let alone" and the individual receives little protection from the courts. A few courts and some judges have recognized this problem but remain the minority throughout the judicial system. In 1998, the Hawaii Supreme Court in *State v. Mallan*[64] held that the right to possess marijuana is not protected under the right to privacy by the state constitution. In his dissent, Justice Levinson wrote, "Legislative enactments intended to compel purely personal safety, health, morals or welfare, under pain of criminal punishment, constitute unreasonable exercises of the police power; and such legislative enactments are therefore unconstitutional."[65] Levinson rejects the regulation of personal, private conduct under the state's police power absent a showing that harm or likelihood of harm to others would occur.[66] The other boundary mentioned by Levinson in his dissent is that once the right to privacy is implicated, the protection afforded to the individual can only be impinged upon when the state demonstrates a compelling interest to do so using the least restrictive means possible.[67] This proposed standard rejects the rationale basis standard of review and would require the state to show far more to demonstrate a compelling interest. The point being, legislation that interferes with an individual's right to privacy by prohibiting activity that does not violate the harm rule should be considered unconstitutional. Although the *Mallan* case was primarily focused on the privacy article of the state constitution of Hawaii, the argument can be made that the Ninth Amendment supports this contention at the federal level.

The harm principle, paternalism, self-determination, and personhood are all theories about an individual's autonomy, personal liberty, and right to privacy. These theories share a common theme: the state should play no role in certain matters pertaining to individual activity. The idea that the state knows what is best for individuals and should be allowed to govern under this principle goes against the ideals of our founders and their beliefs in natural law. For the state to do so would be an "almost un-American rationale for any type of government activity."[68] The framers explicitly acknowledged that individuals possess certain "unalienable rights"[69] that are not enumerated in the text of the Constitution and are not contingent on the relationship between individuals and the federal government.[70]

By implementing the harm principle in our nation's legislative and judicial branches of government, the rights of individuals to maintain their lives by their own standards will once again be a reality. This government was founded on the principles of natural law; for the past 100 years, however, it has strayed from this foundation and created the current system of overreaching legislatures with the mindset that the few know what is right for the masses. The harm principle in no way is a blank check to allow society to do as it pleases; it is simply a check on government to respect the individual's autonomy, liberty, and right to privacy. Drug use, for example, needs to be regulated to a certain point. Much as with alcohol and tobacco, there must be age limits, quality standards, and restrictions on when and where these products may be used. The war on drugs has failed and will continue to fail; criminalizing drug use is not the answer. The governmental interest in the well-being of the drug user can be served best by controlling the quality and labeling of drugs and by increasing the availability of drug treatment to those seeking such assistance.[71] There will always be opposition to drug use, simply because it is viewed as immoral, but this alone should not cloud the judgments of the legislature and the courts. In *Bowers v. Hardwick*,[72] Associate Justice Harry Blackmun quoted the following in his dissent: "Reasonable people may differ about whether particular sexual acts are moral or immoral, but we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law."[73] The correlation can be made to the issue of drug use, and the moral disagreements of certain sections of society should not carry the day.

Effects on Law Enforcement

Randy Barnett, a former prosecutor assistant state's attorney for Cook County, Illinois, recently described the devastating effect the so-called war on drugs, and particularly marijuana, had on the prosecution of violent crimes in his district. In 1979, before the crackdown on drug users, he had a caseload of between 125 and 135 cases. With such a relatively low caseload, he was able to take defendants charged with the most vicious and violent crimes to trial, offering only those plea bargains that involved fair and correct sentences for those crimes. When the war on drugs set a new priority of cracking down on drug users, however, he saw his caseload skyrocket to more than 400 annually. He then had no choice but to offer "giveaway" plea bargains even to the most vicious of the violent offenders. He later concluded, "There is no such thing as a free crime. Every enforcement effort consumes scarce resources. The more conduct we define as criminal, the more that scarce resources have to be allocated selectively among different crimes."[74]

Unlike other countries in which drugs and prostitution have been legalized, the United States has deliberately adopted the policy of placing a higher priority on enforcing consensual crimes than crimes involving helpless and brutalized victims. Two poignant cases that took place less than one year apart serve to illustrate this point.

In 1991, four popular students at a middle-class high school in Madison, Wisconsin, became jealous of another classmate and friend's new blue jeans. They took her out in a car, locked her in the trunk, and for several hours amused themselves by beating, stabbing, and sodomizing her with a sharp tire iron. When their victim dared to beg for mercy and call out for her mother, her four classmates dragged her out of the trunk, sprayed Windex on her wounds, poured gasoline over her, and then slowly burned their screaming classmate to death. The ringleader later described what they had done by saying, "You should have seen it. It was so funny."[75]

After the perpetrators were convicted of first-degree murder, the judge decided to relieve the burden on the overcrowded prison system by promising the chief perpetrator of the crime, "She could do something useful with her life after being released from prison."[76] In response to a relatively light sentence received, one perpetrator responded by saying, "It's so stupid when you think about it. I don't blame me. We just need a little growing up."[77]

Under this nation's existing priorities, the early release of such defendants is needed in order to provide prison space for people like J. Harmelin. The year before the Madison torture murders, Harmelin was sentenced

by a Michigan court to a mandatory sentence of life imprisonment without the possibility of parole for possession of less than a pound and a half of cocaine.[78] Apparently, there was nothing useful Harmelin could do with his life after prison because policy makers had decided it was necessary to incarcerate him for life to protect society. Evidently, it was more important to spend half a million dollars to incarcerate Harmelin, a drug user, for life than to parole him and make room for violent offenders such as the Madison torture murderers.

Indeed, under existing public attitudes, Harmelin may even have been fortunate to receive only a life sentence without parole. In 1989, federal drug czar William Bennett responded to a question about the feasibility of beheading drug offenders by stating, "Morally, I don't have any problem with it."[79] In the 1970s, the laws of several states—including Georgia, Louisiana, and Missouri—proscribed the death penalty for youths over age 18 who sold a marijuana cigarette to a youth under 18.[80] In Missouri, the sentence for a second possession of marijuana was life imprisonment without parole.[81] In California, a first offense of selling a marijuana cigarette carried a sentence of life imprisonment.[82]

Those who are committed to the continued criminalization of such "crimes" as homosexuality, contraception, and marijuana use believe heavier penalties and strict legal enforcement will result in greater compliance with the laws. In this regard, it may be useful to again make historical comparisons.

Consider the issue of legalized abortions. Momentarily setting aside the question of whether abortion is a societal evil requiring suppression, consider only the question of how suppression might best be accomplished. In Austria, for example, where contraception and abortion are legal and available, the abortion rate is one of the lowest in the world.[83]

Contrast this low rate, however, with the abortion rate in Romania when that country was ruled by the dictator Nicolae Ceausescu, who decreed that abortion was a serious state crime to be enforced by the secret police. (Indeed his abortion laws appeared to have been modeled after those of Nazi Germany, which was the only country in history to impose the death penalty for abortion.) Under Ceausescu's brutal regime, government agents (dubbed the "menstrual police" by some Romanians) rounded up women under age 45 every three months and examined them for signs of pregnancy in the presence of agents. A pregnant woman who later failed to produce a baby at the proper time could expect to be summoned for investigation and interrogation by the secret police. Not surprisingly, abortion rates in Romania skyrocketed to the highest in Europe, with more than 60 percent of pregnancies ending in illegal abortion. In 1990,

after Ceaucescu was overthrown and the harsh abortion law overturned, *Newsweek* reported the poignant case of a young Romanian woman who was recovering from a self-induced abortion. "I could have killed Ceaucescu for that (anti-abortion) law alone," the suffering woman told a *Newsweek* reporter. "Now that it's possible to be a woman again, I'm mutilated."[84]

The effects of harsh drug and marijuana laws and enforcement have had similar results. During the drug war of the 1980s, the federal government extracted more than $20 billion from hapless taxpayers to fund antidrug activities and harsh law enforcement.[85] At a time when many children went unvaccinated and millions of Americans were homeless, the government spent $7.8 billion annually on drug enforcement.[86] The armed forces, including the Coast Guard and Air Force auxiliaries, were mobilized in search-and-destroy missions and radar and helicopter searches. U.S. troops were deployed to Colombia and army helicopters were dispatched to Bolivia. Spy satellites were used by the Central Intelligence Agency and the National Security Agency as part of the drug war. Drug arrests of American citizens doubled to more than 852,000 in 1989, causing the already bursting U.S. prison system to turn away violent offenders and give early release to many murderers, rapists, and child molesters.[87] Domestically, when the National Guard was mobilized in 41 states, wiretap authorizations skyrocketed. Like Ceausescu's anti-abortion laws, U.S. drug laws became progressively stricter in congressional legislation enacted in 1984, 1986, and 1988.

So what was the result of such massive expenditures of public treasure, use of wiretaps, intrusions into privacy, early release of violent offenders, and the incarceration of hundreds of thousands of American citizens for drug use? Like the increased number of abortions that resulted from Ceausescu's harsh anti-abortion laws, drug use increased dramatically as a result of harsh U.S. drug laws and enforcement. In 1990, the U.S. Department of State reported that world production and consumption of drugs had climbed to the highest levels in history.[88] In such major cities as New York and Washington, D.C., police officials reported no discernible reduction in drug sales.[89] Perhaps the most disturbing result of the drug war, however, is that the United States, with 4.4 percent of the world's population,[90] now consumes more than 34 percent of the cocaine that is produced globally,[91] a figure never approached when cocaine was legal in the United States.[92]

Holland again provides a useful basis for comparison. Arnold Trebach's monumental study of drug usage around the world reveals that drug usage in the Netherlands declined dramatically after marijuana use was

decriminalized in 1976.[93] Marijuana use by teens dropped by a staggering 33 percent after legalization.[94] By 1985, only 0.5 percent of Dutch high school students used marijuana compared to more than 5 percent in the United States.[95] Although the Netherlands is world renowned for having liberal drug laws, a recent study concluded that the Netherlands had the "lowest number of addicts in Europe and the lowest proportion of AIDS patients (3 percent) who are intravenous drug users."[96] A policy of heroine maintenance in Great Britain has resulted in a heroin addiction rate less than one-third of that existing in the United States,[97] and drug-related crime is virtually nonexistent.[98]

In contrast to the United States, countries that have legalized drugs share a common policy view—namely, that one dollar spent on education and treatment can have a greater effect on reducing drug addiction than a thousand dollars spent on arrest, incarceration, military mobilizations, and wiretaps. Indeed, the thousands dollars spent on enforcing drug laws can increase rather than reduce the rate of addiction.

In the United States, a study by James Ostrowski has revealed that when marijuana use was legalized in Alaska, use by high school seniors declined to 4 percent compared to a steady 6.3 percent in other states where such drug use was illegal (and punishable by up to life in prison without parole).[99] William Chambliss's monumental study of drug laws in the United States concluded that the "use of marijuana actually declines after legalization."[100]

The possibility that drug use might actually decline as a result of decriminalization is rarely considered by the opponents of legalization. Often the only response to such a suggestion is something like, "Well, it just can't be." No amount of data, studies, or experience from other countries can convince the proponents of legalization otherwise. The theory, of course, is that the lure of drugs is so overwhelming that if they were legalized, citizens from all walks of life who have never before used drugs would suddenly leap at the chance to pump themselves full of poisonous and addictive drugs. There are several reasons why this does not occur, not the least of which is simple common sense. Indeed, as discussed in Chapter 3 of this book, marijuana use in the United States did not become a serious problem until it was criminalized, just as abortion in Romania did not become pandemic until is was so brutally suppressed by Ceausescu.

It is true that some surveys reveal that there might be a small degree of curiosity that leads to usage immediately after decriminalization, a curiosity that almost certainly would not have existed had the drug not been previous criminalized. A study conducted by the National Commission

on Marijuana and Drug Abuse in 1972 revealed that 3 percent of adults who did not use drugs indicated they might try the drug if it were decriminalized.[101] If one were to assume the worst possible scenario, that 4 percent of Americans might try and use marijuana or other drugs if legalized, this would increase the number of annual deaths from illegal drug use (not counting use of marijuana for which no documented case of death from use has been found) by a figure far less than 1 percent of the 550,000 deaths caused from the use of alcohol and tobacco. However, this figure would be offset by the thousands of lives saved by the availability of uncontaminated supplies, clean needles, and fewer drug-related crimes and murders. However, proponents of continued enforcement of the harshest drug laws propound that even a 1-percent increase in addicts would be a national disaster and justify filling half of the available jail space in the country. Studies conducted in foreign countries with legalized drugs, however, reveal that legalization is much more likely to result in lower levels of drug use and far lower levels of drug abuse.

Milton Friedman, winner of the Nobel Prize in Economics, has explained why legalization so often results in reduced usage. As his study on the question reveals, the very fact that a drug like marijuana is illegal makes it attractive as a "forbidden fruit."[102] This alone might explain why marijuana usage among high school students in Alaska was so much lower than in other states where marijuana was illegal.

A study by Walter Block has offered a similar explanation as to why drug use declines after a drug is legalized. According to his study, a drug's illegality "increases its attractions to so many people. If taking heroin were perceived merely to be stupid . . . instead of dangerous . . . fewer would take it."[103] Block concludes that criminalization only plays into the hands of the criminal element: "Better to ruin their business by deflating the profit balloon than by acting in a way which only supports them."[104] There are, however, other explanations of equal importance.

A perverse effect of U.S. drug-enforcement policies is that even modest enforcement victories serve to intensify the drug problem. For example, after billions of dollars were spent on the drug war, federal enforcement agencies claimed that as much as 5 percent of drug imports had been intercepted as the fruits of victory. What those enforcers did not realize, however, was even this great "victory" did nothing except raise the price of the prohibited drugs, increase the profit margin for drug dealers, and send an economic signal to drug producers to increase production (which, of course, is exactly what happened). As Walter Block has observed,

> Every time a battle is won in the [drug war], paradoxically, the enemy is strengthened, not weakened. [Interdiction] only succeeds in raising the profit motives attendant upon production. Thus, the more vigorous and successful the activities of the Drug Enforcement Administration, the greater the strength of the illicit drug industry.[105]

A study by Steven Witosky has revealed the relationship between the illegality of a drug like marijuana and its price.[106] The study cites the price in 1981 for an ounce of pharmaceutical-grade cocaine hydrochloride produced by a major U.S. pharmaceutical company as around $1.80 per gram.[107] That same year, the Drug Enforcement Administration (DEA) estimated a street price for cocaine of more than $55,000 per kilogram. Taking into account differences in purity, the study concluded that the criminal law had succeeded in

> taxing cocaine about $800 per gram, or about $22,350 per ounce . . . thereby making the illegal [production of cocaine] extraordinarily profitable. It has been estimated that the total premium over actual cost of production exceeds $72 billion annually—almost all of which goes to support and promote criminal activity instead of to education and drug treatment programs.[108]

Higher prices also have another effect—on the user. Instead of only having to burglarize two homes a week to earn enough money to support a habit, an addict might have to burglarize six homes a week to earn enough to pay the higher price for the drug. A study by the Drug Abuse Council revealed that for every 10-percent increase in the price of heroin, crime increased by 2.87 percent.[109] In Washington, D.C., the murder rate doubled after police began to step up enforcement of the drug laws.[110] Thus, even a modest "victory" claimed by those conducting the drug war has the direct result of increasing crime—a result felt by every American, rich or poor.

Thus the costly drug-enforcement "victory" has five major consequences: (1) It increases the profit to the drug dealer and helps to support the lavish tax-free lifestyle of the privileged few; (2) it diverts billions in potential tax dollars away from the government (which could be used for education and drug-treatment programs) to organized crime, where it is sure to be used for a variety of criminal purposes; (3) it increases the economic incentives of drug producers to increase drug production; (4) it incentivizes the addict to increase the number of violent and property crimes committed to support his habit; and (5) it results in the increased use of prohibited drugs such as marijuana. An analysis of FBI statistics

reveals that addicts deprived of their drug commit more than 4 million crimes a year, steal $7.5 billion in property, and commit 1,600 murders to earn the money needed to pay the high drug prices created by prohibition.[111]

Criminalization apologists prefer to ignore these real and documented consequences and instead seek to justify the billions of dollars spent on the drug war by expressing the forlorn hope that if prices rise, perhaps fewer people will want to use them. The problem with such a simplistic rationale for the wasteful expenditure of taxpayers' billions is that drugs are not toothbrushes. An economist would explain that the demand for drugs is extremely inelastic. People do not go bargain hunting when contemplating the idea of becoming addicted to a drug. They do not say, "I really want to become addicted, but the price is a little too high today so I guess I won't." In any case, a first-time user may be offered the drug for free. Once addicted, an addict does not give up his addiction because of an increase in the price of the drug. Instead, he will simply commit more crimes to support his habit. In short, the apologist's rationale is either deliberately specious or reveals a tragic misunderstanding of the true causes of drug addiction.

Both advocates and opponents of marijuana legalization are apt to begin their argument with a statement as to the evils of marijuana use and the adverse effects of addictive drugs on the human body. Certainly, that excessive marijuana use may be implicated in the deaths of one or two people from consumption of marijuana may support the view that overconsumption of marijuana may be harmful, although marijuana appears to be the least harmful of all the forbidden drugs. Opponents of legalization rely on the harmful effects of the most dangerous drugs to justify criminalization and enforcement of the less harmful drugs, even at extravagant human and social cost. Responsible advocates of legalization concede the harmfulness of some drugs, particularly if not properly regulated and controlled, but point out that criminalization has historically resulted in higher rates of addiction and diverts scarce societal resources away from education and treatment programs, which have proven to be far more effective than criminalization in reducing rates of addiction. These advocates also point out the inconsistency in laws that support and even subsidize the use of tobacco and alcohol, which results in the deaths of more than 100 times as many people as drugs.

Most advocates of legalization, however, do not rest their cases primarily on the assumption that legalization will reduce rates of addiction—for several reasons. First, opponents of legalization are not apt to be persuaded on this point. As we have seen, no amount of empirical, historical,

or comparative data can persuade an opponent who clings to cherished preconceptions about the effects of harsh laws and enforcement on rates of drug use. To be fair to such opponents, we should also note that not all studies unambiguously support the view that legalization would result in reduced levels of drug abuse. For example, the study already cited suggested there might be a least some curiosity use of drugs after legalization by those who had not previously used addictive drugs.

Rather, most legalization advocates rely heavily on the importance of responsible evaluation of societal priorities.[112] They concede that although some illegal drugs may be harmful if misused, they refer to numerous studies showing that there is scant evidence that marijuana is any more harmful or addictive than alcohol, and indeed they point to ample evidence that marijuana has medicinal benefits.[113] But legalization proponents' best argument may be simply that the societal *costs* of criminalization (increased drug-related crime, including numerous murders and torture, diversion of valuable resources to organized crime, the monopolization of scarce prison resources necessitating the early release of violent offenders, the corruption of government) vastly exceed any benefit in terms of possibly keeping one or two people from jeopardizing their health by using marijuana. This is clearly the advocate's strongest argument in favor of decriminalization, and this will be the primary focus of the remaining chapters in this book.

Advocates of legalization often use arguments that are not particularly persuasive on the issue of legalization; in fact, the arguments may undermine the more persuasive line of argument regarding societal priorities. Advocates of legalization often use the argument that such drugs as marijuana, cocaine, and heroin are not actually harmful. Studies abound showing the therapeutic effects of marijuana as a possible treatment for diseases such as multiple sclerosis, epilepsy, Crohn's disease, appetite loss, Tourette syndrome, asthma, and alleviating the side effects of certain drugs treating AIDS and cancer.[114] Other studies, however, show that prolonged use of high levels of THC may affect brain development[115] and trigger schizophrenia[116] and anxiety attacks.[117] In other words, it may have side effects of equal severity as those found in many *legal* drugs on the market. (If anyone doubts the side effects of these numerous legal drugs, just watch the pharmaceutical ads on television that spend the greater part of their ad time describing horrific potential side effects such as death, blindness, paralysis, and suicidal thoughts.) But aside from the fact that claims that marijuana is completely harmless will never persuade opponents of legalization, many of whom are firm in their belief that the private use of any prohibited drug is the evil and moral equivalent

of first-degree murder, such an argument detracts from the force of the argument based on societal priorities. Because most advocates of drug legalization also favor the continued legalization of tobacco and alcohol, many are content to note the much higher number of deaths resulting from tobacco and alcohol use than from drug use. Advocates extrapolate from that glaring discrepancy that drugs should be legalized for the same reasons that tobacco and alcohol are legalized.

Nevertheless, a discussion of the harmful effects of drugs is useful in understanding the causes of addiction (which in turn are relevant to evaluating the effectiveness of enforcement programs) and for that reason are reviewed briefly here. Those who claim that many prohibited drugs are essentially harmless make their strongest case with marijuana. Andrew Weil, who conducted the first modern studies on marijuana use, states that marijuana is an "active placebo"[118] that produces "trivial effects."[119] Other recent studies have revealed that even though it is used for a variety of purposes ranging from stimulation to relaxation, it tends to have "whatever effects a user wants."[120] A study of the effects of marijuana on driving revealed the commission of the same number of driving errors by those who had heavily smoked marijuana as those who had not taken the drug. The experimenter who conducted the study remarked that "this result is puzzling because of the elaborate efforts made in this study to maximize marijuana intoxication."[121]

Indeed, the lack of any evidence of toxicity has frustrated attempts to calculate a lethal dose. The best that experimenters have been able to do is to extrapolate from animal experiments that a "person might die after eating 24 ounces all at once."[122] Unfortunately for advocates of criminalization, however, it appears that more people have died from drinking too many glasses of water at once than from ingesting too much marijuana.[123]

The 1986 Drug Abuse Warning Network reported that traces of marijuana were implicated in 12 fatalities.[124] However, this did not mean that marijuana was responsible for the deaths, only that traces of cannabis were found during autopsies. In any case, aspirin traces were found to be "implicated" in a greater number of deaths than marijuana. A study conducted by researchers Steven Duke and Albert Gross concluded flatly that "no death from a marijuana overdose has ever been established."[125]

Because such experimental evidence hardly justifies laws that impose life imprisonment on marijuana users, legalization opponents have attempted to justify criminalization on grounds that it might provide a transition to more harmful drugs. No reliable evidence has been found to support this contention, but even if true it would prove little because

studies have shown that tobacco and alcohol are the classic gateway drugs to more harmful drugs.[126] One study has even concluded that coffee drinking leads to opium use,[127] and another has concluded that tobacco use leads to opium smoking. Whatever the merit of such studies, however, the Wootton Report issued by the British government concluded that "marijuana found no progression to heroin in any country."[128]

None of these studies and evidence have had any noticeable effect on governmental authorities. In 1987, more than 400,000 Americans were arrested for possessing marijuana, clogging the court system, leading to the release of thousands of violent offenders, and making a virtual mockery of the integrity of the U.S. justice system.

In any case, it has already been noted that alcohol was a major factor in 9,967 traffic deaths (nearly one-third of 2014 total traffic fatalities),[129] 32–50 percent of homicides,[130] 33 percent of sexual assaults,[131] nearly 25 percent of violent crimes,[132] and 66 percent of intimate partner violence (all criminal data are for 1995–1997).[133] If policy makers can justify life imprisonment without parole for the use of marijuana, then what punishment would they impose were marijuana to be a factor in as many crimes as alcohol?

Before the prohibition of alcohol, most consumption in the United States was of milder forms such as beer and wine. After criminalization, however, bootleggers discovered that beer and wine were too bulky and difficult to transport and store clandestinely in comparison to harder and more concentrated liquors such as whiskey and bourbon. There was not enough profit in bootlegging wine and beer to justify the risks of illegal distribution. As a result, national alcohol consumption patterns soon shifted to hard liquor as a result of Prohibition. It should be no surprise that alcohol poisoning among consumers also rose dramatically because no government regulatory body was available to oversee and prevent the abasement and contamination of the hard liquor supply.[134]

It now appears that deadly consequences flow directly from criminalization of marijuana. As already noted, more than 4 million crimes a year—including more than 1,600 murders—are committed by drug dealers and users who are denied any legal means of obtaining their drug. But other social consequences of criminalization are equally tragic. At a time when African Americans continue their struggle for economic opportunities, 90 percent of those actually prosecuted for drug-related offenses are black.[135] The devastating impact this has on the families, social fabric, and economic opportunities of African Americans is enormous and almost impossible to measure.

The tragic consequences of cocaine criminalization provide an excellent reason why even tobacco, which has a much higher death rate and addiction rate than cocaine, should also remain legal. An interesting case study of the effects of prohibiting tobacco is provided by the experiment of a Vermont prison that attempted in 1992 to prohibit the use of tobacco by inmates. Prison authorities have more power and control than could ever be exerted over citizens at liberty, but when cigarette prohibition was introduced, a black market in cigarettes was created virtually overnight in which the price of a cigarette rose to 2,000 percent of its market value. So desperate were tobacco addicts to get their "fix" that incidents of violence and disruptive behavior skyrocketed, and men began to exchange drugs and sex for tobacco. In November 1992, Vermont wisely rescinded its tobacco prohibition policy.[136]

Similar effects were observed in Europe after World War II. Cigarettes were so scarce that

> nicotine addicts reduced themselves to depravity. They became liars and thieves, bargained treasured possessions, traded away food, though they were already underfed, [and] . . . women smokers resorted to prostitution.[137]

So many cultural changes are taking place in society that it is not possible to make precise comparisons of the rate of drug use before and after criminalization. One critic perhaps put it best when he observed:

> [W]e do not know how many people used drugs in that era [before criminalization]; estimates vary widely. Perhaps the number was small; if so, free access did not lead to widespread use. Perhaps the number was large; if so, the nation nonetheless prospered and normal family life continued. We do know that there were no drug houses or blighted neighborhoods, nor did drug gangs have corner shoot-outs, "drug-related" crime did not exist, and people lived ordinary middle class lives while consuming drugs avidly.[138]

In short, perhaps no other action by government has had such a devastating effect on its own people than the criminalization of drugs, particularly marijuana.

CHAPTER TWO

The Victimless Crime Family

Advocates of marijuana legalization often base their arguments on the assertion that because there is scant evidence that marijuana use harms health, its consumption constitutes a victimless crime and therefore should not be criminalized. They note that annually 650 of every 100,000 tobacco users die and 150 alcohol users die—but no one dies from marijuana use.[1] This argument fails to acknowledge that many other so-called victimless crimes are nevertheless criminalized, but it does raise the broader question of what *priority* society should give to the enforcement of victimless crime laws and how such crimes should be defined. If marijuana use is determined to be a victimless crime, then it would be useful to compare the enforcement of marijuana laws with other analogous victimless crimes. We might thereby compare and measure the usefulness to society not only of criminalizing such activity and behavior but also of the cost to society of enforcing punishment for these crimes to the detriment of enforcing punishment of crimes with clearly ascertainable victims.

Under the strictest definition, it has been argued that that there is no such thing as a victimless crime. For example, many of the economic laws in the Soviet Union (before its collapse) made it a crime for any person to sell a good to another for a profit. Soviet bureaucrats denied that such a crime was without a victim. They would explain that the purchaser was the "victim" of the seller who was exploiting his labor and taking advantage of him. The degree of exploitation was manifested by the amount of the profit. The fact that the buyer was a willing participant acting in his own perceived best interest made no difference in defining the crime. The

government had decided the buyer was a victim and would brook no protest by the buyer than he was not a victim.

In the same way, a Massachusetts law forbidding a husband and a wife from having intercourse in other than a supine position was not considered to be a victimless crime by those applying the strictest definition. Under their definition, the victims of such a crime were the participants who were ruining themselves morally by engaging in such conduct. Indeed, before the Supreme Court case of *Lawrence v. Texas* in 2003, Georgia had a similar statute forbidding married couples from engaging in "sodomy," which included engaging in any consensual sexual act performed in any position other than supine. It provided for 20 years' imprisonment for the act of having oral sex with one's spouse.[2]

The crime of using contraceptives in Connecticut was not considered by many state legislators to be a victimless crime because the availability of contraceptives was thought to encourage promiscuity by taking away the "punishment" of having a child. The victims were the perpetrators who degraded themselves by using the contraceptive with their spouse in the privacy of their homes. As in the case of the Soviet view of the crime of selling a good, the government of Connecticut did not consider the consensual nature of the activity of the participants in using contraception to be a relevant factor in determining whether the crime had a victim.

A more liberal definition of a victimless crime will nevertheless include acts such as race car driving, trapeze acrobatics, coal mining, and skydiving. Although such activities are entirely consensual, they nevertheless involve a real danger to the person who participates in them. The theory of those who criminalize such activities is that the victim is the participant who endangers him- or herself by engaging in such activities.

A better definition of the victimless crime focuses on the nature of the consensual activity proscribed, and it addresses the issue of whether there is harm to those *other* than those engaged in the consensual activity. For example, skydiving off a building in lower downtown Manhattan might be prohibited on grounds of grave potential harm to someone other than the skydiver (such as pedestrians on the street). Skydiving might also be regulated by the imposition of certain safety requirements. Ultimately, however, the consensual act of skydiving would not be absolutely prohibited if it posed no threat to anyone other than the skydiver.

Under the definition proposed, the use of tobacco and alcohol are considered consensual and victimless activities. This is not to say their use should not be regulated. The evidence is strong that passive tobacco smoke has serious adverse health consequences on innocent bystanders.[3]

However, this can be dealt with by prohibiting smoking on airlines, in public buildings, on public transportation, and the like. The fact remains, however, that the vast majority of the 480,000 annual smoking death victims are those who, knowing the dangers, choose to engage in the use of tobacco.

Alcohol use presents a weaker case for legalization. Alcohol is a major factor in more than 50 percent of the murders and 62 percent of the assaults committed in the United States, so it is more difficult to rationalize legalization on grounds of a lack of victims. However, even these tragic figures, combined with the harm done to alcohol abusers themselves, do not support a case for outright prohibition. As the following chapter reveals, the costs to society during the Prohibition era vastly outweighed the modest benefits of reduced alcohol consumption.

The weakest case of all for criminalization, of course, is drug use. The harm to the user, while it exists, is minimal compared to the harm done to users of tobacco and alcohol. The harm to third parties is the consequence of criminalization itself—namely, the crimes committed by addicts seeking money to buy their drugs and the violence committed by drug dealers. In short, drug use provides the most classic example of a victimless crime, with the possible exception of consensual contraceptive and sexual acts between spouses that may provide an even better example.

Before applying the notion of a victimless crime to the smoking or ingestion of marijuana, it remains to compare such prohibition to the two other types of victimless crimes—namely, prostitution and gambling.

By definition, the victimless crime lacks a complainant. In the classic case of a crime involving a victim such as robbery or assault, the existence of the crime is brought to the attention of the authorities by a complainant. A victimless crime, however, is not so easily discovered. The authorities must actively go out and look for evidence of the existence of the crime despite the lack of any complainant who alleges having suffered harm.

A variety of methods are employed to discover the existence of the victimless crime, ranging from the use of confidential informants, covert surveillance, wiretaps, and searches of private homes. In the most extreme kind of invasion of privacy, a high-powered telescope might be used to peer into a home to find evidence that a husband and wife are engaging in oral sex.

In a case of a man arrested in a Denver suburb in 1980, the police made peepholes in the ceiling of the public restroom in a local mall so officers could observe possible acts of masturbation or drug transactions.[4]

The fact that such surveillance involved peering at hundreds of law-abiding citizens in various states of undress going to the bathroom in what they thought was the privacy of their locked toilet stalls was apparently considered a small price to pay for the opportunity to observe the commission of a possible victimless crime such as masturbation or a drug transaction. The hard work of the police finally paid off, however, when they saw and arrested a man for masturbating in the privacy of his locked toilet stall.[5] The surveillance, of course, was justified on grounds that the act of masturbating in a closed stall in a public restroom was *not* a victimless crime—rather the victim was the perpetrator himself who harmed himself by "self-abuse." As demonstrated by this occurrence, drug-apprehension measures are not limited to those actually involved in drug transactions. Existing civil penalties permit the seizure of any property on which drugs have been used, regardless of whether the owner of the property is aware of any drug transactions.[6] Under such laws, when the owner of an automobile or boat rents it to someone who then uses drugs in that automobile or boat, his or her property is subject to seizure without compensation.[7] This is true even though he or she had no knowledge that the renter would use drugs on the property.[8]

Because criminalization of marijuana use is justified on grounds of harm to the user, it is also useful to compare this justification in the context of criminalization of prostitution, where the chief harm flowing from criminalization is that inflicted on innocent victims.

Contraceptive Policy

Contraceptives were banned in the United States for many years. The U.S. Tariff Act of 1930 forbade the import of, among other articles, any writing urging treason, murder, and, "any drug or medicine or any article whatever for causing unlawful abortion. . . ."[9] The fact that the private use of contraceptive devices by consenting adults was considered a societal evil on par with murder (some may recall the bumper stickers "Sperms Are People, Too") reveals the priorities that society often gives to keeping members of society from engaging in private and consensual conduct thought by the majority to be "immoral." Many states banned the use of contraceptive devices with laws that were even stricter than the federal law.[10] Laws against the use of contraceptive devices might still be in effect today were it not for the 1965 Supreme Court case of *Griswold v. Connecticut*,[11] which struck down a Connecticut law that made it a felony for consenting adults to use a contraceptive device. The Court held that such a ban on use violated a "zone of privacy created by several constitutional

guarantees."[12] Despite the *Griswold* case, however, many state legislatures found the act of using a contraceptive device to be so abhorrent that they made it a felony to even "exhibit" contraceptive devices. As late as 1972, for example, a Massachusetts court convicted a man of a felony for giving a lecture on contraception to students at Boston University and for exhibiting and distributing a sample of Emko vaginal foam. The U.S. Supreme Court reversed the conviction for giving the lecture on contraception (on free speech grounds) but upheld the conviction for distributing the foam.[13]

As recently as 1971, the federal Comstock Act defined contraceptive material as "filthy and vile."[14] The Comstock law was named after Anthony Comstock, later appointed as the U.S. postal inspector, who introduced in Congress a bill to outlaw as unmailable any writing describing contraceptive methods. Comstock zealously pursued citizens whom he suspected of engaging in conduct which, though consensual, offended the morality of society. According to one historian, Comstock found sport in baiting doctors who engaged in promoting such activity. In one instance, he had two women associates write to a Midwestern physician, claiming that their husbands were insane and that they feared that any children might inherit their insanity. When the doctor wrote them back with simple advice about contraceptive methods, Comstock had him arrested and sent to the penitentiary for seven years of hard labor.[15]

Such anticontraception laws were vigorously defended (in much the same way as marijuana laws are defended today) by those who felt strongly that the fabric of society depended on ensuring that consenting adults did not engage in conduct that, though voluntary, might be harmful to themselves. Such views were apparent in laws that revealed a greater fear of what consenting adults might be doing in the privacy of their homes than in any actual harm done to an unwilling victim. Blackstone, for example, wrote in his epic treatise of the common law that the act of anal intercourse between consenting adults was a heinous offense of "deeper malignity than rape."[16] In 1986, Chief Justice Warren Burger of the U.S. Supreme Court approvingly cited this quote from Blackstone in upholding a Georgia statue that imposed a 20-year prison term of hard labor for the crime of engaging in any consensual act of anal intercourse with any other person (including one's heterosexual spouse).[17]

Sodomy Laws

As with the laws against contraception and marijuana, sodomy laws in the United States were based on the assumption that an act between consenting adults in the privacy of their homes poses a more serious threat to

society than wanton acts of violence on unwilling victims. The theory of harm of the act of sodomy was based on a perceived societal need to free citizens from the *thought* that others might be engaging in mutually agreeable but immoral conduct. Clearly, the common law doctrine that an act of anal intercourse between consenting adults is a greater threat to society than an act of brutal rape on an unwilling victim is based on such a premise.

Were this common law premise a matter of theory only, the issue of decriminalization of victimless crimes would be of little but academic interest. In fact, however, the enforcement of most laws in the United States today, including but most particularly the enforcement of marijuana laws, are based on this premise. In 1989, more than half of all scarce prison space in the United States was occupied by those convicted of crimes involving consensual conduct.[18] The cost of incarcerating half a million inmates convicted of engaging in consensual acts related to drugs alone exceeded over $8 billion dollars in 1990 (not counting the lost productivity and ruined lives of those incarcerated),[19] while arrests for consensual sexual acts between prostitutes and willing customers constituted half the total arrests in many major cities.[20]

Societal Priorities

So committed are law enforcement officials to enforcing crimes involving consensual conduct that they are prepared to give early release to the most vicious murderers and rapists to make room in America's overcrowded prisons for those convicted of crimes involving consensual conduct. In many cases, even the most vicious and violent offenders are paroled, given probation, or face reduced charges or sentences so authorities can find room in the prisons for those convicted of such crimes as possessing a small amount of drugs.

In 1991, the U.S. Supreme Court upheld the sentence of a Michigan man sentenced to mandatory life imprisonment without possibility of parole for mere possession of a pound and a half of cocaine.[21] The fact that first-degree murderers are often paroled after as little as three and a half years to make room for drug users has little effect on the policy makers who are responsible for protecting society. According to these policy makers, citizens suffer greater harm by the mere act of *thinking* about another citizen who is harming himself through willful drug use than citizens who are made personally vulnerable to the ravages of the released murderer or rapist. As for the drug users themselves, their families are thought to be harmed less by the term of life imprisonment

without parole than by the drugs (although at much greater cost to the taxpayer).

Prostitution and AIDS

A common mode of transmission of the human immunodeficiency virus (HIV) is through the sharing of drug-injection needles contaminated with infected blood of another user. Over time, many of those infected with HIV develop acquired immune deficiency syndrome (AIDS), a dangerous disease that can kill its victims. As of 1992, about a third of AIDS cases in the United States resulted from shared needles.[22] More than half of the AIDS cases that resulted from heterosexual contact involved sex with injection drug users.[23] Because drug use is criminalized in the United States, 80 percent to 90 percent of injection drug users are not in treatment at any given time.[24] Of those not in treatment, 78 percent share drug-injection equipment with another intravenous user, including 20 percent who shared needles with total strangers.[25]

Thus, a person who never uses drugs can contract the AIDS virus by simply having sex with a person who once was an injection drug user. Also, intravenous drug-using mothers can transmit the virus to their innocent children.

Our friendly Martian might predict that the threat of transmission of such a deadly virus as AIDS to members of the general population who do not use drugs might be enough to trigger a rethinking of America's tragic drug-criminalization laws. If drugs were legalized, drug users would have no fear seeking treatment or obtaining sterilized needles, and the spread of AIDS to the general population could be greatly inhibited, if not prevented completely.

Such a prediction by our disinterested observer fails to take into account the "no price is too high" philosophy of policy makers. A 1990 congressional study reported why proposals for distribution of needles have been consistently rejected: "(P)roviding injection equipment sends the wrong message, since abstinence from drug use is inconsistent with the exchange of needles." Not even the deaths of thousands of innocent children have been enough to soften the hearts of policy makers determined to prohibit at all costs the possession of drug injection equipment.

Once, 48 states and the District of Columbia prohibited the possession of drug injection equipment; now only nine states fully prohibit sale of nonprescription needles.[26] The results of such laws have been tragic indeed. Because possession of injection equipment is illegal, addicts rarely carry them. As Feldman and Biernacki reported, "The illegality of possessing

hypodermic syringes . . . accounts for the unpredictable supply of hypodermic syringes, the chronic fear of arrest, and the necessity of constructing social arrangements that involve needle sharing."[27] One drug user confided to a researcher, "One thing you will not catch is someone just walking around carrying a needle. You'll catch them with dope before you'll catch them with a needle."[28]

A survey of 24 drug injectors revealed that 23 did not carry syringes because of the fear of arrest.[29] A study by Booth and Koester has revealed that injection drug users "frequently found themselves in situations where they used whatever syringe was available."[30] In addition, they found that "sharing the cost of drugs and users' desire to prepare drugs as quickly as possible encourage the sharing of cookers, even when each user has their own syringe."[31]

Because of the long incubation periods for the transmission of AIDS, it is not yet possible to compare AIDS transmission rates in countries with needle-exchange programs to rates in the United States. However, a 1989 evaluation of a needle-exchange program begun in 1984 in the Netherlands revealed that "the incidence of hepatitis B infection declined steadily from 49 per 100,000 users in 1984 to [nine] per 100,000 in 1989."[32]

A 1985 opinion survey conducted by the U.S. Department of Justice ranked prostitution 174th in severity out of 204 crimes ranging from murder in the first degree to schoolchildren truancy. (The offense ranked 175th was "a store owner knowingly puts large eggs in containers marked 'extra large.' ")[33]

More than half a million women work as prostitutes in the United States.[34] One study estimates that between 12 percent and 20 percent of women have engaged in prostitution at some point in their lives. A recent study estimated that 75 percent of men have patronized a prostitute at least once.[35] It is estimated that there are more than 338 million acts of prostitution annually.[36]

Most other countries in the world do not criminalize prostitution, and many actively regulate and tax it under the auspices of the law.[37] In the United States, prostitution is only legal in certain counties of Nevada. In those Nevada counties where prostitution is legalized, regulated, and taxed, the rate of AIDS among prostitutes is the lowest in the United States.[38] Revenues from prostitution go to support public services rather than being diverted to pimps, hustlers, and organized crime.

A friendly Martian advised of these facts might be surprised to learn how municipal and state governments in the United States have decided to allocate scarce law enforcement resources. A study of major cities in the United States revealed that "police arrested twice as many people for

prostitution as they did for all homicides, rapes, robberies, and assaults combined."[39] Murderers, rapists, and other violent offenders are being given early release in order to accommodate accused prostitutes who occupy over 30 percent of all scarce female prison space. During a period when sixteen major city governments were expending over $100 million of municipal funds to arrest prostitutes, over 90 percent of perpetrators of murder, rape, robbery, and assault evaded police detection and prosecution.[40]

High rates of violent crime appear to have little effect on the decision by most American cities to allocate a disproportionate share of law enforcement resources to suppress prostitution. The cost to the taxpayer of processing, arresting, and incarcerating each prostitution suspect ranges from $877 per arrest in Boston to $2,000 in New York City.[41] With more than 100,000 prostitution arrests per year, the financial cost alone to society of such arrests is staggering,[42] especially when this figure does not include the $150 billion in annual tax revenues lost by states and municipalities because prostitution has been criminalized.[43] One 1993 study concluded that the

> average American pays $800 in taxes to pursue [those engaged in prostitution]. On the other hand, if these activities were decriminalized and taxed, we could wipe out the national debt—that's the $4 trillion debt, not the meager $226 billion deficit—in 20 years.[44]

If criminalized prostitution only resulted in the loss to deficit-ridden governments of $4 trillion in potential revenues, the consequences would not be so tragic. Unfortunately, the social costs of criminalization far exceed those costs. The same $4 trillion lost to governments that could use those revenues to fund social services, child care, and the like goes to funding the criminal activities of pimps and organized crime whose crimes in other areas of society wreak untold misery and suffering on innocent citizens. But this is only the beginning.

A study by Carole Campbell of the Department of Sociology at California State University–Long Beach reveals that the rate of HIV infection among female prostitutes in the United States ranges from zero percent in certain counties of Nevada, where prostitution is legalized, to 48 percent in regions where prostitution is the most zealously suppressed.[45] The reason for such differences in the HIV rate is readily ascertained.

Prostitution has been decriminalized in 11 of 17 counties in Nevada.[46] The state board of health requires that prostitutes in state-licensed brothels be tested weekly for venereal diseases and monthly for HIV infection.[47] Regulations require that customers use condoms at all times. Prostitutes

are given formal training in screening customers for sexually transmitted diseases. Should any question arise, a consultant is available for a second opinion. Any customer who is accepted is required to wash his genitals with warm water and an antiseptic solution.

Because the prostitute is fully protected by the law, she can reject any customer and also enforce the rule requiring the use of a condom. Unlike states where prostitution is criminalized, violent crimes against prostitutes are almost nonexistent, as is the robbery ("rolling") of a customer by a prostitute. Most brothels are located near sheriff stations. State regulations also require that each licensed brothel maintain a place for the storage of hygienic supplies and prophylactic devices. Solicitation outside the brothel is strictly prohibited and enforced. Indeed, unlike cities and towns in other states where prostitution is criminalized, towns near the legalized brothels report almost no problems with streetwalkers or solicitation.

There are no pimps in the legalized brothel and no incidents of forced prostitution. Indeed, state regulations prohibit a brothel from hiring any male for any purpose other than maintenance or physical repairs to a facility.[48] Prostitutes pay a predetermined fee to the brothel owner for room and board, and the costs of HIV antibody tests are deducted from their paychecks.

License fees are an important source of income in the counties where the brothels are legal. Wages are reported, and taxes are paid on all earnings. The license fees paid by brothels to the county range up to $100,000.[49] The revenues are used to support a variety of social services unavailable in similar counties that persist in criminalizing prostitution.

Conditions in the Nevada counties where prostitution is legal may be contrasted with conditions where prostitution is suppressed. In Seattle, for example, a survey of prostitutes revealed that 76 percent had been beaten or assaulted by pimps or customers.[50] Such crimes most often go unreported, of course, because a prostitute who reports such a crime will have to admit her crime of prostitution to the police. Similarly, crimes committed by pimps are often not reported because the prostitute relies on the pimp for protection from customers, other pimps, and the police.

Police corruption is one of the most severe consequences of criminalization. Enforcement of prostitution is almost entirely up to the discretion of police officers. Most soon become aware of the identity of local prostitutes and can choose to arrest them at almost any time. Prostitutes are almost completely at their mercy. A formal analysis by the Washington State Department of Social and Health Services in Olympia has revealed

that 20 percent of prostitutes who reported injuries in the Seattle area were injured by police officers.[51] Such power over prostitutes creates a temptation many police officers are unable to resist, and some extort sexual services from prostitutes.

Despite its staggering social and economic costs, the criminalization of prostitution is often defended on grounds that legalization would give society the appearance of "condoning" its practice. A similar rationale is also given for the refusal to strike adultery statutes. In Colorado, a compromise was reached by the state legislature whereby adultery remained a crime on the statute books but no penalty was provided. This statute was overturned in 2013.[52]

In fact, legalization of prostitution would no more constitute a condoning of the practice than the legalization of smoking, drinking, adultery, overeating, inadequate exercise, or jilting lovers. In fact, by persisting in policies of criminalization of prostitution, policy makers not only ensure the continued domination of prostitution by criminal elements but also deprive society of billions of dollars of potential revenues that are instead diverted to crime. The hypocrisy of such laws is manifested not only by the widespread corruption that criminalization breeds but also by the tactics used by law enforcement to ferret out acts of prostitution.

Comparable to illegal marijuana transactions, the consensual act of prostitution has no complainant. When arrests prove to be an insufficient diversion to street solicitation, enforcement agencies often resort to "sting" operations to ferret out possible acts of prostitution between consenting adults—rather than track down violent criminals. In a Washington state case, police authorized a female snitch to engage in "22 acts of prostitution over a three-week period and to supervise other women while taking part in prostitute recruitment activities in order to gather evidence."[53] In a California sting operation, a motel manager testified that a vice squad officer had "come to the defendant's motel approximately [10] times during a two-month period, importuning her each time to find a girl for him, and that she repeatedly told him she did not have any girls and to stop bothering her." When she finally decided to get the officer off her back by sending him to see someone at another hotel, she was arrested for promoting prostitution.[54]

Were the costs of criminalizing prostitution limited to the billions of dollars in wasted enforcement costs, lost tax revenues, and the incalculable amount of support provided to crime, the consequences would not be so tragic. But each year, thousands of innocent people die of AIDS, the eradication of which is made extremely difficult, if not impossible, by the

criminalization of prostitution. As is the case with consensual use of drugs, no "price is too high" to enable self-serving policy makers to be able to pat themselves on the back for refusing to "condone" prostitution.

Gambling

> [Lotteries are] a tax on the willing.
>
> —Thomas Jefferson[55]

In early 1993, 33 states and the District of Columbia sponsored official lotteries.[56] Twelve states, including South Dakota and Colorado, have legalized casino gambling.[57] Fifty-two Indian tribes in 17 states operate casinos.[58] Forty-seven states sponsor some form of gambling.[59]

Nevada first legalized casino gambling in 1931; the gambling industry now accounts for 60 percent of all Nevada jobs and pays more than half of the state's taxes.[60] As a result, the state's only income tax is a voluntary one—paid for by willing gamblers. Low corporate taxes, made possible by gambling revenues, fostered what has been at times the fastest-growing economy in the United States.[61]

In the earliest days of the republic, state-sponsored gambling financed everything from the Revolutionary army to the most prestigious universities, including Harvard, Dartmouth, and Princeton.[62] However, a series of lottery scandals in the late 1800s triggered a wave of antigambling hysteria, so that by 1962 no state operated a lottery.

The criminalization of gambling proved a boon to organized crime during the early 1900s in the United States,[63] which got another big boost by Prohibition.[64] When Prohibition was finally ended by the 21st Amendment, organized crime faced possible extinction. Indeed, had the repeal of Prohibition extended to gambling, prostitution, and drugs, organized crime would almost certainly have met an ignominious end.

But it was not to be—and the continued criminalization of gambling played a crucial role in its resurrection. By the 1950s, gambling was big business for organized crime. A 1952 study by the American Bar Association reported that "illegal gambling has been the principal source of profits and backbone of organized crime during the [20] years since the repeal of Prohibition and up to the present time."[65]

A California special crime study commission reported that "in California, as in most other states of the Union, the principal profits of organized crime are realized from illegal gambling, prostitution, the narcotics trade [and a variety of lesser rackets]."[66] A 1969 study reported that illegal gambling grossed more than $20 billion, of which "$2 billion per year finds

its way directly and indirectly into the hands of corrupt public officials and law enforcers."[67]

Although the loss of tax revenues from the criminalization of gambling costs local government billions of dollars, the diversion of those same billions to organized crime costs society much more—as did the billions diverted toward the corruption of public officials. Indeed, the social and human costs of the criminalization of gambling are virtually incalculable.

With regard to the legalization of alcohol, it took just 13 years after the criminalization of alcohol use for Mill's prediction—that "wrong opinions and practices gradually yield to fact and argument"—to be vindicated. Such a yielding to "fact and argument" took many more years in the area of the legalization of contraception, and it has yet to take place with regard to the legalization of drugs. It is not surprising, therefore, that it has taken almost a century to legalize gambling on a broad basis, deprive organized crime of a major profit base, and earn much-needed revenues for social services.

Like the opposition to drug and alcohol legalization, moral hypocrisy continues to play a large role in the opposition to legalized gambling. For example, the governor of Connecticut stridently opposed gambling in his state on moral grounds—until, that is, the Connecticut Indians (who took advantage of a U.S. Supreme Court ruling on Indian rights of sovereignty)[68] offered the state a $100-million gambling revenue-sharing deal.[69]

The answer to moralist opposition to gambling is essentially the same as to the moralist opposition to the legalization of alcohol and marijuana—namely, that such activities should be legalized not because they are good, but because they are bad—and criminalization deprives government of the resources needed to fund programs that have proven effective in inhibiting those activities. For example, no amount of criminalization or heavy-handed enforcement was able to significantly reduce the level of tobacco consumption. But education and an ongoing information program on the dangers of smoking reduced smoking by 36 percent between 1965 and 1987.

Unfortunately, the history of decriminalization in the United States reveals a tendency toward policies which are "all or nothing." One of the most distinct advantages of legalization is that it releases law enforcement resources to focus on the more narrow aspects of regulating particular types of usage. For example, the repeal of Prohibition might have been accompanied by extremely strict laws on drinking and driving, and enforcement resources released by repeal might have been directed toward the enforcement of such laws. In Finland, for example, most people consume alcohol, but consumption is heavily taxed, and few citizens risk

drinking and driving because such activity is considered to be extremely serious—as are the penalties such as mandatory incarceration in camps above the Arctic Circle. In the United States, by contrast, first-time drunk drivers are often let off with nothing more than a fine.

Although the consumption of tobacco in the United States has been greatly reduced by education and antitobacco campaigns, a well-financed tobacco lobby has succeeded in procuring tobacco subsidies through legislation; they have also gotten tobacco taxes limited to levels far below what would create a black market. As a result, the government forfeits potential tax revenues that could be used to further promote education and antismoking campaigns. More important, higher taxes would give those on the verge of quitting an extra financial incentive to give up a habit that is far more deadly than most drugs.

Hypocrisy is not limited to the opponents of legalization. Opponents to higher tobacco taxes claim that higher tobacco taxes would constitute a regressive tax on the poor. In other words, higher taxes would only inhibit the poor from smoking themselves to death whereas the rich would suffer no such financial inhibition. Thus, only the lives of the poor would be saved by higher tobacco taxes. Only tobacco tax opponents could argue that such taxes hurt the poor.

Relatively low tobacco taxes in the United States have succeeded in destroying a Canadian policy of inhibiting smoking through imposition of high taxes. Canada was finally forced to rescind its high cigarette taxes after smuggled cheap American cigarettes undercut its tobacco taxation program.

The all-or-nothing mentality of policy makers has carried over into legalized gambling. One of the most important goals of legalization should be to deprive organized crime of its profits and divert money that would be spent on gambling in any case (legal or illegal) to the public coffers where they can be used for socially useful purposes. Such a goal is perverted, however, when states attempt to encourage gambling by those who would otherwise have no inclination to do so.

Many states that permit legalized gambling also allow the advertising and promotion of such gambling. Typical of such promotion is that of a giant Illinois lottery billboard in a ghetto of Chicago that teased, "This Could Be Your Ticket Out."[70] In some states, lottery operators deliberately time their advertisements to coincide with the dates when low-income recipients receive their Social Security checks.[71] Radio and television advertisements often target working-class people.[72]

Such types of promotion convey a message that "gambling is not a vice but a normal form of entertainment."[73] This message is not only inconsistent

with the rationale for legalization but also diametrically opposed to it. In a perverse way, it also provides ammunition to those who oppose legalization in the first place.

Legalization of personal vices is justified by a considered weighing of the costs and consequences of criminalization. Tobacco and alcohol have not been legalized because government encourages or "condones" their use. Indeed, they have been legalized because the government has, by expensive trial and error, determined that their use can be more effectively inhibited by legalization, education, and rehabilitation. It is also based on the premise that government can find better uses for its proceeds than subsidizing organized crime and that the creation of a police state is too high a price to pay to enforce absolute prohibition of what is essentially consensual conduct. In short, legalization is a policy based on a reasoned and responsible consideration of societal priorities.

A legitimate theory of legalization therefore requires a concomitant policy of education, treatment, and discouragement of use. Most important, a policy of legalization requires a forthright acknowledgment that the activity legalized is still considered to be a "vice" and that government is committed to the use of every means of persuasion and education to inhibit an activity deemed harmful.

Thus, legalization of alcohol and tobacco should have been accompanied not only by a ban on promotion and advertising[74] (as was later done belatedly with regard to television and radio advertising) but also by a more extensive antiuse campaign funded by higher taxes on consumption. Today, both liquor and cigarette taxes in the United States are far below that of many foreign countries. Higher taxes in the United States could fund far more extensive public service antismoking and antidrinking advertisements in both broadcast and print media. For example, one of the most effective antismoking advertisements (and one that most enraged the smoking lobby) was one showing glamorous young movie actress Brooke Shields with cigarettes sticking out of her ears, implying that she did not think smoking was "cool" and that she would not date someone who smoked. Indeed, evidence revealed that the ad had such a devastating effect in reducing the use of tobacco by young people that lobbying groups eventually succeeded in having the ad taken off the air.

A ban on promoting and advertising should accompany any future legalization of drugs. Government should make clear that legalization should not be confused with condoning or encouraging its use. Taxes earned on drug sales should be devoted toward funding education and treatment centers. Today, the wealthy can go to a Betty Ford clinic to

"detox." Poorer addicts are showered with billions in incarceration and prosecution expenses but provided little in terms of treatment and education.

The legalization of gambling should be accompanied not only by a ban on promotion and advertising but also by a vigorous education campaign. Just as cigarette manufacturers are required to warn cigarette users of the dangers of smoking, lotteries and casinos should be required to advise all customers of the economic stupidity of their wagers. Although most lotteries require that the lottery ticket state the actual odds on the back of each ticket, the print is usually so small that it can be read only with a magnifying glass. A short warning along the lines of "You should be aware that you are, over the long term, betting one dollar for the chance of winning 50 cents"[75] might be appropriate. Instead of posting the portraits of jackpot winners, casinos might be required instead to post the names of cooperating losers along with the amounts they had lost. If casinos balked, the state has the ultimate negotiating tool of the power to criminalize gambling. If a casino did not like the regulations, it could simply decline to enter the gambling business.

Indeed, one reason why a significant amount of illegal gambling still exists in the United States is that legal gambling enterprises persist in trying to fleece and mislead their customers. A favorite ploy of almost all lotteries is one that insults the intelligence of all but the most ignorant of lottery customers—namely, advertising a huge jackpot that is payable only in installments over 20 or 30 years. In fact, of course, the current cash value of such jackpot "annuities" is only a small fraction of the advertised jackpot advertised. Illegal numbers operations almost always pay off in a lump sum in the actual amount advertised.

The typical legalized state lottery keeps a "rake" of more than 50 percent of the amounts wagered.[76] As Scarne has noted, "state run lotteries have not hurt the illegal numbers games, for a very good reason: the numbers racket pays better odds than the state lotteries do."[77] Most illegal numbers rackets retain no more than 30 percent to 40 percent of wagers.[78] Indeed, if a gambling enterprise in Las Vegas attempted to keep a rake as unconscionable as that of the typical state lottery, its operators would probably be run out of town on a rail. By contrast, horse racing retains only 19 percent of wagers,[79] slot machines 3 percent to 11 percent, sports bookmakers 4.5 percent, and casino table games approximately 3 percent.

For such reasons, the legalization of gambling in many states has had only a limited effect on illegal gambling. Governments have gone from the one extreme of prohibiting gambling altogether to the opposite extreme of actively promoting gambling and extracting the greatest possible rake from

players. In fact, such governments cause far greater harm than the illegal gambling they purport to replace.

A responsible gaming policy must include not only an education and treatment program for compulsive gamblers and those who can least afford it but also strict prohibitions against promotion and advertising. Those who wish to gamble in states that forbid gambling have no trouble finding outlets for their illegal gambling activities. Because the purpose of legalization is to provide an outlet for those who will gamble in any case, there should be no need for promotion or advertising of legal gambling.

Opponents of legalized gambling often note that gambling losses are often incurred by those least able to afford it. This is doubtlessly true, but such an argument fails to consider the fact that many of the same people who lose money in legal gambling establishments would lose it in illegal ones. The difference is that in the case of legalized gambling, the player has a legal recourse against fraud and extortion. Likewise, a legalized gambling operation will have a legal recourse against a cheating player, whereas violence may be the only recourse by an illegal gambling operation.

Legalization opponents also sometimes argue that legalized gambling will attract undesirable elements of society. In fact, this has not proven true where gambling has been legalized. As one critic has noted

> the claim that casinos attract unsavory characters as compared to families has no merit. Can anyone prove that the millions of vacationers and conventioneers—consisting of professional people, blue collar workers, and their families—who have frequented Las Vegas, Reno, Lake Tahoe, the Bahamas, and Atlantic City, are undesirable visitors?[80]

Despite evidence that legalized gambling has siphoned off billions of dollars from organized crime, legalization opponents persist in their claim that legalized gambling attracts organized crime. It is true, of course, that in the early days of legalized gambling, when Las Vegas had one sheriff and virtually no state regulation, organized crime became involved in Las Vegas casinos. Today, however, legalized gambling, particularly in Las Vegas and Atlantic City, is closely regulated. Gambling license applicants are subject to the most rigorous background checks of any industry in the United States.

Notwithstanding claims by those who have an ax to grind (such as Atlantic City casino owner and U.S. president Donald Trump), the recent expansion of gaming to Indian reservations has been remarkably free of organized crime influences. Although there were legitimate concerns about

mob influence in the early 1980s,[81] by 1992 the U.S. Justice Department was able to report that it found "no widespread or successful effort by organized crime to infiltrate Indian gaming operations."[82]

Indeed, gambling profits on Indian reservations, which exceeded $400 million in 1992, have financed community, health, and education programs for impoverished tribal communities.[83] In 1982, for example, 70 percent of the members of the Shakopee Mdewakanton Sioux Indian tribe were on welfare. Two to three families lived in squalid trailers. Ten years later, after the infusion of millions of dollars of gambling profits, children of tribal members were guaranteed free college educations and liberal trust fund payments for their development and job training.[84]

In 1985, the Bureau of Indian Affairs reported a 39 percent unemployment rate among American Indians and a 45 percent poverty rate.[85] The government's response was to cut spending by the Bureau of Indian Affairs by 75 percent between 1977 and 1990.[86] In 1991, however, Indian gambling profits were 11 times greater than the money spent by the bureau.[87]

Legalized gambling represents recognition by government of the human instinct for risk-taking. For some people, this instinct manifests itself in investment in risky penny stocks, real estate ventures, or pork bellies. For others, risk-taking takes the form of a recreational activity. In the long term, this instinct can no more be suppressed than the profit motive that communist governments attempted to suppress. Ultimately, policy makers must make the difficult decision as to whether gambling profits will be used to fund further illegal activities or promote the public good.

One of the driving forces that finally forced the legalization of alcohol and the ratification of the 21st Amendment was the economic factor: the tax revenues from alcohol consumption have proved enormous. Today, a renewal of alcohol criminalization would probably result in the bankruptcy of many states that rely heavily on liquor taxes.

Although the prospect of healthy tax revenues was not the driving force for the legalization of marijuana by referendum in Colorado in 2014, the attendant revenues to the state as a result of legalization were $129 million in fiscal year 2015 alone.[88] Any future act to reinstate criminalization in Colorado would therefore directly affect overall state revenue and bring a commensurate decline in state services, including education and rehabilitation.

Thus, the challenge for marijuana legalization, like gambling, is twofold: first, to channel the profits from marijuana sales away from organized crime to the public coffers, where it can be used to promote the public good; and second, to educate consumers to the risks and dangers or irresponsible

marijuana consumption. This can be accomplished only when legalization is accompanied by the strict regulation of promotion and advertising of marijuana and the creation of a fair and comprehensive regulatory system.

To date, Colorado can lay claim to progress with regard to meeting these criteria, establishing a comprehensive regulatory system and allocating the tax revenues to worthy public uses. In 2016, four more states—California, Maine, Nevada, and Massachusetts—finally passed referenda that legalized recreational marijuana use, and four more states—Florida, Montana, North Dakota, and Arkansas—legalized it for medical uses.[89] It remains to be seen if these new states will create their own models or adopt successful models of regulation in a way that will maximize public health benefits.

CHAPTER THREE

Lessons from the Prohibition Era

> Policy is formed by preconceptions and long implanted biases. When information is relayed to policy makers, they respond in terms of what is already in their heads and consequently make policy less to fit the facts than to fit the baggage that has accumulated since childhood.
>
> —Barbara Tuchman, *Practicing History: Selected Essays*, p. 289

> If a law is wrong, its rigid enforcement is the surest guaranty of its repeal.
>
> —Herbert Hoover, Public Papers of the Presidents of the United States, 1929, p. 102

Perhaps no other experience in American life draws a closer parallel to the prohibition of marijuana than the prohibition of alcohol by the 18th Amendment to the U.S. Constitution. America's great experiment of Prohibition raised fundamental questions about how law is created and the role of values and cultural traditions in the lawmaking process of a democratic society.

The lessons of Prohibition were learned only after years of upheaval, violence, suffering, and corruption. But lessons learned are often forgotten by the next generation. It is an important role of history to remind succeeding generations of those lessons so they can be learned in a less expensive way than by hard experience.

When Barbara Tuchman observed that "[policy] is formed by preconceptions," she might have added that policies are far easier to discard than

preconceptions. In the case of national Prohibition, an overwhelming majority of those in Congress and in 45 of the 48 states had an almost ideological preconception about the role of law in society. It was a preconception that law could be a substitute for social reform; that the basis of law should extend beyond protecting citizens from unwanted and harmful conduct of others and into protecting citizens from the consequences of their own behavior.

Like ideology, preconceptions almost always fall hard. For a politician responsible for a constitutional amendment as radical as the 18th Amendment, to admit error was almost unthinkable. Despite mounting evidence of failure, drastic efforts were made to conceal that evidence. As renowned political commentator Walter Lippman wrote in 1931 in *Vanity Fair*, referring to the whitewashing Wickersham Commission on Prohibition, "everything possible was done to conceal the truth from the public generally. . . . What was done was to evade a direct and explicit official confession that federal prohibition is a hopeless failure."[1]

The accumulating evidence that Prohibition was a monumental failure was indeed staggering. For example, the average annual consumption of spirits doubled from 101 million gallons at the beginning of Prohibition in 1919 to 204 million gallons in 1926, the height of Prohibition.[2] Death rates per 100,000 people from alcoholism and alcohol poisoning skyrocketed from 1.4 in 1919 to 4.1 in 1926. Meanwhile, the number of prisoners serving long-term sentences tripled between 1921 and 1931. By 1930, more than one-third of the nation's scarce prison space was allocated to those convicted of Prohibition offenses.[3] A report to the Wickersham Commission on Prohibition in 1929 revealed that "crime had increased by 50 percent as a result of Prohibition."

Social commentators began to note the hypocrisy of politicians who defied the Prohibition laws in private while professing support in public. In more recent decades, U.S. presidents have admitted to using marijuana privately and yet have still publicly supported prohibition on cannabis.

Today, criminalization of marijuana use deprives the government of untold billions in tax dollars that are diverted toward nonproductive criminal uses—as they were during Prohibition. Although it is impossible to precisely determine the effects of criminalization of drug use on the economy, the economic loss of billions of dollars—just when government programs such as Social Security and Medicare compete for scarce dollars from a deficit-ridden treasury—is staggering. The 18th Amendment was passed by the one of the largest majorities in American political history and prohibited the production, distribution, and sale of all alcoholic beverages, including wine and beer. In 1917, it was approved by a vote of

65–20 in the U.S. Senate and 246–95 in the House, and the consequent amendment was then ratified by 45 of the 48 states within 25 months (only 36 states were needed for ratification).[4] When Prohibition's enforcing legislation, the Volstead Act, was vetoed by President Woodrow Wilson for technical reasons on October 27, 1919, his veto was overridden by Congress by a vote of 176–5 in the House and 65–20 in the Senate.[5]

The Origins of Prohibition

The American temperance movement can be traced to a widely reported sermon against the sins of drunkenness—or intemperance—delivered by Reverend Increase Mather of New England in 1673. Ministers of such religious denominations as the Methodists, Presbyterians, and Congregational Church followed this call with their own intemperance sermons. Many church leaders demanded total abstinence from alcohol from all members of their congregations. Because such calls for voluntary abstinence had only limited effect among churchgoers and were widely disregarded by those outside the church, they were soon followed by demands for laws enacted and enforced by the state.

As early as 1685, the Society of Friends demanded at their yearly meeting that a law be passed making it illegal to sell liquor to Indians. In 1783, the Brethren of "Dunkards" declared that all those who disobeyed a prohibition on drinking alcohol should be excommunicated from church.

Early legal efforts to inhibit the consumption of alcohol met with limited success. In 1777, Dr. Benjamin Rush, an instrumental figure in the promulgation of the Declaration of Independence, published a paper outlining the harm caused by the consumption of alcohol. This paper, which was directed only toward the consumption of distilled spirits, and not beer or light wine, was adopted and approved by the Board of War of the Continental Congress. On March 25, 1776, orders were given to Continental army officers to prevent soldiers from visiting bars, which were then known as "tippling houses." The sale of spirits to soldiers was prohibited by an act of the Continental Congress on September 20. Two years later, the Continental Congress passed resolutions calling on each colony to prohibit distilling of alcohol. Several did so, including Pennsylvania, which took strong measures against distilling in 1779.

In 1785, Rush published his famous article on the harmful physical effects of alcohol titled "An Inquiry into the Effects of Ardent Spirits Upon the Human Body and Mind."[6] Other physicians and surgeons soon took up the temperance cause from the medical perspective; as a result, the

New York College of Physicians in 1790 presented to the U.S. Senate a comprehensive document setting forth the adverse physical consequences of alcohol consumption and urging that action be taken to curb the use of alcohol.

In 1802, Congress shifted emphasis to the prohibition of liquor to Native Americans, authorizing President Thomas Jefferson to take all necessary measures to prevent such sales. In 1805, William Henry Harrison, governor of the Northwest Territory and future U.S. president, pushed through legislation prohibiting the sale of liquor to Native Americans residing within a 40-mile radius of the town of Vincennes.

The American Temperance Society

The first attempt to organize a temperance movement was in 1789. Two hundred farmers in Litchfield, Connecticut, met to create an association "to discourage the use of spirituous liquors." Although this first attempt at organization was considered fanatical at that time, Litchfield was to become the center of the New England temperance reform movement, initiated in 1810 by church leaders.

Other temperance societies soon sprang up, but none formed a nationwide organization until the American Temperance Society. Also known as the American Society for the Promotion of Temperance and later the American Temperance Union, the society held its first national temperance convention in Philadelphia in 1833.

By the 1850s, the temperance movement had evolved into a political action group. In 1853, Reverend John Marsh, secretary of the American Temperance Union, declared:

> We ask at the hand of our civil legislatures a prohibitory law which we can not get except at the hands of political action. It is, therefore, to me absurd to renounce or reject all pretensions to mingle in politics. We mean to carry it to the polls and to carry the polls in our favor. . . . We have up to this time been timid before politicians. We have said "We did not mean you." We say now, "We do mean you and will put you down if you do not give us what we ask." These are our sentiments.[7]

Political action had some successes during this period in states such as Illinois, Rhode Island, Maine, and Massachusetts, which adopted statewide prohibitions; others such as Louisiana adopted local option laws. In 1852, Abraham Lincoln joined the Sons of Temperance in Springfield,

Illinois. Reaction to such laws was sometimes fierce, however, as in Illinois and Maine where, in 1855, the militia had to be called out to quell protests against alcohol prohibition.

Political action soon led to the formation of the Prohibition Party in Mansfield, Ohio, on July 24, 1869. The party first ran a national presidential ticket in 1872; by 1892, it was polling more than one-quarter of a million votes in the national presidential election.

During the late 1800s, other reform movements such as the Woman's Crusade of 1873 and the Woman's Christian Temperance Union were organized in support of national prohibition. This latter organization was successful in securing "scientific temperance instruction" in the public schools. A second wave of state prohibition laws was initiated during this period in additional states such as Kansas and North Dakota. However, by 1890 many states later repealed their prohibition laws; by the end of 1890, only six states had statewide prohibition laws or constitutional prohibition amendments.

The decade of the 1890s proved to be a low point in the prohibition movement. Not only did many states repeal their prohibition laws, but those that retained them found their laws all but impossible to enforce. As a result, the alcohol industry began a period of expansion and growth. In reaction to such developments, the Anti-Saloon League was formed in 1893 in Oberlin, Ohio, and local leagues were soon established around the country.

The Progressive Movement

The Progressive Movement, which arose in the early 20th century between the election of Theodore Roosevelt in 1901 and the repudiation of President Wilson in 1919, was essentially a movement to reclaim democracy after a period of industrial consolidation, the growth of big business, and the creation of a discontented urban underclass. The Progressive Movement promoted a wide variety of legal and political reforms, including prohibition.[8]

In the first decade of the 1900s, prohibition was seen as a means of eliminating alcohol consumption, which was thought to impair human reasoning and undermine religion and government. It was based not only on the teachings of science but also on the democratic principle of curbing a plutocracy, of which the most corrupting was the liquor industry.

A religious component of the Progressive Movement was also recognized. Protestant denominations in particular saw alcohol consumption as undermining Christianity's most powerful incentive to self-discipline

and social morality. The result was wretched homes, pauperism, crime, disease, vice, and a lowering of society's general moral tone. Catholic reformers perceived alcohol consumption as destroying human decency and honor.

These reformers were probably on the weakest ground, however, when they attempted to invoke biblical scriptures to support their demand for prohibition. Such reliance soon triggered a vigorous theological debate on whether the Greek and Hebrew words for wine should be properly translated as "unfermented grape juice." If the suggested vision of Jesus and his disciples at the Last Supper drinking something akin to Welch's grape juice was not enough to arouse the snickers of the wine industry, then other readers of the Bible suggested that perhaps Ephesians 5:18 should be changed to read, "And be ye not drunk with unfermented grape juice."

Other members of the Progressive Movement emphasized the dangers alcohol posed for representative democracy. If the lower classes were permitted to continue drinking, they would become both corrupted and impoverished and would eventually sell their votes to those who would confiscate and redistribute property and abolish liberty and free government.

Although several Catholic organizations formed prohibitionist societies (such as the Catholic Prohibition League of America), most Catholics resisted the prohibition movement, especially after some prohibition laws refused to exempt even sacramental wine for communion services.[9] Most Jewish organizations also resisted prohibition, the Reform Wing of American Judaism denouncing it in 1914 as a fanatical movement.[10]

Scientific Contributions

By 1900, anti-alcohol advocates had amassed a formidable mass of scientific literature to buttress their demand for prohibition. As early as 1866, Dr. Benjamin Watson concluded that alcohol acted as a depressant rather than as a stimulant despite popular perception. In 1892, Professor Emil Kraepeling of the University of Heidelberg reported that alcohol functioned as a narcotic drug, depressed both the brain and the nervous system, and diminished a person's ability to function and perform physical tasks.[11]

In 1896, the Massachusetts Bureau of Labor Statistics reported that more than one-fifth of all mental diseases were directly caused by the use of alcohol. A study by the American Medico-Psychological Association reported that 24 percent of mental diseases were caused by alcohol and that alcohol was the sole cause of insanity in more than 14 percent of

cases. Alcohol was also linked to cirrhosis of the liver, Bright's disease, heart disease, chronic catarrhal inflammation of the stomach, and lowered resistance to a host of other serious diseases.[12]

Years before modern science linked alcohol consumption to birth defects, alcohol in the pre-Prohibition era was linked to no less than four classes of mental retardation in children, including imbecility, idiocy, epilepsy, and feeblemindedness. A 1908 issue of *McClure's Magazine* reported a study revealing that 5 percent of all cases of imbecility and 20 percent of cases of epilepsy (more than 160,000) were caused by parental use of alcohol. A study of 57 children produced by alcohol-consuming parents revealed that 82 percent suffered defects, including deformation, idiocy, and epilepsy. Only 10 percent were found to be normal.[13]

A national meeting of neurologists and psychiatrists in 1914 declared alcohol to be a "definite poison to the brain and other tissue" and the cause of many severe mental and physical defects. In 1918, the American Medical Association (AMA) declared itself as opposed to the use of alcohol on grounds of its medical harm, its president declaring that the AMA would "welcome national prohibition."[14]

School textbooks of the period stated categorically that alcohol "is a colorless liquid poison" that "is always a poison and always harmful to the human body." A contributor to *Cosmopolitan* magazine in 1908 declared that alcohol is "poison pure and simple" and that it should be put subjected to legislation like other drugs such as arsenic, strychnine, etc.[15]

Statistical reports seemed to confirm the scientific literature. The American Underwriter reported that alcohol was a significant factor in 7.7 percent of all deaths.[16] A joint study by the Actuarial Society of America and the Medical Directors' Association, which represented over 43 insurance companies in North America, showed that even moderate drinkers (who drank less than two beers a day) had a mortality rate 18 percent greater than nondrinkers.[17]

A study of the returns of 33 charity organization societies that was published in the *Economic Aspects of the Liquor Problem* found that more than a quarter of all cases of poverty were traceable to alcohol.[18] The Massachusetts Bureau of Labor Statistics reported in 1895 that 39 percent of the state's poverty cases were directly caused by alcohol.[19] In 1914, *Literary Digest* published a study of 13,402 convicted criminals in 12 states that concluded alcohol was a significant contributing factor in half of all crimes and the primary cause in a third of all crimes.[20]

The Coalition of Prohibition Interests

By 1915, an unlikely coalition of powerful interest groups were uniting to press for national prohibition. Business groups became convinced that the $2 billion spent on liquor could be diverted toward more productive consumer goods, thus raising the standard of living for all. Companies that stood to benefit most directly from prohibition such as Welch's Grape Juice and Coca-Cola were in the forefront.

A study of the effects of prohibition in several states concluded that wherever prohibition was enacted, there was an increase in bank deposits, trade, and business activity. World War I increased people's concerns about national survival and caused many to support prohibition as a means of increasing military efficiency.

At a time when business and labor could agree on little, union leaders supported business in pushing for prohibition, stating their belief that liquor dulled the working man's "class consciousness" and rendered him incapable of fighting vigorously for better pay and working conditions.

Supporters of the Progressive Movement shrugged off concerns about the loss of government revenues that might be caused by prohibition, noting that the $340 million in liquor tax revenues only made the government more beholden to the liquor industry.

Southern politicians determined to perpetuate a system of racial segregation believed that liquor might encourage racial protests and violence. A not uncommon perception was that a bar room would precipitate a race war. Indeed, many racial violence incidents involved alcohol use.

Other proponents of prohibition expressed concern that liquor played a major role in the rape of white women. *Collier's* magazine published an article in 1908 suggesting that the liquor industry's practice of selling liquor bottles with images of naked white women on their labels inflamed sexual passions of African Americans.[21]

The 18th Amendment

The 18th Amendment to the Constitution was the culmination of a gradual but relentless national prohibition strategy. The process began in 1901 when Congress passed the Anti-Canteen Law and continued by banning the shipment of liquor through the mails in 1908. Next came the Webb-Kenyon Act of 1913, which prohibited the interstate shipment of liquor to states where it was prohibited; the Lever Food and Fuel Control Act of 1917, which forbid the use of food products in the production of liquor; the War Prohibition Act of 1918, which prohibited the sale of beer

and wine; and finally the National Prohibition Act of 1919 (more popularly known as the Volstead Act), which provided for enforcement of the War Prohibition Act and defined an intoxicating liquor as any beverage containing more than 0.5 percent alcohol.

The 18th Amendment provided that the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." It further provided that "the Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The Prohibition Experience

By 1914, 74 percent of the United States by area and 47 percent by population were dry.[22] However, these laws were commonly evaded by importing alcohol from wet states. Because Congress has exclusive power to regulate interstate commerce, dry states were powerless to prevent this circumvention of their laws.[23] Congress then passed the Webb-Keyon law, forbidding shipments of liquor where they would be consumed in violation of state law.[24] But still the laws were circumvented. Even under Webb-Kenyon:

> liquor forces poured their liquor into dry states and communities. . . . [It] became perfectly clear to the people that the liquor problem could only be solved by an amendment to the Constitution of the United States that would outlaw the liquor traffic in every foot of American soil. . . . [25]

Prohibitionists believed that a national dry law would succeed where state dry laws had failed. State laws were violated internally, for instance, by "blind pig" establishments and externally by importing alcohol from wet states. Importation occurred even in the face of the Webb-Kenyon law making it illegal. A national dry law could, of course, be circumvented in the same way: by surreptitious production within the borders or by importation across the borders from countries where alcohol was legal.

The Volstead Act was the federal law designed to enforce Prohibition. The act, however, had major loopholes: it allowed the use of alcohol for medicinal and sacramental purposes, and it did not "prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in government bonded warehouses."[26]

Doctors, for instance, were allowed to prescribe whiskey, beer, and wine for medicinal purposes in a way comparable to doctors who now

prescribe marijuana for medical purposes in states where medical use of cannabis is legal. When the Volstead Act first went into effect, "Thousands of Americans complained of ailments which could be relieved only by copious draughts of these beverages."[27] According to one estimate, doctors were paid $40 million in graft to write fraudulent prescriptions.[28] In 1920, 15,000 doctors and 5,700 pharmacists applied for medicinal use permits.[29] In 1921, more than 8 million gallons of alcohol was prescribed, a 20-fold increase over the pre–Prohibition era.[30] By 1929, the 100,000 permitted doctors were writing 11 million prescriptions per year.[31] In Chicago, an estimated 50 percent of the one-half million prescriptions for whiskey were fraudulent.[32]

Of course, some enterprising scofflaws found it convenient to eliminate doctors as middlemen altogether. Huge numbers of counterfeit prescription forms with forged doctor signatures flooded some cities. In 1920, for example, Prohibition agents in Chicago counted 300,000 forged prescriptions. The prescriptions were filled at drug houses or retail druggists. Eager to participate in the source of newfound wealth, bootleggers set up shop as druggists to receive government permits to fill prescriptions. Before Prohibition, 400 drug houses filled the demand for medicinal alcohol; by the late 1920s, there were 3,300 such firms.[33] When the Willis-Campbell Act was passed to address these problems, the primary effect was to increase the price of the prescription. The doctor received two dollars for the prescription and the druggist from three to six dollars for the half-pint.[34] Foretelling the demise of Prohibition, enforcing the law simply made it more profitable to break it.

The alcohol sold by druggists had been accumulated and warehoused by the federal government before Prohibition began. In 1920, these supplies were estimated to be between 40 million and 70 million gallons.[35] The supplies were stored by the government but still owned by the distillers, although they were prohibited from disposing of them.[36] Distilleries continued to operate to replenish the whiskey used for medicinal purposes, brandy used to fortify sacramental wines, and rum used to treat tobacco products.[37] A major exception of the Volstead Act was that it did not prohibit the sale of stored distilled spirits in government warehouses.[38] Under Volstead and existing notions of property rights, nothing prevented the sale of the warehoused alcohol, only that it could not be moved.[39]

George Remus, a Chicago attorney, understood the enormously lucrative potential under this section of Volstead. Eventually, he bought more than a dozen distilleries in Kentucky, Missouri, and Ohio, thereby taking rights to the stored supplies owned by those distilleries.[40] Under the medicinal permit system, he then accepted prescriptions.[41] Because he was not

transporting the alcohol, he was perfectly legal under Volstead: he was selling liquor on permit under government control.[42] But by controlling manufacture and sale, he saw "[excellent] discretionary opportunities in bookkeeping, distribution, and other business methods."[43] He bootlegged his supplies by rail and truck throughout the Midwest and to New York and Philadelphia. He would leave enough liquor in the warehouse to satisfy government inspectors.[44] After a few years of operation, his business was earning $50 million a year and employing 3,000 people.[45] His personal take was $5 million over a five-year period.[46] For his short but profitable life in crime, Remus served five short jail sentences and paid $11,000 in fines.[47]

Remus was the largest but not the only bootlegger of warehoused alcohol. Enormous quantities of stored liquor made their way into the illicit distribution system. By 1925, legal controls on medicinal liquor had been tightened—but not before as much as two-thirds of the original 70 million gallons stored before the onset of Prohibition had been siphoned off.

Wine was something of a favored drink under Prohibition. Volstead contained an "apple-cider" provision that allowed "home fermentation of fruit juices."[48] This exception was exploited by every household that enjoyed wine; in these homes, "the cellar, garage, or a closet usually held a keg of grape juice quietly obeying the call of nature. . . ."[49] Under this exception, consumption of wine rose by two-thirds under Prohibition. By 1930, 100 million gallons of wine were produced.[50] From 1920 to 1926, sales of grapes doubled. In California, the acreage devoted to growing grapes grew from 97,000 acres in 1919 to more than 680,000 in 1926.[51] No wonder that Andrew Volstead was soon nicknamed the "patron saint of the San Joaquin Valley."

It should be no surprise that Volstead's exception for sacramental wine was also exploited for monetary gain. The exception was an allowance to Jewish families who could have as many as five gallons of wine a year.[52] The wine was purchased by rabbis who had to present a government-issued permit and a list of members in their congregation. There was no government oversight, however, over who could become a rabbi. Permits were rarely checked, and anyone convincingly presenting themselves as a rabbi could buy wine. According to one estimate, the demand for sacramental wines increased by 800,000 gallons during the first two years of Prohibition.[53] One Prohibition proponent fumed that the sacramental use of wine was converted into a sacrilegious use.[54]

Although beer was not a favored drink under Prohibition, it was probably the easiest beverage to make. The Volstead law prohibited the production of "cereal beverage" with an alcohol content greater than

0.05 percent.[55] It was supposed that "near beer" with alcohol content less than this percent would replace the consumption of real beer. However, the production of near beer required that real beer be made and the alcohol then drawn off: "A perfectly legal process was dependent on a first stage that was illegal, and that the government had to accept."[56] The manufacturers were required to ship the alcohol to government warehouses, but much was diverted to bootleggers.[57] Real beer could also be made by mixing two perfectly legal products: yeast and wort.[58] Or a brewer might put the alcohol back in a keg or ignore the second step altogether. General Andrew, the Prohibition commissioner, said in 1930:

> If a brewer is disposed to violate the law, it is just a question of putting a hose in a high-powered beer tank and filling near-beer kegs with high powered beer and running it out as near-beer. So it is a rather difficult thing to get at.[59]

Real beer was so difficult to control that it became a virtually open violation of the Volstead Act. According to one commentator, "Really enormous amounts of beer were diverted to bootleggers . . . trucks loaded with beer traveling the streets in broad daylight were a common sight in many large cities."[60] But a beer drinker did not have to depend on a black market beer supplier. Anyone could produce beer in a covert and virtually undetectable manner with wort. Wort production increased to six times the amount produced before Prohibition.[61]

The amount of alcohol distributed and consumed under Volstead's loopholes was undeniably significant. Those sources of the illicit good, however, were a small trickle compared to the flood of illicit booze smuggled from other countries. The Canadian border presented a particularly daunting task for enforcement agents.

In the first half of 1920, 900,000 cases of alcohol were imported into Canadian border towns. The amount of liquor imported into Ontario alone rose from nine gallons per capita to 102 gallons per capita with the onset of Prohibition.[62] Canadian imports of liquor from Britain alone increased six times between 1918 and 1922.[63] Just 11 days after Prohibition went into effect, the director of U.S. Customs told Congress that large quantities were crossing the border and infinitesimal amounts were being intercepted.[64] Plugging the leaks along the border was never successful. In 1928, the Department of Justice said smuggling had increased by 75 percent since 1925.[65]

In 1928, an estimated $15 million in alcohol had come across in railcars on an annual basis.[66] Rail was a particularly effective smuggling method

because of the quantity of product that could be brought across. Three cars seized in 1927 carried $200,000 worth of alcohol.[67] In April 1930, 62 planes loaded with liquor took off from Canada for landing fields in the United States.[68] In the mid-1920s, an estimated 800 rum boats operated in the Great Lakes; an equal number traversed the length of Lake Champlain and rivers throughout the northern tier of states.[69] Overnight tourists and small time smugglers would return to the United States with bottles in baby carriages, hot water bottles, and the toes of oversize shoes.[70] In the most definitive evidence of U.S. inability to stop illicit traffic, in 1927 Canada agreed to notify the United States when a boat carrying alcohol cleared Canadian customs headed for the United States. In the year March 1928, Canadian records indicated that boats loaded with 3.4 million gallons of liquor headed for U.S. shores. Of this quantity, Prohibition agents seized less than 5 percent.[71] Given the ingenuity and doggedness of the smuggling campaign, rumors of an underground alcohol pipeline or electric torpedoes filled with whiskey crossing the lakes seemed not so farfetched.[72]

Smuggling also occurred along the Mexican border, albeit on a much smaller scale. During Prohibition's first years, only 35 agents were assigned to patrol the entire length of the U.S.–Mexico border.[73] Smugglers could bring alcohol across with minimal trickery. Women would traverse the bridge between Juarez and El Paso "wearing voluminous skirts and bulging in all directions because of the goat bladders and stomachs filled with mescal and tequila and tied about their waists."[74] Some simply pushed barrels of alcohol across the Rio Grande or floated them across in rafts.[75]

In the beginning stages of Prohibition, the U.S. Coast Guard faced the greatest enforcement challenge. The rumrunners essentially operated with impunity by staying outside the three-mile territorial limit. Although U.S.-registered vessels were subject to seizure outside this limit, simply registering the ship with a different country circumvented this problem.[76] The boats would be "immune from U.S. authorities, and waited for the well-informed to come to him."[77] Thus was born the famous Rum Row, a line of ships stretching the length of the Atlantic Coast and the Gulf of Mexico just outside the reach of American law.[78] In 1922, Prohibition Commissioner Roy Haynes estimated that hundreds of these ships were anchored off the East Coast, with as many as 60 off New Jersey alone.[79] Given that the actual smugglers were beyond their reach, enforcement authorities were reduced to trying to intercept innumerable small, fast watercraft that actually brought products ashore.

The smuggling enterprises off the coasts may best reflect the thrust and parry carried on between law enforcement officers and lawbreakers. While rumrunners had their way in the early years, in 1924 Congress gave the Coast Guard some $13 million to restore 20 World War I naval destroyers. By 1928, the Coast Guard assigned three cruisers, 25 destroyers, 243 patrol boats, and 11,000 officers to the Prohibition effort.[80] Throughout the 1920s, half of the Coast Guard budget, some $15 million a year, was devoted to enforcing Prohibition.[81] An agreement with Great Britain allowed the Coast Guard to search all British ships within one hour's running distance from the coast.[82] Other countries agreed to extend the territorial limit to 12 miles.[83]

For every step taken by law enforcement, the smugglers seemed to take a counterstep. Whatever boats the Coast Guard would use, the smugglers would design their boats a touch faster.[84] To combat the 12-mile limit, the smugglers used large mother ships that would rendezvous with several small fast boats to make exchanges before they could be detected by the Coast Guard.[85] In some cases, a single slow and expendable boat carrying a minimal load would create a diversion so that several faster boats with sizable cargoes could escape.[86] Even when boats were boarded, their cargo might be so cleverly hidden that it would not be found. In the case of the ship *Alice*, the bottles were stored in 22-foot compartments built onto the outside of the ship's hull.[87]

If all else failed, smugglers were prepared to fight. Both sides, in fact, were usually heavily armed. By 1929, 18 rumrunners and eight coastguardsmen had been killed in these shootouts.[88]

The exertions of the Prohibition forces never seemed to affect the ability of rumrunners to deliver their goods. Perhaps the real effect was to make the rumrunners bigger, smarter, and more sophisticated. Despite the expense of equipping the Coast Guard, Rear Admiral Frederick Billard, Commandant of the Coast Guard, testified before Congress in 1932 that "smuggling is now carried on almost exclusively by large, highly organized international syndicates."[89]

Prohibition and Crime

One justification for national prohibition was that alcohol caused crime. But almost by definition, Prohibition produced even more crimes. By criminalizing a victimless, consensual, and everyday act, "Almost the entire country engaged in illicit behavior."[90] This included those people who advocated for or were responsible for enforcing the law. In San

Francisco, a jury on a Prohibition case drank the evidence and found the defendant not guilty.[91] In the mid-1920s, Prohibition agents owned and ran their own speakeasy in Manhattan for nine months; when discovered, they claimed they were "investigating."[92] One man, who was both a congressman and strong advocate of dry laws, was discovered smuggling nine trunks of alcohol from Canada when one of the trunks started dripping brandy.[93] In 1920, a still was discovered on the property of Senator Morris Sheppard himself, the author of the 18th Amendment. The still was producing 130 gallons a day.[94]

Organized crime was the most destructive result of Prohibition. First, the best organized entity can satisfy all of the demand in the market, thereby realizing monopoly profit: "The monopoly nature of the market increases the profit potential of organized crime. It is precisely the large profit margin which renders organized crime lucrative and increases the threat to community values, such as the work ethic."[95] Second, the supply of alcohol required the conglomeration of a large number of functions. The "empire" must consist of "breweries, distilleries, bottling plants, truck drivers, places to sell it (speakeasies), waiters, cooks, jazz musicians, to entertain. . . ."[96] In this sense, organized crime resembles a vertically integrated business enterprise.

The resilience of organized crime is demonstrated by enforcement efforts in Chicago. Spasms of enforcement and arrests of members of criminal organizations were ultimately futile. In 1921, the Chicago police undertook a campaign to break the syndicate. In one day, they made 500 arrests and closed several hundred speakeasies. Within a month, the syndicate returned to full strength. In 1923, Mayor William Dever also undertook to enforce the dry laws. In three days, 700 arrests were made; within a few weeks the speakeasies were open again. Despite his best efforts, Mayor Dever was never able to control the mob throughout his term.[97] Through it all, profits flowed unhindered to the gang elite. By 1926, gangster Al Capone's annual income was approaching $100 million.[98]

Organized criminals during Prohibition were, of course, not above using violence to protect their monopoly. In Chicago alone, rival gang factions killed 500 men over a five-year period, 300 of these occurring in 1926 and 1927.[99] One journalist commented that in some weeks, "The outline of a day's news read like a war communiqué."[100] Chicago's gang warfare culminated in the St. Valentine's Day massacre on February 14, 1929, when Capone's men tricked seven members of a rival gang into believing they were Prohibition agents. The rivals were disarmed and then shot and killed in cold blood.[101]

The gangs also relied on their ability to corrupt elected officials and police officers to protect their market. The corruption of cops was widespread in the large cities. In congressional testimony, Mayor Dever estimated that as much as 60 percent of his police force "was actually in the liquor business."[102] Representative Fiorello La Guardia (Progressive–N.Y.) estimated that between $7.50 and $12 per case was being paid out in graft by the time a case reached the consumer.[103] Graft also reached the federal agents. Of the 18,000 agents employed by the Prohibition Unit from 1920 to 1933, 1,608 were dismissed for bribery, corruption, extortion, embezzlement, or filing false report.[104] Major Chestor Mills, Prohibition administrator of the Second Federal District of New York, described the relationship between the politicians and agents in his district:

> Three quarters of the 2,500 dry agents are ward dealers and sycophants named by the politicians. And the politicians, whether professionally wet or professionally dry, want prohibition because they regard prohibition as they regard postmastership–a reservoir of jobs for henchmen and of favors for friends. . . . Prohibition is the new pork barrel.[105]

The net effect of Prohibition seems impossible to discern. The statistics on the number of drinkers, the amount of alcohol consumed, and the number of deaths caused are so divergent that "it is a bit difficult to believe they dealt with the same subject."[106]

Perhaps most important of all is that the law was ignored as an infringement on personal liberty.[107] The *Machinists Monthly Journal* predicted this effect as early as 1904: "Prohibition never yet prohibited. People cannot be made good by law, and every effort to make people do something under compulsion which they did not wish to do has proven a failure."[108]

Enforcement Efforts

One of the most glaring deficiencies of the Volstead Act was that enforcement was intended to be shared among state, local, and federal governments. In perhaps an unprecedented example of an unfunded mandate, the states were intended to be the primary enforcers of the law.[109] The first Prohibition commissioner, John Kramer, asked that county, state, and city officials be zealous in enforcing the law and that the federal government had the secondary role of acting to see the ban was obeyed.[110] Unfortunately for the "drys," many states failed to enact any legislation at all that would trigger enforcement at the state level.[111] States that had laws did not devote the necessary resources to make them effective. By 1926, states

were spending less than $700,000 on enforcement, one-eighth as much spent on the collective departments of fish and game.[112] Only 18 states spent any money on enforcement, and three states—Missouri, Nevada, and Utah—put less than $1,000 each into the cause of enforcement.[113] In Illinois, where Volstead was notoriously violated, only 12 of the state's 53 most populous counties were actively attempting to enforce the law.[114] The concurrent enforcement scheme provided "an excellent excuse to states to abdicate their law enforcement responsibilities."[115]

The expenditures devoted to federal law enforcement grew five times between 1920 and 1930, significantly more than any other function of the government.[116] The amount of money allocated to the Prohibition Unit before 1928 and the Prohibition Bureau after 1928 grew from $2 million in 1920 to a peak of more than $13 million in 1930.[117] When the amounts allocated to the Department of Justice, Coast Guard, and Bureau of Customs are factored in, the total amount expended on Prohibition enforcement was more than $40 million.[118] This is a significant share of a total size of federal government budget of $3.6 billion.

The resources expended equated to a huge number of arrests, trials, and imprisonments. In San Francisco's federal courts, there were 50 new cases a day resulting from raids on bootleggers. More than 5,000 cases awaited trial. One trial by jury would take a full day. Emory Buckner noted that providing trials by jury in all Prohibition cases would require 85 additional courts in New York's Southern District alone.[119] Prisons were also filled to capacity. After two years of Prohibition, 130,000 violators had been sentenced and imprisoned.[120] By 1929, more than 500,000 violators had been arrested.[121] In 1923, federal district attorneys were spending 44 percent of all their time working on Prohibition cases.[122]

President Herbert Hoover believed the law must either be vigorously enforced or repealed. He chose the former, and six new federal prisons were constructed. In 1930, more than one-third of all prisoners serving long-term sentences in federal prisons had been convicted under Volstead.[123] In the 1929–1930 fiscal year, Hoover's policies resulted in the arrest of more than 68,000 people and the confiscation of 8,633 vehicles and 64 boats.[124] In 1932, there were 80,000 Prohibition convictions at the state and federal level.[125] In surveying the total effort to enforce the Prohibition laws, the Wickersham Commission said in 1931, "[T]here has been more sustained presence to enforce this law than on the whole has been true of any other federal statute. . . . No other federal law has had such elaborate state and federal enforcing machinery behind it."[126]

The mounting frustration at Prohibition's futility led to ever harsher penalties for violators. This policy was strongly endorsed by anti-alcohol

pietists. Reverend Mark Matthews said the law "ought to be enforced if every street in America had to run red with blood and every cobble stone had to be made of a human skull."[127] Official policy never rose quite to the level of the Reverend's zeal, but Clarence Darrow was surely correct when he said that the drys

> are constantly asking for new laws to still further limit the rights of the individual and compel men to conform more and more of the narrow views of the class of men and women who have always believed that anything that they believe is not good for the people should be forbidden by stern criminal statutes . . . neither liberty nor property is safe from the paralyzing hands of the majority who makes the law.[128]

Proving Darrow's point, in 1929 Congress passed the Jones Act, increasing maximum penalties under Volstead from six months in jail and a $1,000 fine to five years in prison and a $10,000 fine.[129] Not only did violation of Volstead become a felony but also buying a drink or failing to disclose knowledge of a bootlegger or speakeasy to authorities was also a felony.[130] An almost "incalculable number of felonies" was thus created.[131] The Jones Act greatly exacerbated all of the problems associated with enforcing the dry mandate. It further blurred the line "between acceptable and criminal behavior," multiplied the chaos in the judicial and prison systems, and gave many good reasons to wonder whether America was in the midst of a crime wave or social rebellion.[132] Former Prohibition advocate William Randolph Hearst argued that the Jones Act was the "most menacing piece of repressive legislation that has stained the statute books of this republic since the Alien and Sedition laws."[133]

Even constitutional guarantees began to give way under the weight of Prohibition's failure. When the 18th Amendment came into conflict with constitutional rights, the Supreme Court usually ruled that it was the U.S. Constitution that must yield. In 1922, the Court held that it was not a violation of the Fifth Amendment right against double jeopardy to prosecute the same offense under both state and federal law.[134] Search and seizure protections under the Fourth Amendment were significantly eroded. In the case of *Carroll v. United States*, a car that had no indication it carried liquor was stopped and searched by police without a warrant. The search subsequently revealed dozens of bottles of whiskey behind the driver's seat.[135] The Court found that probable cause existed because the search took place in Grand Rapids, Michigan, an access point commonly used to smuggle alcohol into the country.[136]

In the case of *Olmstead v. United States*, the Court upheld the conviction of a Seattle bootlegger based on evidence gathered over several months by wiretapping his telephone. The Court ruled that wiretapping is similar to overhearing a public conversation, so no violation of the Fourth Amendment occurred.[137] The Court also held that the amendment only protected material things such as "persons, houses, papers, and effects." Because wiretapping is not a search, evidence so gathered is not excluded under the Fourth Amendment.[138]

Many commentators noted the Court's proclivity to place enforcement of Prohibition laws above the rights of individuals. In his famous *Olmstead* dissent, Associate Justice Louis Brandeis realized that the Court was compromising cherished values, specifically "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."[139]

In the end, regardless of the oppressive or intrusive measures adopted, enforcing Prohibition laws proved infeasible. The resources required by the effort would have been far too burdensome to bear. Prohibition Commissioner Doran told Congress in 1927 that effective enforcement would cost $300 million.[140] This was almost 10 times the amount of money actually allocated to enforce the law.

The Repeal Movement

As the Prohibition era wore on, most people perceived that the Volstead Act was exacerbating the problems related to alcohol. Elizabeth Tilton of Boston Associated Charities aptly and ironically described the effects of Prohibition without a national prohibition law: they were "bailing water out of a tub with the tap turned on; letting the drink custom and the liquor traffic run full blast while we stood limply around and picked up the wreckage."[141]

The contradictions were legion: Prohibition aimed to reduce crime but made criminals out of untold numbers of people; it aimed to reduce alcohol-related disease but resulted in thousands of deaths from poisoned alcohol; it aimed to eliminate the saloon but created speakeasies; it aimed to reduce the consumption of alcohol but caused the consumption of higher-proof alcohol; it aimed to reduce the influence of the alcohol industry but led to the rise of the organized crime industry. By the late 1920s, a combination of social forces started to gather momentum to release America from the grip of Prohibition.

The first significant stirring of an anti-Prohibition movement was the advocacy of repeal by leading social figures. These groups even included

some original supporters of the dry agenda. Doctors who had proved the ills of alcohol with scientific and objective findings were now among the earliest and strongest inspirations of Prohibition. They were also one of the first groups to reconsider their support. In 1921, the American Medical Association refused to confirm its 1917 resolution against alcohol. Leading health experts came out in opposition to "the intentions and consequences of prohibition." Dr. Nicholl, health commissioner of New York, attributed the increased mortality from drinking to the illicit manufacture of and consumption of poisoned alcohol that Prohibition had brought about.[142]

Leading industrialists also reconsidered their initial support for the law. The Association against the Prohibition Amendment was formed by some of the most prominent millionaires of the age, including the DuPonts, Harvey Firestone, John Rockefeller, and William Randolph Hearst. The wives of many of these men also formed the Women's Organization for National Prohibition Reform.[143] Although members of this most powerful segment of society originally supported Prohibition to promote worker efficiency and safety, they had come to feel that it was "better for workers to imbibe good beer legally than bad booze illegally."[144] Others have charged that the real motive of these groups was to legalize alcohol so it could be taxed, thereby lowering their income-tax burden.[145] If they were so motivated, their efforts were in vain. Following Prohibition, tax rates fell for everyone except the top income earners.[146]

Other prominent groups also came out against Prohibition. Lawyers were increasingly vocal in opposition. In 1927, a New York group calling itself the Voluntary Committee of Lawyers proclaimed that the 18th Amendment was unconstitutional and "in derogation of the liberties of the citizens."[147] City and state bar associations began to echo this sentiment. In 1930, the American Bar Association voted to repeal by a two-thirds majority.[148]

Newspaper articles also reflected the change in national thinking. Perhaps half the major newspapers initially supported prohibition, but they were almost unanimously opposed by the late 1920s. In 1915, the number of newspaper articles supporting Prohibition outnumbered the articles in opposition by 20 to 1. By 1920, the articles favored the policy by four to three. By 1930, the articles favored repeal by at least two to one.[149]

President Hoover empowered the Wickersham Commission in 1929 to study the Prohibition matter. The scope of the investigation was limited to the method of enforcement.[150] Although most of the 11 commissioners were thought to be advocates of the dry position when appointed, the report was ultimately not what Hoover had hoped for. Apparently, the

investigation itself caused many of the appointees to reconsider their positions.[151] The report went beyond a review of possible enforcement schemes to an argument about the wisdom of Prohibition policy itself. Two of the members favored immediate outright repeal of the amendment. The recommendation of five members was tantamount to repeal by advocating legal sales of alcohol by a government monopoly and corporation. Two others, believing Prohibition to be a failure, believed it should be revised and given one more chance. Only two of the 11 members believed the 18th Amendment should be kept essentially as it was.[152] Although intended to buttress support for Hoover's policies, the commission actually inspired the repeal movement. For the first time, a revision of the national policy seemed possible.[153]

The commission identified three problems with the amendment's adoption: The ratifying legislatures had not been elected to consider the issue; many state legislatures overrepresented rural voters, who typically supported dry issues; and state legislatures were elected when a sizable portion of the electorate was absent for military service. The result was that the adoption process exaggerated prohibitionist sentiment.[154]

Regardless of the degree of popular support at adoption, most Americans indicated their disapproval of the law even in the early 1920s. In 1922, a *Literary Digest* poll of 922,000 people indicated that 61 percent wanted the law modified or repealed. In 1926, a poll by the Newspaper Enterprise Association of 1.7 million people indicated that 81 percent were dissatisfied.[155] Out of 17 state referendums, nine indicated a desire to discontinue their state enforcement laws. Large majorities of voters in Illinois and New York appealed to Congress in 1926 to amend the Volstead Act, and voters in Nevada, Massachusetts, Rhode Island, and Illinois requested that the 18th Amendment be repealed.[156]

Despite all of the failures of the dry agenda, the Great Depression may have been what was needed to kill the Prohibition beast. It is possible that failures of policy and ideology do not drive changes in the law. Rather, public choice theorists suggest that pecuniary self-interest motivates change in political outcomes.[157] With regard to Prohibition, taxes and duties in liquor was the main source of government revenue until the income tax was instituted in 1913.[158] Because of the improving economy at this time, the income tax was generating huge revenues for the federal government. Viewed in this light, Prohibition was enacted because it was affordable: policy makers could afford to forgo revenues on alcohol sales because these were "trivial in comparison with the rapidly growing revenues derived from the individual and corporate income taxes."[159] But with the onset of the Depression, income-tax revenues plummeted, and

Congress needed to cut spending or find an additional source of revenue. Economist Clark Warburton estimated that the revenues lost to the federal government from Prohibition ranged from $326 million to $1.7 billion by 1931.[160]

As the problems of Prohibition mounted, the tide of public dissent began to transform the political landscape. By the 1932 presidential election, both President Hoover and the nominee of the Democratic Party, Franklin Delano Roosevelt, advocated repeal. Where Hoover was seen as evasive and dissembling on the issue, Roosevelt unambiguously proposed that the noble experiment must end.[161] Roosevelt's victory in the 1932 presidential election helped the repeal movement. Before Roosevelt's inauguration, Congress drafted 70 resolutions for repeal of the 18th Amendment and 56 bills to amend or repeal the Volstead Act.[162]

For the first time since the Constitution was formalized as the nation's foundation, strategists for the repeal movement urged the use of ratification of the Constitution by state conventions to repeal the 18th Amendment through adoption of the 21st Amendment. Because only 13 states could defeat the new amendment, proponents feared allowing state legislatures to vote on the amendment. Instead, delegates would be elected for the specific purpose of voting on the proposal.[163] The results were overwhelmingly in favor of repeal. Of the 21 million voters in 37 states voting for the delegates, 73 percent favored repeal.[164] A more resounding measure of Prohibition's failure is difficult to imagine. Although the real level of popular support for the 18th Amendment was uncertain, it was "clear that in 1933 an overwhelming majority approved adoption of the 21st Amendment."[165]

Whether the "noble experiment" was truly noble is debatable. It offers, however, valuable lessons as a social experiment and government policy, particularly in the realm of marijuana prohibition. Prohibition was a test case in the government's ability to prohibit the exchange and consumption of a good in popular demand. The fact that the public still purchased the good in huge quantities triggered an irresistible dynamic: demand created a reservoir of profits for enterprising people willing to supply the good. The profits need only be large enough to overcome the risk of being caught plus any moral concerns the supplier may have. Because the supplier can rationalize his efforts as merely satisfying a legitimate want in the face of an oppressive law, moral concerns are minimal. The risk of breaking the law is reduced by two factors. First, the sheer numbers of suppliers creates unimaginable enforcement problems. Second, the profits generated can be used to entice law enforcement agents to conspire in the prohibited trade. Whenever the profits are

sufficiently in excess of the inhibiting factors, there will be suppliers available to satisfy the demand.

As in the case of marijuana and drug interdiction, attacking the trade from the supply side is virtually doomed to failure. A kind of market equilibrium in the prohibited good will establish itself. Profits will be just large enough to compensate the supplier for the cost of the good and the risk of getting caught. One cost of the good is paying graft to law enforcement agents, thereby reducing the risk. If profits are below the equilibrium, suppliers will drop out of the market; if above, they will enter. Government enforcement changes the number of suppliers only in the short term. Even massive enforcement efforts serve only to draw others in the market.

Prohibition actually aggravates the problems it is intended to solve. Given widespread supply, consumption of the prohibited good probably does not decline. The strictly monetary costs of enforcement and imprisonment are almost certainly greater than the monetary costs resulting from the legal good. The costs from a corrupt public service system and the disrespect of all laws caused by prohibition law are inestimable. These are the lessons of the Prohibition era: when considering the societal costs of marijuana prohibition, it is wiser to learn from them than to repeat the mistakes of the past.

CHAPTER FOUR

Marijuana as Medicine

Kyle Bershok Ames

In August 2016, the federal Drug Enforcement Administration (DEA) finally responded to a petition filed five years earlier to reclassify marijuana as a Schedule II drug so that it could be prescribed by doctors to treat an array of illnesses and afflictions. In late 2016, an article in *Scientific American* concluded that

> the evidence shows that the drug has many helpful therapeutic uses. . . . [Marijuana] stimulates appetite in HIV-positive patients, which could be a lifesaver for someone suffering from AIDS wasting syndrome. It is also useful in the treatment of neuropathic pain, chronic pain, and spasticity caused by multiple sclerosis.[1]

Twenty states and the District of Columbia have legalized medical marijuana.[2] Although the specific requirements vary by state, in general, the laws require patients to see physicians to obtain medical marijuana cards that allow them to possess a certain number of ounces of cannabis and cannabis products. Some states allow medical patients to grow their own marijuana plants.

Twenty-one million Americans used marijuana in the 2013.[3] One million Americans used cannabis for its potential medical benefits. According to the 2015 June addition of *National Geographic* magazine, cannabis can be used to bolster appetite in AIDS patients, treat nausea in cancer patients, and relieve pain and muscle spasms in patients with multiple sclerosis.

History of the Medical Use of Cannabis

The health effects of cannabis use have long been of interest to doctors and scientists. Chinese doctors used a cannabis and alcohol preparation as an analgesic that spread to India by 1400 BCE.[4] Romans and Greeks likewise used cannabis to treat a variety of pains, and they included its many uses in early pharmacopeias.[5]

However, in the modern era few rigorous studies have been conducted on marijuana's health effects. Many of the first commissioned studies focused on finding a link between marijuana use, criminality, and insanity. When studies such as the La Guardia report or the Panama Canal Zone report failed to show any correlation between marijuana use and violence and insanity, most researchers simply lost interest. The height of the war on drugs kicked off flurries of studies to show once and for all the harmful effects of marijuana use. However, many of these studies suffered serious methodological deficiencies.

Many Americans have heard that "smoking kills brain cells." This was the conclusion of the 1974 Heath–Tulane study on marijuana use.[6] Monkeys were administered marijuana over the course of several months by ventilators full of marijuana smoke.[7] At the end of the study, autopsies were performed on the brain tissue and showed significant brain cell death in the heaviest "smokers."[8]

Critics later challenged the methods used, contending that the dosage was so high that the smoke displaced oxygen and caused suffocation. As this process was repeated over months, the monkeys began to suffer from asphyxia, which can cause neuron death. Two studies using rhesus monkeys and one using human cadavers in Jamaica were unable to replicate the results of the Heath-Tulane study.[9]

Recent years have brought intense interest in the health effects of marijuana use. This has been spurred on by changing attitudes towards marijuana use and its potential role as a medical treatment. For many decades, research on marijuana was confined to research programs working through the University of Mississippi. Now some state laws allow for medical marijuana use, and these have sparked intensified interest in medical marijuana research.

Health Agencies Evaluate Medical Marijuana

The World Health Organization (WHO) believes that cannabis use can have detrimental effects, but also has therapeutic uses. The WHO breaks down the health effects of marijuana into those that are short term (acute) and those that are longer lasting (chronic):

> The acute effects of cannabis use has [sic] recognized for many years, and recent studies have confirmed and extended earlier findings. . . . Cannabis impairs cognitive development (capabilities of learning), including associative processes; free recall of previously learned items is often impaired when cannabis is used both during learning and recall periods; cannabis impairs psychomotor performance in a wide variety of tasks, such as motor coordination, divided attention, and operative tasks of many types; human performance on complex machinery can be impaired for as long as 24 hours after smoking as little as 20 mg of THC [delta-9-tetrahydrocannabinol] in cannabis; there is an increased risk of motor vehicle accidents among persons who drive when intoxicated by cannabis.[10]

The WHO also warns of chronic health effects of marijuana use. These health consequences are from long-term exposure to cannabis products:

> selective impairment of cognitive functioning . . . development of a cannabis dependence syndrome . . . exacerbate schizophrenia in affected individuals; epithelial injury of the trachea and major bronchi is caused by long-term cannabis smoking; airway injury, lung inflammation, and impaired pulmonary defense against infection . . . higher prevalence of symptoms of chronic bronchitis and a higher incidence of acute bronchitis than in the nonsmoking cohort; cannabis used during pregnancy is associated with impairment in fetal development. . . . [11]

The WHO also recognizes that cannabis has several therapeutic uses and calls for further research into cannabis as a potential treatment for several ailments:

> Several studies have demonstrated the therapeutic effects of cannabinoids for nausea and vomiting in the advanced stages of illnesses such as cancer and AIDS. . . . Other therapeutic uses of cannabinoids are being demonstrated by controlled studies, including treatment of asthma and glaucoma, as an antidepressant, appetite stimulant, anticonvulsant and antispasmodic, research in this area should continue.[12]

The Food and Drug Administration (FDA) has approved a drug that contains a synthetic version of a cannabinol that is naturally present in the cannabis plant and has approved a second drug with properties similar to some cannabinols.[13] Although the FDA has not approved cannabis for medical treatment, it recognizes considerable interest in using cannabis for a variety of disorders, including "glaucoma, AIDS wasting syndrome, neuropathic pain, cancer, multiple sclerosis, chemotherapy-induced nausea, and certain seizure disorders."[14] As a federal agency,

the FDA encourages all states interested in better understanding cannabis to comply with the requirements of the Investigational New Drug (IND) program, the Drug Enforcement Agency, and the National Institute on Drug Abuse.[15] "The FDA supports researchers who conduct adequate and well-controlled clinical trials which may lead to the development of safe and effective marijuana products to treat medical conditions."[16]

Recent Research (1980–2017)

It was not until the 1960s when the main active component of marijuana—THC—was discovered.[17] Two decades later, researchers discovered the system in the human brain responsible for releasing excitatory and inhibitory neurotransmitters through interaction with cannabinoids.[18] The mechanism and components of the endocannabinoid system (ECS) are still not entirely understood, but researchers have identified 113 additional phytocannabinoids since the discovery of THC.[19] Broadly, the term "phytocannabinoid" broadly refers to all cannabinoids that come from the marijuana plant, including THC and cannabidiol (CBD). In the 1990s, cannabinoid ligands and enzymes naturally produced by the human body were discovered—even without marijuana ingestion.[20] Collectively, these endogenous and exogenous cannabinoids interact with the ECS to play a wide role in regulating neurological and biological processes.[21] As of 2017, the ECS is believed to play a role in

> brain plasticity, learning and memory, neuronal development and cellular fate, nociception, inflammation, appetite regulation, digestion, suckling in the newborn, metabolism, energy balance, thermogenesis, motility, sleep–wake cycle, regulation of stress and emotions, and addiction.[22]

Several aspects of cannabis make understanding the health consequences of its use difficult. First, ratios of certain cannabinoids occurring in marijuana plants are difficult to measure. Second, not all the exogenous or endogenous cannabinoids have been discovered and cataloged. Researchers have noted stark differences between two major cannabinoids, THC and CBD, and their effect on the ECS.[23] Third, although specific cannabinoid content plays a role in drug effect, the ingestion method also plays a role in marijuana's variable drug effect. There are many methods of cannabis ingestion, including smoking, eating, drinking as a tincture, and applying topically.[24] Finally, like any other drug, the effects of cannabis vary by dosage and the user's personal characteristics.

On March 15, 2017, newly appointed U.S. Attorney General Jeff Sessions caused alarm in states that have legalized the medical use of marijuana by stating:

> I realize this may be an unfashionable belief in a time of growing tolerance of drug use. But too many lives are at stake to worry about being fashionable. I reject the idea that America will be a better place if marijuana is sold in every corner store. And I am astonished to hear people suggest that we can solve our heroin crisis by legalizing marijuana—so people can trade one life-wrecking dependency for another that's only slightly less awful. . . . Our nation needs to say clearly once again that using drugs will destroy your life.[25]

Opioid use in the United States has undoubtedly reached epidemic proportions. According to the Centers for Disease Control and Prevention, opioids cause the majority of drug overdoses and kill 91 Americans every day.[26] One in eight patients receiving an initial opioid treatment course lasting eight days will still be on opioids one year later, but that number jumps to one in five when the initial opioid course is 10 days long.[27]

A study published in the *Journal of the American Medical Association* (*JAMA*) in 2014 tracked opioid overdose deaths from 1999 to 2010 and concluded that states with legal medical marijuana had significantly lower mean opioid overdose rates.[28] States with medical marijuana laws had a mean 24.8 percent reduction in opioid analgesic deaths compared to states without medical marijuana laws.[29] According to the study:

> Approximately 60 percent of all opioid analgesic overdoses occur among patients who have legitimate prescriptions from a single provider. This group may be sensitive to medical cannabis laws; patients with chronic noncancer pain who would have otherwise initiated opioid analgesics may choose medical cannabis instead. Although evidence for the analgesic properties of cannabis is limited, it may provide analgesia for some individuals. In addition, patients already receiving opioid analgesics who start medical cannabis treatment may experience improved analgesia and decrease their opioid dose, thus potentially decreasing their dose-dependent risk of overdose. Finally, if medical cannabis laws lead to decreases in polypharmacy—particularly with benzodiazepines—in people taking opioid analgesics, overdose risk would be decreased. Further analyses examining the association between medical cannabis laws and patterns of opioid analgesic use and polypharmacy in the population as a whole and across different groups are needed.[30]

Nausea and Vomiting

Nausea and vomiting are common and painful side effects of chemotherapy and other treatments.[31] A growing body of peer-reviewed human and animal studies as well as anecdotal accounts suggests that CBD in cannabis may be effective in lessening nausea. In recent animal studies published in the *British Journal of Pharmacology* in 2011, both THC and CBD reduced vomiting through different physiological mechanisms.[32] The study authors believe there is "compelling evidence that the endocannabinoid system may serve as a regulator of nausea. . . ."[33] This would be especially helpful for cancer patients, who regularly deal with nausea as a side effect of cancer treatment.[34]

Pain

Perhaps one of the greatest potential areas for medical marijuana is the treatment of chronic and neuropathic pain. Opioid drugs are commonly prescribed to manage pain. A 2009 study published in the American Academy of Pain Medicine's journal conducted a meta-analysis of human studies on how marijuana might be used to manage pain.[35] The study's authors only reviewed studies that were double-blind randomized control trials, tested THC or additional cannabidiols (including synthetic versions), and included subjects who had intermittent or chronic pain for at least six months.[36] Out of 229 studies, only 18 fulfilled all of the required criteria.[37]

Results showed a "positive and moderate" reduction of pain intensity but also associated adverse events, including impairment of cognitive and motor function, alterations in perception, and mood disturbances.[38] The authors concluded that "treatment of chronic pain based on cannabinoid compounds would entail more risk than benefit. . . . Nevertheless, the antinociceptive effects of this substance constitute an open avenue for research."[39]

A 2015 clinical review study conducted by Dr. Kevin Hill titled "Medical Marijuana for Treatment of Chronic Pain and Other Medical and Psychiatric Problems" studied the use of marijuana to treat chronic back pain in an elderly patient and examined other studies on marijuana's potential use to treat pain.[40] The patient found marijuana to be an effective mild sedative, allowing for better sleep and less pain the following day.[41] Although Hill found there were benefits to treatment with marijuana, there were also short-term risks, including impaired short-term

memory, motor coordination, and judgment.[42] In some cases, regular use was associated with increased risk of anxiety, depression, and psychotic illness.[43]

To better balance the risks and benefits of using marijuana as medicine, the author laid out several criteria to qualify as a candidate for medical marijuana treatment:

1. a debilitating medical condition for which there is clinical trial evidence that marijuana is effective;[44]
2. failed treatment regimens using pharmacotherapies known to treat the condition;[45]
3. failed treatment using FDA-approved cannabinols dronabinol or nabilone;[46]
4. no active substance use, psychotic, mood, or anxiety disorder;[47] and
5. compliance with state laws.[48]

The author concluding by encouraging physicians to follow these criteria and educate their patients on the risks and benefits of medical marijuana.[49]

Schizophrenia

Schizophrenia is a complex disorder and not entirely understood by researchers. Individuals with this disorder can have a wide range of symptoms, including hallucinations and delusions, reduced expression of emotions, poor executive functioning, trouble paying attention, and problems with working memory.[50] Research studies including "The neuropsychological correlates of cannabis use in schizophrenia" and "Marijuana Use in the Immediate 5-Year Premorbid Period . . ." have shown that cannabis use can have negative and positive effects on patients with schizophrenia.[51]

Cannabis may play a role in prefrontal cortex neurotransmitter stimulation. This would "enhance executive functions and attention/processing speed in schizophrenia by stimulating prefrontal neurotransmission."[52] The study by Coulston et al. published in *Schizophrenia Research* concluded:

> In this context, our findings suggest that cannabis use may enhance executive functions and attention/processing speed in schizophrenia by stimulating prefrontal neurotransmission. These findings have important implications for the treatment of cognitive impairment in schizophrenia, for example, by way of an agonist or partial agonist on cannabinoid receptors (e.g., a cannabinoid).[53]

Other studies have tentatively linked cannabis use with earlier onset of schizophrenia.[54] Another study published in *Schizophrenia Research* in 2016 by Kelley et al. focused on the potential relationship between marijuana use and the onset of schizophrenia, elaborating on several previous studies that found a tentative link:

> Our current data allowed us to determine the effects of premorbid marijuana use and changes in use in the five years preceding psychosis onset. These data indicate that it is the escalation of use that is the most predictive, with greater increases in use increasing the rate of onset in a dose–response manner. Secondly, the data suggests that any increase in use during the pre-onset period increases the rate of onset, and that this may be more important than the level of use alone. This is supportive of hypotheses that there may be a subgroup of subjects particularly prone (perhaps genetically) to the effects of marijuana use at any level.[55]

Posttraumatic Stress Disorder

Posttraumatic stress disorder (PTSD) is a mental health condition in which individuals who have experienced a traumatic event relive the event, have more negative beliefs or feelings, are hyperaroused, or avoid situations that remind them of the event.[56] Ten percent of men and 20 percent of women who experience a traumatic event develop PTSD.[57] The National Center for PTSD recommends four different kinds of "talk treatment" to treat the underlying traumatic event causing PTSD, including prolonged exposure therapy, cognitive processing therapy, eye-movement desensitization and reprocessing, and stress inoculation training.[58] Certain pharmaceuticals can be employed to treat the symptoms of PTSD by altering the brain's serotonin and norepinephrine levels.[59] The National Center for PTSD has a mixed approach to cannabis use among veterans:

> Research has consistently demonstrated that the human endocannabinoid system plays a significant role in PTSD. People with PTSD have greater availability of cannabinoid type 1 (CB1) receptors as compared to trauma-exposed or healthy controls. As a result, marijuana use by individuals with PTSD may result in short-term reduction of PTSD symptoms. However, data suggest that continued use of marijuana among individuals with PTSD may lead to a number of negative consequences, including marijuana tolerance (via reductions in CB1 receptor density and/or efficiency) and addiction. Though recent work has shown that CB1 receptors may

> return after periods of marijuana abstinence, individuals with PTSD may have particular difficulty quitting. . . . [60]

Some research suggests that cannabis may be an effective treatment for some PTSD symptoms, but it also suggests that more research is required. In one 10-person trial, THC decreased hyperarousal symptoms, which are some of PTSD's major debilitating side effects.[61] What is clear is that many PTSD sufferers use marijuana. In 2014, 1.9 percent of Americans ages 12 and older were diagnosed with cannabis use disorders; in contrast, 22.7 percent of veterans in treatment programs administered by the Veteran's Association were diagnosed with cannabis use disorders.[62]

Glaucoma

In glaucoma, pressure builds up in the eye and over time can damage the optic nerve and in some cases cause blindness. Cannabis can be used to temporarily reduce pressure in the eye,[63] although studies show that the effects typically last only three to four hours.[64] Because glaucoma must be treated continuously, patients relying on marijuana would have to use cannabis products six to eight times a day.[65]

New research into glaucoma suggests the condition is caused by more than pressure buildup in the eye. Some researchers believe the condition is neurological like Parkinson's disease and Alzheimer's disease. Decreased blood flow to the optic nerve exacerbates glaucoma, and there is some evidence that cannabis decreases blood pressure. For this and other reasons, the American Academy of Ophthalmology does not endorse cannabis as an effective long-term treatment of glaucoma:

> Based on analysis by the National Eye Institute and the Institute of Medicine, the Academy finds no scientific evidence that marijuana is an effective long-term treatment for glaucoma, particularly when compared to the wide variety of prescription medication and surgical treatments available. Ophthalmologists also caution that marijuana has side effects which could further endanger the user's eye health.[66]

Other Conditions

Because the ECS may play a role in many central and peripheral nervous system functions, cannabis may play a role in many other conditions. For example, cannabis's anti-inflammatory properties could be effective in treating several different ailments. In one research study conducted in

2006 by Jonathan D. Wilkinson and Elizabeth M. Williamson, five separate cannabinoids were tested to treat psoriasis.[67] This painful skin condition causes scaly lesions on the skin and affects between 2 percent and 4 percent of the population.[68] The researchers in this study believed that proliferation of keratinocytes played a role in causing psoriasis. All five of the cannabinoids tested inhibited keratinocyte growth on the skin.[69] "Our results show clearly that cannabinoids inhibit the proliferation of keratinocytes, thus demonstrating a therapeutic potential for the treatment of psoriasis, but further investigation is urgently needed to identify the mechanism by which they act in order to realize this potential."[70] The treatment was provided topically and therefore came with few noticeable side effects; some of the cannabinoids tested had no noticeable side effects at all.[71]

Conclusion

The legalization of medical marijuana has only occurred at the state level, but researchers have been hard at work developing a more thorough understanding of its health effects. Although marijuana has been used as medicine by different cultures for a considerable length of time, there is much to learn about this drug. The studies available show both positive and negative health consequences for short-term and long-term marijuana use. Studies showing changes in brain structures from marijuana use should be further investigated.[72] Other studies have shown that marijuana may be addictive like many other legally permitted substances.[73] Further research is necessary to better understand both the negative and positive health consequences of marijuana use. Many researchers are optimistic about the potential for specific cannabinoids to one day be used therapeutically, but they warn against using marijuana to treat conditions that have not been alleviated by marijuana in clinical trials. As the endocannabinoid system is further researched, new treatments and risks may be discovered.

CHAPTER FIVE

A Brief History of Cannabis Use and Regulation

Kyle Bershok Ames

Research on the history of cannabis is frustrated by an abundance of non-objective sources. Many older sources tend to hold fervent anti-cannabis views along the lines of the 1936 movie *Reefer Madness* or the 1961 book *The Murderers*,[1] both of which were based more on sentiment than on science. On the other side, many Internet sources—including Leafly,[2] High Times,[3] and the Cannabist[4]—have obvious pro-cannabis spins. Therefore, although sources from both sides will be used when appropriate, the majority of the sources cited in this chapter will be drawn from archeological, botanical, and medical journals as well as congressional hearings and centrist authors.

Cannabis is believed to have originated in Central Asia,[5] and has spread widely around the world. There is no consensus on the geographic origin of cannabis. Some researchers believe it originated on the steppes of Central Asia, and others that it originated in the Huang He River Valley, the Hindu Kush mountains, South Asia, or Afghanistan.[6] Nomadic Aryan herders consumed cannabis for its psychoactive properties and carried the plant with them as they traversed long sections of the Silk Road from Mongolia to Eastern Europe and the Middle East.[7]

Cannabis sativa was identified and cataloged by Carl Linnaeus in 1753.[8] Since then, *Cannabis ruderalis* and *Cannabis sativa* have been identified.

Debate is ongoing as to the proper taxonomic classification of cannabis and its subtypes.[9] Although the debate on the correct taxonomy of cannabis is interesting from a botanical perspective, a more practical distinction for our purposes can be drawn. Cannabis can be separated into strains that have a drug effect (psychoactive) or do not have a drug effect (non-psychoactive) based on their ratio of delta-9-tetrahydrocannabinol (THC) to cannabidiol (CBD).[10] Cannabis strains with high ratios of THC to CBD produce the drug effect most associated with "marijuana." Strains with low ratios of THC to CBD do not produce noticeable drug effects and are associated with the fibrous plant material known as "hemp."[11] Cannabis has been called many things by the people who use, sell, and regulate it. For clarity, the term "cannabis" will be used to describe all subspecies of the plant. "Hemp" will be used to refer to cannabis stains that do not produce psychoactive effect, and "marijuana" will be used to refer to cannabis strains that are psychoactive.

Cannabis has been cultivated by humans for thousands of years. Cannabis pollen, seeds, cordage, cordage imprints, and textiles provide physical evidence of the earliest human interactions with cannabis.[12] Like the vast majority of agricultural plants, humans used wild cannabis before learning to cultivate the plant. Wild cannabis was prolific in the United States and could be found growing along roads and rivers, even along the Potomac River outside the nation's capital, until eradication efforts were undertaken by the Federal Bureau of Narcotics (FBN) in the 1930s.[13]

Today, most Americans have a good sense of the complex regulation and enforcement schemes surrounding marijuana and drug prohibition but are largely unaware how one of the world's most ubiquitous drugs went from being unregulated anywhere in the world to being globally prohibited.

Cannabis in Antiquity

Human use of cannabis potentially goes back as far as 25,000 BC to the Paleolithic era. Researchers working in two Gravettian archeological sites, Pavlov and Dolini Vestonice, unearthed clay fragments with strange patterns impressed in them.[14] Microscopic investigation showed that the impressions were from woven fibers, and radio carbon dating placed the clay fragments as being between 26,980 and 24,870 years of age.[15] James Adovasio, a foremost expert in perishable artifacts, identified the patterns as potentially coming from wild hemp fiber.[16] Other archeological research suggests that cannabis was domesticated by humans approximately 10,000 years ago in Southeast Asia.[17]

Cannabis in antiquity had a wide range of uses. Its tough fibers could be woven into ropes and cloth, its stalks ground into pulp, and its buds smoked or drunk. Cannabis by-products can also be used as fodder for animals. Cannabis also played a crucial role in early navigation. Hemp ropes and sails were much stronger, and hemp canvas is more resistant to saltwater than cotton.[18]

Cannabis also played a crucial role in the spread of knowledge. In antiquity, several physical forms of media were used to convey messages: papyrus, parchment, silk, and wood or bamboo boards. Papyrus was first made by the Egyptians by placing strips of the papyrus plants in cross layers, pressing them, and drying them in the sun.[19] In the eighth century, Western societies were cut off from a steady supply of papyrus by Arab control of the Mediterranean.[20] Parchment, a material made from dressed goat or sheep skin, was used as a replacement.[21] However, the high cost of producing parchment prevented its widespread use.[22]

Early Chinese records and documents were etched into bamboo slips.[23] These strips were cumbersome and heavy, however, making it difficult to spread written knowledge.[24] Painting words onto silk sheets was an alternative, but it was prohibitively expensive for most scholars.[25] Papermaking originated in China around the first century AD and is popularly attributed to Tsai Loun.[26] Made from crushed hemp and flax, paper was easier and cheaper to source than papyrus and parchment and easier to make than parchment. Paper also weighed significantly less than bamboo slips. Hemp paper proved to be a superior alternative, but the production process was carefully guarded for 500 years.[27] Korean and Japanese tradesmen learned the Chinese papermaking process in 610 AD. The Abbasid Caliphate learned the process from Chinese papermakers captured in the battle of Talas and the subsequent capture of Samarkand in 751 A.D.[28] The moors opened the first European paper mills in Spain in the Moorish cities of Valencia, Toledo, and Xativa.[29] Thus, a secret guarded for half a millennium was finally revealed to the rest of the world. The ability to write down ideas on an easily transportable and mass-produced medium contributed to the spread of knowledge.

Chinese shamans quickly learned that cannabis could be ingested, turned into teas, and burned on open fires and inhaled to produce mild psychotropic effects. Archeologists unearthed cannabis shoots, leaves, and buds in the tomb of a shaman in Xinjiang, China.[30] The contents were dated to 2500 BC.[31] Cannabis resin mixed with wine was used as an anesthetic in China as early as the second century AD and continued to be used by Chinese surgeons for several centuries.[32]

Cannabis in the Americas

Cannabis hemp was introduced to California in 1795 under the Spanish colonial governor Diego de Borcia, but the industry collapsed shortly after Spain withdrew farming subsidies for the crop.[33] In the early 1800s, Russian settlers at Fort Ross on the northern California coast also grew cannabis of the hemp variety,[34] and cannabis was introduced into Latin America several times in the 16th century by the Spanish.[35]

Cannabis has a rich history in colonial America. George Washington devoted one-third of his estate at Mount Vernon to growing hemp.[36] One of the first drafts of the Declaration of Independence was written on hemp paper.[37] Thomas Jefferson designed and patented a "hemp brake" for separating out hemp fiber.[38] Hemp had been grown in the colonies since the early 17th century. Virginia hemp in particular was praised by King James I for its high-quality fiber, but it was not as profitable as growing tobacco.[39] Between 1712 and 1728, only 15 tons of hemp were exported to England.[40] By 1739, Virginia Governor William Gooch noted that hemp was being grown in large quantities to produce linens but nearly all the hemp produced was consumed domestically.[41] By 1767, however, hemp sold for £21 per ton, whereas tobacco was £16 per ton.[42] In 1775, hemp production in Virginia reached 5,000 tons.[43]

Reefer Madness in Mexico

> Among the misguided youths, both male and female of this city, are a number who have become addicted to the [marijuana] habit, and who congregate in the early morning hours before dawn on various plazas and smoke this poisonous weed, which produces a sort of insanity for the time. . . .
>
> —*Mexico Herald*, 1901[44]

By 1842, cannabis use in Mexico had been noticed by Mexican government officials and academics, and by 1846 the plant was implicated in an "outbreak of laziness" in the military.[45] Marijuana was derided as the "nefarious weed" by one author, and other writers made comparisons between alcohol and marijuana deliriums.[46] Marijuana was prohibited by law in Mexico in 1920, nearly two decades before it was prohibited in the United States. Daily periodicals covered lurid accounts of "marihuanos" smoking a joint or two and then violently attacking parents, children, and gendarmes.[47]

Cannabis was introduced to Central America in the 1530s by the Spanish conquistador Pedro Quadrado.[48] Hemp was becoming a vital source of

fiber for ropes and canvas for the Spanish navy, and in 1545 the Spanish crown ordered the viceroys and governors of the Spanish Empire to undertake hemp cultivation for this purpose.[49]

Although several attempts were made to grow large quantities of hemp for industrial uses in the Spanish colonies of the Indies, Peru, and Chile, these initial large-scale attempts were not successful.[50] However, cannabis continued to be grown on smaller farms.[51] Indigenous peoples working in the cannabis fields had discovered its drug properties and grew cannabis in their home gardens for personal consumption.[52]

Native healers were well acquainted with a multitude of psychotropic plants indigenous to Central America. These healers combined medicine, ritual, and the supernatural to treat a wide host of ailments.[53] After they "discovered" cannabis's drug properties, healers began to incorporate different preparations of the drug into their practices. Spanish colonial authorities quickly took notice of these native practices and sought to bring natives in line with the teachings of the Catholic Church through education and prohibition. Although the authorities knew of cannabis as a drug (by a different name), they did not know that the hemp grown under their orders was the same substance.

By 1777, the supply of hemp was outstripped by increased domestic consumption in Spain, conflict with Britain's royal navy, and increased seaborne commerce.[54] The crown reenacted its order of 1545 to all its colonies:

> The King orders . . . that the Indians and mixed populations of the towns of those dominions apply themselves to the sowing, cultivation, and exploitation of hemp and flax so that those fruits, as primary materials, can be brought to Spain . . . in order to foment the manufacture of cloth, canvas, and rigging of which so much is needed in the Peninsula and in those vast dominions.[55]

Hemp cultivation was thus undertaken across the entire Spanish Empire, particularly in Central and South America. From the plantations, cannabis plants spread throughout the countrysides and established large populations out of reach of government control.

Cannabis Regulation

Exposure to marijuana and its perceived problems was largely concentrated in the Western states. Montana, Colorado, California, and other states began passing laws regulating and prohibiting marijuana. Some of

the most aggressive antidrug laws originated in California. Although most Californians were not familiar with marijuana, it was commercially available through pharmacists and mail-order catalogs under the name "Indian Hemp" or "Cannabis Indica."[56] Cannabis was cultivated and consumed by some people of Middle Eastern and Chinese origin in California, although the use was apparently not widespread.[57] Immigrants from eastern India were also believed to use cannabis, even though there was little factual support for this belief.[58]

Although cannabis use was associated primarily with minority groups in the West, the East Coast saw hashish dens in major cities that catered to upper-middle-class men and women and operated in secrecy.[59] In New York, and inferably elsewhere, hashish was smoked, drunk, and ingested as lozenges.[60]

After the passage of the regulatory Harrison Act in 1914, most states enacted or reenacted narcotics laws.[61] Twenty-one states also restricted the sale of marijuana as part of their general narcotics articles.[62] For instance, one state prohibited the use of marijuana for any purpose, and four states prohibited its cultivation.[63] Society's perception of the narcotic user shifted after the passage of the Harrison Act.[64] The press portrayed narcotics users as criminal "dope fiends."[65] Coupled with increases in drug-related crime because of the closing of drug-treatment clinics, fear became the basis for many post–Harrison Act narcotics statutes.[66] In 1915, Utah was the first state to pass a statute completely prohibiting the sale or possession of marijuana.[67] By 1931, 22 states had enacted such legislation.[68]

Cannabis was not included in the final draft of the Harrison Act in 1914, even though it was repeatedly listed along with opiates and cocaine.[69] The pharmaceutical industry opposed its inclusion possibly because it had a vested financial interest in selling medicines that contained cannabis products; companies saw no reason why a substance used chiefly in corn plasters, veterinary medicine, and nonintoxicating medicaments should be severely restricted.[70] Aside from the labeling requirement of the Pure Food and Drug Act, cannabis remained untouched by federal regulation until 1937.[71]

Lurid accounts in newspapers and magazines, the publications of private narcotics associations, and the effective separation of the addict and his problems from the medical profession all pressed legislatures to deal more effectively with what was perceived as a growing narcotics problem.[72] However, the most prominent influence was racial prejudice.[73] During this time, marijuana legislation was focused in the Southern and Western states.[74] This regionally concentrated prohibition stemmed from

the drug's use primarily by Mexican Americans, who were immigrating in increasing numbers to those states.[75]

Mexican Americans began to constitute a sizable minority across the West. The Bureau of Immigration recorded the entry of 590,765 Mexicans into the United States between 1915 and 1930.[76] An additional unknown number crossed the border illegally.[77] More than 90 percent of these immigrants became residents in the 22 states west of the Mississippi.[78] Mexicans worked primarily as farm laborers, but they also traveled to the Midwest and the North where jobs in factories and sugar-beet fields were available during the economic boom of the 1910s and 1920s.[79] Some labor leaders and nativists opposed Mexican immigration, but employers were eager to hire them.[80] In 1908, American economist Victor S. Clark remarked:

> [The Mexican] is docile, patient, usually orderly in camp, fairly intelligent under competent supervision, obedient and cheap. If he were active and ambitious, he would be less tractable and cost more. His strongest point is his willingness to work for a low wage.[81]

Many Americans were unsure where Mexicans fit into the racial stereotypes. University of Texas sociologist Max Handman remarked that the Mexican was "not a negro," but "the white man refuses him an equal status."[82] Many Anglo Americans thought of Mexicans as a mix of Spaniards and Indians. Both those who opposed and supported Mexican immigration referred to Mexicans as "peons" and remarked on their lack of "ambition."[83] However, relations between Mexicans and Anglo-Americans remained relatively civil:

> The Mexicans don't trouble us much, and are not likely to do so unless we have bad times. Then it may be a bad thing to have the country filled up with cheap labor. They can't do white man's work. Besides they were born in this country, or pretty nearly in this country, and have more right to be here than these Japanese and Italians and Greeks.[84]
>
> —Anonymous labor journal editor

Because many Mexicans worked as transient labors and did not take up permanent residence in towns, they were partially overlooked.[85] Mexican immigration was not restricted by the 1921 immigration act or the National Origins Act of 1924, which set immigration quotas based on racial groups.[86] However, nativist attitudes toward Mexicans were beginning to gain greater traction. Although employers welcomed them in the

1920s, Mexicans were also feared as a source of crime and deviant social behavior.[87] This fear of Mexicans emanated from federal government reports that marijuana was a cause of violence among Mexican prisoners in the Southwestern states.[88] It was thought that marijuana use in the West was largely limited to the Mexican segment of the population.[89] Many laws were founded on pointed references to the drug's Mexican origins and inferred connections with criminal conduct inevitably generated when the Mexicans ate the "killer weed."[90] Similarly, when the legislatures of New Mexico and Texas passed marijuana legislation in 1923, newspaper coverage was minimal.[91] In its only direct reference to marijuana, the *Austin Texas Statesman* stated:

> The McMillan Senate Bill amended the antinarcotic law so as to make unlawful the possession for the purpose of sale of any marijuana or other drugs. Marijuana is a Mexican herb and is said to be sold on the Texas-Mexican border.[92]

American attitudes toward Mexican immigrants sharply deteriorated when the roaring 1920s came to an abrupt end on Black Tuesday, 1929. In the Great Depression that followed, unemployment soared to 25 percent, and wages on average decreased by 40 percent. Mexicans were some of the first workers laid off in large numbers. Increasing numbers began repatriating to Mexico.[93] The U.S. Department of Labor's Bureau of Immigration began targeting Mexican immigrants, and some Americans complained of Mexicans relying on bread lines.[94] Anti-Mexican sentiment was heightened by the newly appointed secretary of labor, William N. Doak, who proposed a simple plan to decrease American unemployment—deport aliens holding jobs.[95] The Department of Labor quickly set about this task:

> It is the purpose of the Department of Labor . . . to foster, promote, and develop, the welfare of the wage earners of the United States . . . and it is a mere corollary to this duty and purpose to spare no reasonable effort to remove the menace of unfair competition which actually exists in the vast number of aliens who have in one way or another, principally by surreptitious entries, violated our immigration laws. . . . [96]
>
> —1931 annual report

To accomplish this, state and federal agents conducted highly publicized mass deportation raids in hopes of scaring more immigrants into repatriating.[97]

Rising Trends toward Cannabis Prohibition

Although cannabis consumption was not directly prohibited by the federal government until the Comprehensive Drug Abuse Prevention and Control Act of 1970, American policy makers built up decades of regulation and enforcement schemes seeking to curb cannabis use. Cannabis regulation was often folded into more expansive antinarcotic or antidrug campaigns that relied on broad legal, social, and medical support. This process grew gradually over time and was contested. The first federal regulations concerning drugs were concerned with quality and purity. As opium use increased to record levels by the end of the 1800s,[98] however, policy makers and the public alike began to push for tighter control of medicines containing opium and an eventual end to the international opium trade. Cannabis was not regulated by the 1914 Harrison Act, but the act would serve as the groundwork for the 1937 Marijuana Tax Act, which served as a practical prohibition of cannabis consumption and cultivation. The basis for the Marijuana Tax Act was challenged and rebuked by medical doctors and researchers in a report by the La Guardia Commission, but the report did not sufficiently affect the populace, which was concerned about the growing menace of marijuana use that was allegedly sweeping the nation's youth.

1848: Drug Importation Act

During the Mexican-American War, 1,773 American soldiers, marines, and sailors were killed in action, and 13,271 died from other causes.[99] The American public was outraged when it learned that many of the drugs given to American soldiers were adulterated.[100] In response, Congress passed the Drug Importation Act of 1848. Before this, drug regulation was left to the states, but these were ineffective at combating significant problems with drug purity.[101] The act itself was limited to inspecting the "quality, purity, and fitness of drugs," with the U.S. Pharmacopeia tasked with setting drug standards.[102] Inspectors were appointed to major ports of entry. Although the system initially worked, it soon fell victim to political cronyism and was not successfully revived until the 1870s when Congress allowed the Treasury department to set drug purity standards.[103] The act was an important first step in gaining federal control of drug laws.

1893–1894: The Indian Hemp Drugs Commission

Cannabis use dates back millennia in India. The most popular means of ingestion was through a cocktail called "bhang" (also known as "banque") that consisted of cannabis and various proportions of nutmeg, cloves, camphor, turmeric, ambar, muske, and sometimes opium.[104] Cannabis was used in medicines in Britain by the 1850s, and recreational cannabis use flourished throughout the empire.[105] When reports of violence, crime, and insanity committed by users of cannabis in India made their way back to the seat of the empire,[106] temperance politician William Caine, who was keen on restricting drug use in the empire, demanded that the Secretary of State of India make the Indian government gather a group of experts to study the effects of cannabis use in that country.[107] The Indian Hemp Drugs Commission was comprised of 257 researchers, 57 of whom were medical practitioners.[108] The study focused on 1,440 Britons and Indians who were moderate or excessive users of cannabis.[109] The commission's findings were republished in the *British Medical Journal*:

> Hemp has been represented as a specially noxious substitute or alternative for opium in India. The use of haschish [sic] has been credited with terrible effects—violence, debauchery, insanity, and crime. The gaols [jails] and madhouses of India have been said to be largely filled with its victims, and rape and murder alleged to be frequently and directly due to excess in the smoking of ganja and drinking of bhang. The report of the Hemp Drugs Commission, which has recently been published in India, has clearly demonstrated that this view of the effects of the consumption of hemp is grossly exaggerated, that the evils commonly attributed to its use do not exist, and that the baneful effects caused by its abuse are very rare. It has been shown that in some parts of India the use of hemp in moderation is exceedingly common, as many as 1 in 200 of the inhabitants of Bengal consuming it much as we in this country consume tobacco, tea, or coffee, or the inhabitants of France and Italy consume their cider or light wine, as a mild stimulant and harmless luxury.[110]

The commission's findings refuted many concerns with marijuana use; marijuana was not related to crime, violence, or insanity, and only one out of 1,400 users became excessive users.[111] Of all people admitted to mental hospitals, only 4.5 percent were cannabis related.[112] The commission decided that because cannabis produced little harm and that prohibition would be impossible to enforce, marijuana should only be heavily regulated and not prohibited.[113] The commission recommended a heavy taxation scheme across India to prevent "excessive" use and recommended

that municipal authorities be allowed to determine the number of cannabis shops in their municipalities.[114]

1906: Pure Food and Drug Act

Although the Drug Importation Act of 1848 had attempted to regulate the purity of drugs imported into the United States, it had done nothing to regulate the manufacture and distribution of those drugs once they were in the United States. The first attempt to regulate the manufacture and distribution of drugs began in 1906 with the enactment of the Pure Food and Drug Act.[115]

The Pure Food and Drug Act was part of a larger push for purity in consumables in the wake of several major events. By 1900, hundreds of thousands of Americans were drug addicts because of the widespread use of prescription drugs containing morphine, cocaine, laudanum, and heroin.[116] In 1901, an outbreak of tetanus from unsafe vaccinations resulted in the deaths of many children.[117] In February 1906, Upton Sinclair's novel *The Jungle* was published and revealed the disgusting conditions in slaughterhouses and meat-processing plants.[118] Meanwhile, the chief chemist for the U.S. Department of Agriculture (USDA) from 1883 to 1912, Harvey Washington Wiley,[119] presented evidence that domestic food and drugs were commonly adulterated, and he pushed for federal regulation.[120] The United States was also influenced by England's regulation of food and drugs. By 1875, England had created separate acts regulating food and drink as well as drugs and subsequently consolidated these acts into the Sale of Food and Drugs Act.[121] The British government also looked at regulating cannabis use through the Indian Hemp Drug Commission in 1893–94 but determined that such use represented "little injury."[122]

The District of Columbia Pharmacy Act of 1906 provided the last big push for national action.[123] It restricted the ability of pharmacists to prescribe habit-forming drugs.[124] Only a month later, the Pure Food and Drug Act was passed.[125] The act itself contained a wide array of regulations and restrictions, the most important being that any habit-forming drugs be prescribed only by physicians.[126]

The act deemed any article of food or drugs as misbranded if it contained but did not disclose on its label any alcohol, morphine, cocaine, heroin, or derivatives or preparations of these substances.[127] The Pure Food and Drug Act of 1906 curtailed the marketing of drugs and sodas that contained cocaine or opium in two ways:[128] first, by prohibiting the interstate shipment of food and sodas containing cocaine or opium;[129] and

second, by requiring that any amounts of these drugs be marked on the labels of all medicines.[130] This act placed all drugs in two classes—prescription only and drugs that could be sold over the counter without a prescription.[131] This act was the legal basis for suppression for all sales of sedatives.

America's Opium Problem

Opium importation into the United States after 1840 led to a continual increase in consumption through the rest of the century,[132] with the per capita importation of crude opium peaking in 1896.[133] The first law against opium use resulted from an anti-Chinese crusade.[134] Between 1850 and 1890, the Chinese population in the United States grew from 4,000 to 107,000; the overwhelming majority lived in California.[135]

White laborers formed coalitions to oppose Chinese laborers.[136] When a national depression hit large Californian industries in the 1870s, the Chinese began to take over smaller business that had been controlled by middle-class whites.[137] By their very presence, the Chinese had enemies in both the working and middle classes.[138] Consequently, the press began to support campaigns against the Chinese.[139] For the next 50 years, legislation prohibiting the further immigration of Asian laborers became the chief object of the organized activities of the working people of California.[140]

After the economic depression of the 1870s, the California state legislature began inquiring into the "moral" aspects of the Chinese population by creating "fact-finding" committees that placed the Chinese and their lifestyle under a microscope.[141] The findings justified past prejudicial treatment and proposed future legislation against the Chinese.[142] In addition, laws prohibiting gambling and lotteries were selectively enforced against the Chinese. Along with this prejudice came a fear of opium smoking as one way by which the Chinese were supposedly undermining American society.[143] By 1900, more than 80 percent of Chinese arrests in San Francisco were for crimes against morality, including opium use (15.95 percent) and gambling (82 percent).[144] In contrast, Chinese arrests in San Francisco for crimes against persons or property accounted for only a combined 2.01 percent.[145] In essence, the California legislature was leading a moral reform crusade against the Chinese.

The first anti-opium crusade in U.S. history was directed against working-class Chinese. These workers were brought over as cheap laborers but were no longer needed because of the economic depression.[146] Consequently, the

anti-opium crusade was both ideological and economical.[147] Opium smoking became a special problem when white men and women in the state began to "contaminate" themselves by frequenting dens in Chinatown. Furthermore, it was not the use of opium itself but the smoking of it, a uniquely Chinese habit, that became the subject of much state legislation.[148]

The city of San Francisco prohibited the commingling of races in opium dens, but the success of this statute was limited. In 1878, the San Francisco Police Department made the following plea to a California state senate committee:

> These latter places were conducted by Chinamen, and patronized by both white men and women, who visited these dens at all hours of the day and night, the habit and its deadly results becoming so extensive as to force action on the part of the authorities. . . . The department of the police, in enforcing the law with regard to this matter, have found white women and Chinamen side by side under the effects of this drug—a humiliating sight to anyone who has anything left of manhood.[149]

The press reinforced the idea that the Chinese were responsible for all of the opium smoking among white people. The *Sacramento Union* antagonized American manhood by printing ominous descriptions of opium houses:

> Upon a matting-covered couch lay a handsome white girl in silk and laces, sucking poison from the same stem which an hour before was against the repulsive lips and yellow teeth of a celestial. She was just taking the last pipeful; the eyes were heavy, the will past resistance or offense. She glanced up lazily but was too indifferent to replace the embroidered skirts over the rounded ankles the disturbed drapery exposed.[150]

Unfortunately, the press did not print that many of these places where opium was smoked were run by the Chinatown Guides Association and were set up as displays to shock tourists and no real opium was being used.[151] As a result of this propaganda and other political pressure, in 1881 the Californian state legislature validated anti-Chinese sentiment by enacting a law against opium smoking.

A few years after the California law, the federal government began discriminating between the different uses of opium through various tax measures.[152] Opium smoking was excluded in the United States in 1909.[153] However, opium and its derivatives were permitted to be major ingredients

in patent medicines.[154] There was no requirement that patent medicines containing opiates be so labeled in interstate commerce until the Pure Food and Drug Act of 1906.[155] Many proprietary medicines that could be bought at a local store or by mail order contained morphine, cocaine, laudanum, or (after 1898) heroin.[156]

Only opium smoking was considered immoral and a problem; other opium consumption was considered to be medical use.[157] Smoking opium, solely a pastime, lacked elaborate advertising campaigns, similar to those boosting morphine and cocaine preparations, and hence lacked political support. This double standard remained until the passage of the Harrison Tax Act in 1914, and only later did all opiate use develop into a general moral issue.[158]

As racist sentiments in the Western states built an anti-opium coalition, the United States was grappling with a large number of opium addicts after the Civil War. To compound matters further, the U.S. acquisition of the Philippines threatened to drastically increase the supply of opium and opium addicts. Following the capture of the Philippines in the Spanish-American War in 1898, the U.S. federal government struggled to control the opium epidemic affecting the Filipino civilian population.[159] Many feared its spread from the Philippines to the United States through the opening of new trade routes. Foremost among these voices was Charles Brent, an influential missionary bishop to the islands. He put together a commission to investigate alternatives to a licensing system for opium addicts, which came to the conclusion that if narcotics were going to be controlled, they needed to be put under international regulation.[160] Their recommendations were taken up by Congress in 1906. In 1908, President Theodore Roosevelt appointed Dr. Hamilton Wright as the first opium commissioner in the United States. Dr. Wright claimed that the United States consumed "the most habit forming drugs per capita"[161] and lamented that:

> one of the most unfortunate phases of smoking opium in this country is the large number of women who have become involved and were living as common-law wives or cohabitating with Chinese in the Chinatowns of our various cities.[162]

In response to the findings of the Brent Commission and the concerns raised by Dr. Wright, Roosevelt called for an international conference on opium, and it was held in Shanghai in 1909.

1909: The Shanghai Conference

> International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.[163]
>
> —Justice Horace Gray

In 1900, the U.S. Supreme Court in its landmark decision *Paquette Habana* held that international law was part of U.S. law and found by treaty, and controlling executive or legislative acts. If neither were present, the court would look for the "customs and usages of civilized nations."[164] International treaties are the primary means of creating international law and have played a crucial role in international (covered in greater depth in Chapter 6) and domestic drug control.

Thirteen nations attended the 1909 Shanghai Conference, including the United States, Great Britain, China, and India. The conference resulted in all nations adopting the following resolution:

> The contracting Powers shall use their best endeavors to control, or to cause to be controlled, all persons manufacturing, importing, selling, distributing, and exporting morphine, cocaine, and their respective salts, as well as the buildings in which these persons carry such an industry or trade.

1912: The International Opium Convention at the Hague

The Shanghai conference resulted in nine resolutions and one bilateral treaty between China and England but required follow-up. The signatories of the International Opium Convention at the Hague agreed to regulate *domestic* opium production and distribution.[165] This convention was signed by Germany, the United States, China, France, the United Kingdom, Italy, Japan, the Netherlands, Persia, Portugal, Russia, and Siam (now Thailand).

1914: Harrison Narcotics Act, 38 Statute 785

The Harrison Narcotics Act of 1914 was enacted as U.S. support of obligations incurred by signing the Hague agreement on opium and as a moral symbol of the government's views on drugs.[166] For 50 years, this act served as the basis for the entire federal scheme of drug-control legislation.[167]

At the time, it was widely believed by Jurists that the federal government could not directly prohibit a substance, as this would violate the police powers of the state under the 10th Amendment. To circumvent this potential constitutional roadblock, the Harrison Act was a "revenue measure" that punished manufacturers and sellers of opium and cocaine by requiring them to register, pay a fee, and keep records of all such drugs in their possession, but the act did not directly prohibit possession of these drugs.[168] The act required every person who produced, imported, manufactured, compounded, dealt in, dispensed, sold, distributed, or gave away opium or coca leaves or their derivatives (cocaine) to register with the Internal Revenue Service and to pay a special tax.[169] No grounds for refusal of registration were set out in the act.[170] The act was essentially a prohibition on marijuana:

> However transparent this pretext may be, and however valid may seem the contention that Congress was in reality masking an unconstitutional police measure in taxation clothes, nonetheless the measure has been upheld as a revenue measure, and the question of its constitutionality may be deemed closed.[171]

Registered parties were required to file returns that identified the quantity of all opium, coca leaves, and their derivatives and that these drugs be transferred pursuant to a special order form supplied by the transferee.[172] These special order forms could only be obtained from the Internal Revenue Service by registered parties.[173] Consequently, all transfers of cocaine and opium would be between registered parties.[174] The regulations prohibited a consumer from registering under the act. Consumers could thus only obtain a supply of such drugs through a duly registered physician, dentist, or veterinarian.

> Overnight, opiate addiction had become an illegal activity except in the narrowest of medical exceptions. Yet, thousands of bona fide opiate addicts existed in every region of the country requiring at least a short term solution to their dilemma.[175]

The new interpretation left registered professionals as the only legal source of supply. In turn, registrants were heavily monitored through record-keeping provisions and sanctions for violations.[176] The Bureau of Internal Revenue's Narcotics Division decided to close maintenance clinics and oppose treatment as an alternative except among the elderly and terminally ill.[177]

Part of a rush of legislation, the Harrison Act was approved in a few minutes, a fact not even noted that week in *The New York Times*'s summary of that session's work.[178] The act had incorporated numerous compromises among the pharmaceutical trades, the medical profession, and the Bureau of Internal Revenue.[179] The bill was passed and signed by President Woodrow Wilson in December 1914. Finally, the American government acknowledged its international promises to control opiate and cocaine traffic by federal law.[180]

The Harrison Act became effective on March 1, 1915.[181] Enforcement of the act would in large part shape the course of U.S. drug enforcement to the present day. Soon after, the federal government began prosecuting thousands of physicians for prescribing drugs to addicts.[182]

In *Webb et al. v. U.S.*, a retail druggist and a practicing physician had been indicted for conspiracy to violate the Harrison Act by providing maintenance supplies of morphine to an addict.[183] A divided Supreme Court concluded that to call "such an order for the use of morphine a physician's order would be so plain a perversion of meaning that no discussion of the subject is required."[184] In 1922, three years after *Webb*, the Court eliminated the intent of physicians as a defense if they prescribed large amounts of narcotics to addicts.[185]

The constitutionality of the Harrison Act was next challenged in the landmark case *United States v. Doremus*.[186] The defendant was a physician who had been prosecuted under §2 of the act for selling heroin without an order from the commissioner of the Internal Revenue Service. The district court found that §2 was not a revenue measure and was an invasion of the police power reserved for the states by the 10th Amendment to the Constitution.[187] The Supreme Court, however, reversed the district court and found that the Harrison Act was within the power of Congress to create excise taxes.

> We cannot agree with the contention that the provisions of §2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes. It follows that the judgment of the District Court must be reversed.[188]
>
> —Associate Supreme Court Justice William R. Day

Chief Justice Edward Douglass White dissented and was joined by three other justices who found that the act was not a revenue measure but an attempt to regulate conduct falling within the reserved police powers of the state:

> The Chief Justice dissents because he is of opinion that the court below correctly held the act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States.[189]
>
> —Chief Justice Edward Douglass White

1921: Narcotics Division, Bureau of Internal Revenue

Because the Harrison Act escaped constitutional scrutiny by ostensibly being a "revenue act," enforcement of its provisions was assigned to the Bureau of Internal Revenue in 1921.[190] The Bureau of Narcotics was created from the old narcotics unit within the Treasury Department's Bureau of Prohibition.[191]

1922: Narcotic Drugs Import and Export Act (Jones-Miller Act)

In 1922, Congress passed the Narcotic Drugs Import and Export Act, more commonly referred to as the Jones-Miller Act.[192] The act brought U.S. domestic law into compliance with international agreements by tightening control over a wide range of substances loosely defined as "narcotics." This was the first time in U.S. federal drug control that legislation did not refer to individual drugs and instead relied on an expansive category of "narcotic drugs."[193] Crucially, the definition of "narcotics" included any part of the cannabis plant and any of its derivatives.[194]

The act made it unlawful to:

> purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package. . . . The provisions of subsection a. shall not apply . . . to any person having in his or her possession any narcotic drugs . . . which have been . . . issued for legitimate medical uses by a physician.[195]
>
> —§4704

In addition, the act required every person with a legal right to handle these narcotics to register and pay an "occupational tax" of up to $24 per year.[196] Cocaine importation was prohibited altogether, and "the importation and use of opium and *other narcotics* [including cannabis] was prohibited except for medical purposes."[197]

The act established the Federal Narcotics Control Board to oversee the import of opiates that still had legitimate medical uses into the United States.[198] The board consisted of three cabinet members[199]—the

Secretary of Commerce, the Secretary of State, and the Secretary of the Treasury—with primary responsibility for "administration of the Act" within the Department of Treasury.[200]

The board was tasked with determining the exact amount of unprocessed opium and coca that could be imported into the United States for "legitimate and medical purposes" each year.[201] The board also determined which manufacturers could process the crude opium and coca leaves for this purpose. This broad discretionary power granted to the Federal Narcotic Control Board, and thus in large part to the federal Bureau of Narcotics, was supported by the U.S. attorney general in 1927 in response to a challenge by Dissosway Chemical Company.

Dissosway's application to procure crude opium was denied by the board. The company had never before engaged in manufacturing and distributing opium derivatives, which the board felt would create a "reputable concern."[202] Those already involved in opium processing were favored when it came to apportionment.[203] The attorney general weighed in on the agency decision and gave heavy deference to the board. Essentially, this interpretation granted such broad power to the board that the government obtained full control over the opium market.

The act also contained powerful legal presumptions against those found in possession of narcotics:

> Whenever on trial for a violation of this subsection the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.[204]
>
> —§174 Jones-Miller Act

Violation of the act was a serious offense. Section 174 of the act set stiff mandatory sentences for those found in possession of narcotics because, under the preceding presumption, they must have violated the act by illegally importing the narcotic substance. First-time offenders would receive:

> imprisonment for not less than five nor more than [20] years, and in addition, a fine not exceeding $20,000. For a second or subsequent offense the minimum is [10] years, the maximum [40] years, and the additional fine may be, as before, $20,000.[205]

These mandatory minimums applied to marijuana and heroin equally as "narcotics." Adjusted for inflation, the fine for a first-time offense would exceed $287,000 in 2016.[206]

The Jones-Miller Act greatly expanded federal control of drug enforcement beyond the bounds of the Harrison Act by setting mandatory sentencing minimums. It effectively prohibited cocaine and heroin use under the presumption that possession was evidence of illegal importation. The act also brought the drug industry under heavy regulation, a foreshadowing of tightening federal drug enforcement and the expanding role of the federal government in drug markets. The act also supported the broad agency discretion of the FBN. The act's constitutionality was upheld in *Yee Hen v. United States* in 1925.[207]

1925: Panama Canal Zone Report

Cannabis use by U.S. military personnel was prohibited in response to growing concern over marijuana use among U.S. service members stationed in the Panama Canal Zone.[208] At the request of the base commander, a committee was appointed by Meriwether Walker, governor of the Canal Zone, to study the effects of marijuana smoking. The committee was made up of doctors, officers, and lawyers: Colonel W. P. Chamberlain, chief health officer; F. E. Mitchell, district attorney; Guy Joahannes, chief of police; and C. H. Calhoun, head of the customs service. L. B. Bates, chief of the Ancon Hospital Laboratory; Dr. George Hesner, superintendent of the Corozal Hospital for the Insane; and Colonel William Rigby, judge advocate general for the U.S. Panama Canal Department, also contributed to the committee.[209]

The committee investigation lasted nine months.[210] Extensive literature reviews of the topic were conducted, authors were interviewed, and copies of their sources obtained.[211] Officers were questioned, and personnel records were examined for links between known marijuana use and disciplinary problems.[212] In addition, medical personnel observed policemen, soldiers, and doctors smoking marijuana and being under its effects.[213] The final report of the committee concluded:

> The influence of the drug when used for smoking is uncertain and appears to have been greatly exaggerated. The reports seem to have little basis in fact, and there is no medical evidence that it caused insanity. Tests conducted by our local board confirm the evidence that the plant is not a habit-forming drug, and that no pleasurable sensations nor actions of violence were observed. The board concluded that there is no evidence that the marijuana grown locally is a habit-forming drug in the sense of the term as applied to alcohol, opium, cocaine, or that it has any appreciable deleterious effect on the individuals using it.[214]

1930: Federal Bureau of Narcotics and Harry Anslinger

The Federal Bureau of Narcotics was the predecessor of the Drug Enforcement Administration (DEA). The FBN was created in 1930 as a consolidation of the Bureau of Customs and Prohibitions and the Federal Narcotics Control Board as authorized by the Harrison Act.[215] The FBN was tasked with "preventing illicit traffic in narcotic, stimulant, and depressant drugs" as well as "controlling the legitimate manufacture of such drugs for medicinal purposes."[216] Under the Harrison Act, drug enforcement was still ostensibly "revenue collection," not police power enforcing outright prohibition. Therefore, the FBN fell under the Treasury Department.[217]

Harry Anslinger was appointed the agency's first commissioner, a position he held from 1930 to 1963.[218] Previously, Anslinger had served as a consultant in the Netherlands, Germany, the Bahamas, and Venezuela, and by 1929 he was working in the Bureau of Prohibition as assistant commissioner.[219] Anslinger claimed to have developed a staunch probationary zeal in his youth when a local choirboy and friend of his "died from smoking opium."[220] Anslinger commonly referred to a wide range of substances as "dope" and "believed that all dope, from marijuana to morphine, was equally dangerous."[221] However, Anslinger was at first dismissive of the threat of marijuana, which was viewed solely as a Mexican habit.

By the late 1920s, the percentage of drug addicts in the penal system led to addiction being associated with domestic crime; the Porter Act of 1929 established "narcotic farms" for the treatment of addicts.[222] In the wake of societal attitudes regarding addiction's association with crime, some felt drastic enforcement measures were now necessary. Notably, Commissioner Anslinger's "vigorous leadership" paved the way for him to form a "powerful law enforcement agency" confronting this issue head-on.[223] He "shifted the main concern from prohibition to narcotic law enforcement," thus transforming the federal approach to drug enforcement.[224]

At the time of the FBN's creation, the U.S. economy was entering the Great Depression, so the bureau's budget was not especially large. Therefore, Commissioner Anslinger relied on "publicity and warnings" with an emphasis on marijuana.[225] Public misconceptions regarding marijuana furthered Anslinger's scheme to form a strong-armed enforcement division even in a bad economy. The FBN assisted in local and state police efforts and "remained relatively unchanged" for some 30 years.[226]

1934: Uniform Narcotic Drug Act

The Harrison Act was unable to effect the desired decrease in drug use. To fully gain control over narcotics within the United States, state and federal legislation was needed to provide a consistent underpinning for enforcement. The National Conference of Commissioners on Uniform State Laws formally approved the formation of uniform narcotic laws in 1932.[227] Subsequently, in 1934, the Uniform Narcotic Drug Act was passed and applied throughout the states.

Congress intended the act as a "general statute," one that would not require states to enact specific penalties for illicit acts.[228] There is "no rule of law which prohibits the repeal of a special act by a general one."[229] As of today, almost every state follows a version of the act, although states that have legalized recreational cannabis—Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington—and the District of Columbia fall outside the scope of the act's desired uniformity.

Interpretation by the separate states of the act has not been consistent. The term "narcotic drugs" encompassed "coca leaves, opium, cannabis, and every other substance chemically and physically indistinguishable from them." This generic terminology and states' version of the Uniform Narcotic Drug Act spawned litigation around the country. For example, in the Texas court of appeals case *Ex parte Tipton* in 1981, the majority overturned an indictment for "hashish" possession, holding that the Texas Controlled Substances Act set penalties for THC possession, but failed to explicitly include "hashish" as a controlled substance.[230] Quoting the book *Marihuana Reconsidered*, Judge Sam Houston Clinton agreed that the indictment should be overturned, stating:

> Put another way for present purposes, one man's "hashish" may be another man's "charas," "Chira," "Magoon," "Majun," "Madjun" or "Manzul,"[231] or even [marijuana], which, of course, is one reason that not only a penal statute but also a charging instrument must be more precise in stating the elements of an offense, including the listed controlled substance involved in it.
>
> Finally, the demonstrated mischief the dissenting opinion would generate and permit necessitates the requirement laid down by the Court that the charging instrument "explain why 'hashish'" is noted as a controlled substance.[232]

The "Hemp Conspiracy"

Some authors have proposed that the anti-cannabis consensus was the result of a conspiracy against the rise of industrial hemp in the 1930s. The idea of the "hemp conspiracy" has gained considerable traction online and can be found in many online pro-cannabis publications and several books.

> Interestingly Anslinger, the director of the Federal Bureau of Narcotics for 31 years, is seen as the front man for major U.S. capitalists who viewed marijuana, notably hemp, as a major threat to their monetary resources. Hence, the refer madness movement is directly linked to the *hemp conspiracy* involving Randolph Hearst, Andrew Mellon (to whom Anslinger was linked through marriage), and the powerful DuPont family. With the advent of the decorticator machine, hemp was seen as a more economical alternative to paper pulp used in the newspaper industry. Hearst felt his large timber holdings threatened while Mellon (the richest person in the United States at that time and secretary of the U.S. Treasury) was the main financial backer of the DuPont industries, that just came out with a new synthetic fiber, nylon. For nylon to succeed it had to replace the traditional resource, hemp. This capitalist's propaganda effort then linked racial fears to fuel Heart's *yellow journalism* spreading stories of rape, murder, and violence by "Negros, Mexicans, and Orientals" all under the evil drug marijuana.[233]

This excerpt contains similar assertions to Jack Herer's *The Emperor Wears No Clothes*.[234] Although the idea of a hemp conspiracy is interesting, it is not the most likely explanation for the rise of anti-cannabis legislation and the decline of the American hemp industry. The increasing role of federal regulation of drugs by the 1930s was already nearly a century underway. Before strict federal regulation, 30 states had enacted marijuana regulation or prohibition. The sensational "yellow journalism" accounts of marijuana were not unique to Randolph Hearst and his newspapers; periodicals in Mexico also decried the immoral and violent acts of the crazed "marihuano" (marijuana user).[235]

1934: State Uniform Narcotic Drug Act

Like the markets of most other commodities, drug markets are subject to the forces of supply and demand. As the federal government and state governments opposed to legalized cannabis are aware, cannabis prohibition is undermined by a patchwork of regulatory schemes across

the states ranging from complete prohibition to complete legalization. Some neighboring states are not happy with these legal changes. In late 2014, Oklahoma and Nebraska, for example, filed suit in federal court seeking an injunction against Colorado after the voters passed Amendment 64, which legalized recreational cannabis use. In hearings before the Supreme Court, the plaintiffs argued against the patchwork of regulation in their complaint:

> In passing and enforcing Amendment 64, the State of Colorado has created a dangerous gap in the federal drug control system enacted by the United States Congress. Marijuana flows from this gap into neighboring states, undermining Plaintiff States' own [four] marijuana bans, draining their treasuries, and placing stress on their criminal justice systems.[236]

In 2016, the Supreme Court ruled against Oklahoma and Nebraska. This same problem affected earlier federal and state efforts to prohibit cannabis.

At its apex, the Uniform Narcotic Drug Act was adopted in large part by 46 states, Puerto Rico, and the District of Columbia.[237] California and Pennsylvania adopted their own narcotics statutes that were approved by Bureau of Narcotics Commissioner Harry Anslinger.[238] In 1956, the House Subcommittee on Narcotics reported that narcotics laws in Kansas, New Hampshire, and Massachusetts were inadequate.

Reefer Madness (1936) and *The Devil's Harvest* (1942)

Although legislation was tightening the control of marijuana, many Americans were unconcerned with its supposed dangers. Many, especially those not living in the Southwest, were not familiar with marijuana as a recreational drug, and the average American in the 1930s was more likely to know about Cannabis indica as an ingredient in many patent medications. The Federal Bureau of Narcotics was accomplishing its federal and state regulation but was unable to change public perceptions about cannabis. The FBN launched a media campaign to inform the public about the "dangers" of cannabis. The most notable film produced was *Reefer Madness*, a "moralistic sexploitation"[239] that followed the plight of young high school students roped in to smoking marijuana by a slick conman "dope" dealer. The movie begins by labeling marijuana as "The Real Public Enemy Number One!," and lamented that marijuana led to "shocking violence ending after in incurable insanity."[240]

1937: Marijuana Tax Act

In 1937, the House Ways and Means Committee introduced a bill to regulate marijuana on the federal level. The bill came during Franklin Roosevelt's New Deal expansion of the federal government.[241] Driving factors that led to a push for federal legislation included increased federal government power combined with anti-Mexican sentiment, the perceived corruption of youth, and Harry Anslinger's desire to protect the newly formed Bureau of Narcotics.[242]

Chairman Robert Doughton (R-N.C.) cited the insistence of the Department of the Treasury, botanists, chemists, physicians, and the *Washington Times* as strong proponents of the bill.[243] Doughton had previously introduced a version of the bill, the Doughton Act, in 1936 that would have placed responsibility for drug enforcement under a "Secret Service Division," thus threatening to subsume the Federal Bureau of Narcotics and dismissing its commissioner.[244] The bill was defeated in committee by opposition from the FBN and Commissioner Harry Anslinger.[245] The FBN increased its reports and warnings on the dangers of marijuana and provided newspapers with lurid tales of marijuana depravity, and the bureau was cited as the source of marijuana facts for 17 published marijuana articles.[246]

Representing the Department of Treasury was Fred Vinson, assistant general counsel, and Harry Anslinger, the commissioner of narcotics. The stated purposes of the bill were to (1) develop a tax scheme to render "virtually impossible" the purchase of marijuana for illicit uses while not interfering with industrial and medical uses and (2) develop a means to publicize the dealings in marijuana in order to tax and control trafficking.[247] At this time, many legislators believed that an outright prohibition (of any kind, including firearms) would be struck down by the Supreme Court as unconstitutional.[248] To get around this constitutional inconvenience, the committee designed a regulation scheme that required purchasers of marijuana to pay a tax of $100 per ounce (for comparison, a *pound* of marijuana cost around $20 at this time).[249] The would-be purchaser of marijuana had to go through a regulatory process designed to be so complicated and expensive that it would serve to be a prohibition in everything but name:

> This bill will permit anyone to purchase marijuana, as was done in the National Firearms Act in permitting anyone to buy a machine gun, but he would have to pay a tax of $100 per ounce of marijuana and make his purchase on an official order form. A person who wants to buy

> marijuana would have to go to the collector and get an order form in duplicate, and buy the $100 tax stamp and put it on the original order form there. He would take the original to the vendor, and keep the duplicate. If the purchaser wants to transfer it, the person who purchases marijuana from him has to do the same thing and pay the $100 tax. That is the scheme that has been adopted to stop high school children from getting marijuana.[250]

Opposing the bill were Raymond Scarlet, representing a business that utilized cannabis seeds as birdseed, and Dr. William Woodward, representing the American Medical Association (AMA).[251] Scarlet presented testimony to the effect that cannabis seeds were a necessary and irreplaceable component of pigeon food without any known substitute. In response, Chairman Doughton asked, "Does that seed have the same effects on pigeons as the drug has on individuals?"[252]

The testimony on behalf of the AMA was not received much better. Dr. Woodward noted that the committee's choice to use the term "marijuana" instead of the better known "cannabis" was responsible for the absence of hemp and cannabis businesses at the hearing, and he refused to use the "mongrel" word "marijuana," which only had meaning in relation to "cannabis preparations for smoking."[253] Dr. Woodward recognized that the goal of the bill was not regulation but complete prohibition: "To say, however, as has been proposed here that the use of the drug should be prevented by a prohibitive tax loses sight of the fact that future investigation may show that there are substantial medical uses for cannabis."[254] The hearing can be best summed up by this short exchange between Representative John McCormack of Massachusetts and Dr. Woodward.

> *McCormack:* With all due respect to you and for your appearance here, is it not the fact that you are peeved because you were not called in and consulted on the drafting of the bill?
> *Woodward:* Not in the least. I have drafted too many bills to be peeved about that.
> *McCormack:* There is no question that the drug habit has been increasing rapidly in recent years.
> *Woodward:* There is no evidence to whether or not it has been.
> *McCormack:* In your opinion has it?
> *Woodward:* I should say it has increased slightly. Newspaper exploitation of the habit has done more to increase it than anything else.
> *McCormack:* It is likely to increase further unless some effort is made to suppress it.

Woodward: I do not know. The exploitation targets young men and women to venture into the habit.
McCormack: At any event, it is a drug.
Woodward: Cannabis indica is a drug, yes.[255]

The Marijuana Tax Act was passed on August 2, 1937,[256] and it stayed in force until it was overturned by the Supreme Court in *United States v. Leary* in 1969.[257] In reviewing the act, the Court noted the "scanty legislative history."[258]

1938: La Guardia Report

Some skeptics were unconvinced by the testimony presented at the marijuana tax act hearings. Among them was Fiorello La Guardia, 99th mayor of New York City and a staunch opponent to alcohol prohibition.[259] La Guardia was the first Italian American elected to Congress and an advocate for the rights of minorities.[260] During his time in Congress, La Guardia attempted to show how difficult it would be to enforce the Volstead Act, the federal legislation establishing and enforcing the prohibition on the sale and transport of alcohol, by brewing his own beer in his congressional office.[261] Inspired in part by lurid media accounts of crimes committed by youth under the influence of marijuana in New York as well as the Panama Canal Zone report, La Guardia requested that the New York Academy of Medicine form a committee to investigate.[262]

Cannabis had been prohibited in New York in 1927 by a comprehensive narcotics bill. However, there were few arrests for marijuana possession—only 160 in 1938.[263] Although it was reported in the press that marijuana use was widespread among the youth of New York, the committee struggled to find state officials familiar with this supposed epidemic. When questioned by the committee, domestic relations judge John Hill found only 10 cases out of 2,500 that noted marijuana use.[264]

The study itself was split into two parts: a clinical study of the effects of marijuana use and a sociological study. The clinical study lasted four to six weeks and consisted of 72 male and female volunteer participants from local prisons. The participants were split into groups and monitored by medical doctors and nurses before and after smoking or ingesting marijuana. A battery of tests was performed, including physiological, psychological, and behavioral observation. The study was able to challenge racist assertions that marijuana had some sort of enhanced effect on the "degenerate races"[265] by including white, black, and Puerto Rican participants.[266] In its conclusion, the committee rejected the common portrayal of the

"marijuana dope fiend." Instead, the committee described the effects of marijuana similar to the "modern" conception of marijuana:

> The personality changes observed when the subject is under the influence of 2 cc. of [marijuana] cigarettes demonstrate that the subject experiences some reduction in drive, less objectivity in evaluating situations, less aggression, more self-confidence, and a generally more favorable attitude toward himself. These reactions can be ascribed to two main causes, namely, an increased feeling of relaxation and disinhibition and increased self-confidence. As the drug relaxes the subject, the restraints which he normally imposes on himself are loosened and he talks more freely than he does in his undrugged state. Things which under ordinary circumstances he would not speak about are now given expression. Metaphysical problems which in the undrugged state he would be unwilling to discuss, sexual ideas he would ordinarily hesitate to mention, jokes without point, are all part of the oral stream released by the [marijuana].[267]

The committee also found that excessive marijuana ingestion in some cases caused anxiety and nausea but did not produce personality changes in individuals.[268] The committee's findings were a flat rejection of the portrayal of marijuana use by the press and the Federal Bureau of Narcotics.

The second part of the study focused on marijuana use in New York City. The study consisted of undercover investigations by six police recruits in the Harlem and Times Square areas. Investigators posed as students and peddlers in schools and questioned administrators from 39 high schools, but they did not find evidence of marijuana use among youths.[269] Investigators also infiltrated "tea pads," which were rooms where people would gather to smoke marijuana.[270] The investigators discovered that rather than being dens of criminal activity, these groups of marijuana smokers were similar to social clubs.[271]

The report was covered by *The New York Times*, but publication of the report was delayed until 1944 and was never widespread.[272] Harry Anslinger, commissioner of the Federal Bureau of Narcotics, reacted negatively to the committee's published conclusions:

> [The] primary interests of the Bureau of Narcotics is in the enforcement aspect . . . from this point of view we feel that it is very unfortunate that Drs. Allentuck and Bowman [researchers of the La Guardia report] should have stated so unqualifiedly that use of [marijuana] does not lead to physical,

> mental or moral degeneration and that no permanent deleterious effects from its continued use were observed.[273]

The Federal Bureau of Narcotics continued to criticize the report.[274] Although the AMA resisted the Marijuana Tax Act of 1937, as a whole the association had a history of supporting the regulation of drugs and supported the stance of the Bureau of Narcotics on the La Guardia report by publishing several editorials critical of the report.[275] The AMA's attack relied on information provided by Commissioner Anslinger and criticized the La Guardia Commission's methodology and conclusions.[276] Mayor La Guardia also received letters from concerned citizens about the report.[277] Facing unexpected opposition by the AMA and fierce opposition from the Bureau of Narcotics, Mayor La Guardia did not advocate for marijuana policies in line with the findings of his committee.[278]

1942: *Hemp for Victory*

The Marijuana Tax Act worked as intended, and farmers choose to plant other crops rather than go through the complex and expensive regulatory process. Hemp was still an important commodity, but demand for the product was met by importation, primarily from the Philippines.[279] The fiber plants jute and sisal provided another alternative to domestic hemp fiber and were likewise imported from East Asia.[280] This supply was stopped by the Japanese occupation of the Philippines in 1942.[281]

Fiber and rope were crucial to the war effort. Each battleship required more than 34,000 feet of rope, and hemp rigging was required for parachutes, firehoses, stitching in cloth, and other naval uses.[282] Wartime production increased demand, and naval stores of hemp imported from the Philippines were in danger of being exhausted.[283] To meet this demand, the requirements of the Harrison Act for growing hemp were streamlined. Farmers would take out contracts with the federal government to grow hemp; the proper tax stamp was included in each contract. This process led to a 1,000-percent increase in tax stamp permits being approved.[284] The U.S. Department of Agriculture issued an informative news reel titled *Hemp for Victory* in 1942 that explained the importance of hemp production for the war effort and included practical instructions on growing and harvesting hemp for farmers.[285] Several technological advances improved the viability of domestic hemp production. Power harvesters cut down acres of hemp in a fraction of the time required by hand harvesting. Breaking—the process of removing the woody stalks from the long strands

of fiber—was described by the USDA as "one of the hardest jobs known to man."[286] This, too, was a task made easier, quicker, and cheaper by powered breakers. Rope spinning by hand was also mechanized.[287] In 1942, American farmers harvested 14,000 acres of hemp. The USDA's goal was 300,000 acres in 1943.[288] After the war, the Treasury department issued fewer and fewer permits, issuing its final permit in 1957.[289]

Jazz Musicians

Jazz musicians were associated with marijuana use from the inception of the genre. Some authors have divided jazz into three distinct "drug periods." They labeled the period from the 1920s to World War II "the era of marijuana."[290] The air of jazz clubs supposedly hung thick with clouds of marijuana smoke, and musicians were said to live bohemian lifestyles of heavy drinking, smoking, and womanizing.[291] This at least was the view that many Americans, including government officials such as Harry Anslinger, held of jazz musicians and patrons. Press coverage of jazz musicians fixated on the perceived relationship between jazz, marijuana, and so-called deviance.[292] Jazz musicians and jazz publications decried the coverage as "a vivid picture of everything that jazz is not."[293]

The post–World War II period saw a revival of the belief that jazz musicians were narcotics users. Newspapers and magazines linked the degeneration of the youth to jazz, one lamenting, "teenaged dope addiction [often] started to the frenzied music of bebop jam sessions."[294] To many Americans, jazz was synonymous with marijuana, and marijuana was synonymous with deviousness.

1952: Boggs Act

During the 1940s the purported link between crime and drugs fueled national movement toward a punitive approach to drug use, resulting in harsh penalties. Prior to 1951, there were basically two sets of penalties for drug offenses.[295] First, violations of the Harrison Act were punishable by fines of up to two thousand dollars and imprisonment for up to five years, or both.[296] Second, violations of the importation laws were punishable by a fine up to five thousand dollars and imprisonment up to ten years.[297]

With the 1951 amendments to the Narcotic Drugs Import and Export Act and the Harrison Act, Congress standardized penalties for all drug offenses.[298] Furthermore in 1951, the Bureau of Narcotic's Commissioner Harry Anslinger encouraged Congress to pass the Boggs Act.[299] The Boggs

Act imposed mandatory minimum sentences on narcotics offenders.[300] The states followed suit with their own mini Boggs acts. In 1956, an unsatisfied Congress increased federal narcotics laws again.[301] Pursuant to the Narcotic Control Act of 1956, one could be sentenced to the death penalty for conviction of selling narcotics to anyone under eighteen years of age.[302] The adoption of these statutes has left the United States of America with one of the strictest narcotics policies in the world, imposing stiff mandatory minimum sentences, normally considered for more serious violent crimes against person or property, to the narcotics offender.[303] Furthermore, to ensure that the drug trafficker would serve his full term in prison, Congress denied eligibility for a suspended sentence, probation, or parole even on first conviction.[304]

Narcotic Control Act of 1956

By 1956, no penalties remained on the books for Harrison Act or Marijuana Tax Act violations.[305] Like the Jones-Miller Act, the Narcotic Control Act treated cannabis, opium, and cocaine collectively as "narcotics."[306] The act laid out penalties similar to the Jones Miller Act:

a. Not less than two years or more than [10] years imprisonment. Fine of not over $20,000 is optional.
b. For a second offense, not less than five years or more than [20] years imprisonment. Fine of not more than $20,000 is optional.
c. For a third or subsequent offense, the offender may get not less than [10] or more than [40] years in prison and, in addition, may also be fined $20,000.
2. For selling, bartering, exchanging, giving away, or transferring any narcotic drug or [marijuana] to a person under [18] (if the offender is himself over [18]), the mandatory sentence is not less than [10] or more than [40] years imprisonment plus the optional $20,000 fine.

Pushback against Harsh Drug Sentencing

The 1960s were dominated by a more free-spirited experimental view of drugs. In 1961, the American Bar Association (ABA) and the American Medical Association published a combined report, *Drug Addiction: Crime or Disease?*[307] The report criticized the dominant law enforcement approach to addiction and advocated a more balanced prevention policy.[308] It was only one year after this report that President John F. Kennedy convened a White House Conference on Narcotics and Drug Abuse that promoted

rehabilitation rather than punishment.[309] Legislation that authorized the involuntary civil commitment of narcotics addicts was enacted by the states of California (1961) and New York (1962) as well as by Congress (1966). Although these laws served a humanitarian and social control interest, poor treatment success and high operational costs led these programs to disappear.[310] In response to this AMA and ABA report, Congress enacted the Narcotic Addict Rehabilitation Act in 1966.[311] The act permitted federal judges to condition criminal sentences of probationers and inmates on the participation in treatment programs available in federal prisons in Fort Worth, Texas, and Lexington, Kentucky.[312] As with civil commitment laws, this act has been de-emphasized over the years.[313]

It was in the 1960s that depressants, stimulants, and hallucinogenic drugs were brought under federal control for the first time. This was done through the Drug Control Amendments of 1965.[314] These amendments gave the Food and Drug Administration (FDA) control over barbiturates, amphetamines, and other drugs from their production by manufacturers to their sale to consumers.[315] This act limited the number of times a prescription could be refilled and made it criminal to possess the substances without a prescription.[316] The FDA then included peyote, mescaline, LSD, DMT, psilocybin, and some tranquilizers.[317] Once again, the states followed the federal government's lead and adopted legislation regulating the possession, use, manufacture, and distribution of depressants, stimulants, and hallucinogenic drugs.[318]

Also in the 1960s, the international community agreed on a narcotics control compact.[319] The agreement was a "single convention" and replaced all earlier international agreements dealing with the control of narcotics.[320] It limited the production, manufacture, import, export, trade, distribution, use, and possession of opiates, cocaine, and cannabis drugs to medical purposes only.

Leary v. United States and the Controlled Substances Act (1970)

Although other drug-control legislation had been implemented in the previous three decades, the 1937 Marijuana Tax Act was still the main tool for prosecuting individuals found in possession of marijuana. In 1965, Harvard professor and counterculture activist Timothy Leary drove with his family from New York to Texas for vacation in Mexico.[321] At the border, U.S. customs inspected the vehicle and found marijuana.[322] Leary was tried for two violations of the Narcotic Drugs Import and Export Act and one of the Marijuana Tax Act.[323] In 1969 The Marijuana Tax Act was struck down as a violation of the Fifth Amendment's right against

self-incrimination because the act required persons to register and apply for a tax stamp for transfers of marijuana, a substance illegal under state law, thus exposing themselves to a "real and appreciable" risk of self-incrimination.[324] Justice John Marshall Harlan III closed the tax-scheme method of federal prohibition but did not close the door on federal marijuana prohibition: "We are constrained to add that nothing in what we hold today implies any constitutional disability in Congress to deal with the [marijuana] traffic by other means."[325]

Congress quickly found those other means, and in 1970 it passed the Comprehensive Drug Abuse Prevention and Control Act, which contains the better known Controlled Substances Act (CSA).[326] The CSA improved the administration and regulation of the controlled substances under several existing statutes. The preceding statutes were repealed, and drugs under the act were labeled "controlled substances."[327] The CSA was signed into law by President Richard M. Nixon to tighten regulation on drugs that had a "high potential for abuse" or other negative consequences.[328] Marijuana was placed in the most restrictive schedule, Schedule I, in 1971 pending the findings of the national commission on marijuana and drug abuse.[329] As of 2017, marijuana remains a Schedule I drug.

The CSA rejects the Harrison Act's reliance on revenue powers and instead founds itself on Congress's power to regulate interstate commerce.[330] In the last half of the century, the powers of the interstate commerce clause were substantially broadened so that they could sustain strict regulation of drug use without setting police functions as revenue measures.[331]

Controlled substances are subject to increasing levels of control pursuant to this act on the basis of abuse potential and lack of therapeutic usefulness. The Controlled Substances Act authorized the attorney general and the secretary of what was then the Department of Health, Education, and Welfare to add or remove substances from the list of controlled substances on the basis of abuse capacity. The rigid minimum penalties for drug offenders were reduced, and education, research, and rehabilitation programs became the focus of encouragement by the government. That same year, a Uniform Controlled Substances Act was drafted and adopted by more than 40 states.

The function of the Uniform Controlled Substances Act was to replace the Uniform Narcotic Drug Act. This federal legislation required many states to amend their existing legislation by adopting classifications similar to the federal approach. Section 201 of the act as adopted by all states that have enacted a Uniform Controlled Substances Act provides the criteria to be used in controlling and classifying drugs into the five schedules. The DEA defines Schedule I as:

> drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence. Some examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4 methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote.[332]
>
> Pursuant to 21 USC § 812(b)(1), a substance will be placed in Schedule I based on specific findings made by the Administrator that "(A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision."[333]

Currently, 183 substances are listed as Schedule I drugs, including heroin, LSD, cannabis extract (including cannabinol oil), and marijuana.[334] Methamphetamine and cocaine are Schedule II drugs.[335] Each state has enacted its own version of the CSA, although with some modifications. For example, the Colorado Uniform Controlled Substances Act of 1992 did not list marijuana as a Schedule I drug.[336]

In 1972, the National Commission on Marijuana and Drug Abuse (the Shafer Commission) was commissioned by President Nixon. One of the commission's tasks was to determine the proper scheduling for marijuana. In its final report to Nixon, the commission recommended a scheme of "partial prohibition" similar to many modern decriminalization schemes:

> The total prohibition scheme was rejected primarily because no sufficiently compelling social reason, predicated on existing knowledge, justifies intrusion by the criminal justice system, into the private lives of individuals who use [marijuana]. The commission is of the unanimous opinion that [marijuana] use is not such a grave problem that individuals who smoke [marijuana], and possess it for that purpose, should be subject to criminal procedures. On the other hand, we have also rejected the regulatory or legalization scheme because it would institutionalize availability of a drug which has uncertain long-term effects and which may be of transient social nature.[337]

The only changes to federal law that the commission suggested were decriminalizing personal (but not public) possession and decriminalizing distribution that was not for profit.[338] President Nixon declined to implement the recommended changes.

1973: The Drug Enforcement Administration

Throughout the early 1970s, the federal government created many offices and agencies to enforce drug-related legislation such as the Special Action Office for Drug Abuse Prevention and the Bureau of Narcotics and Dangerous Drugs (BNDD), which consolidated the Bureau of Narcotics and the Bureau of Drug Abuse Control.[339] However, the creation of all these offices and agencies did not achieve the intended goal of coordinating federal drug law enforcement resources.[340] The enforcement resources of the BNDD, the Office of Drug Abuse Law Enforcement, the Bureau of Customs, and the Office of National Narcotics Intelligence were consolidated into a single federal enforcement agency, the Drug Enforcement Administration, by executive order of President Nixon in July 1973.[341] All the functions performed by the previous agencies were integrated into this new agency.[342] The DEA was created to carry out Nixon's "all out global war on the drug menace":[343]

> [T]he federal government is fighting the war on drug abuse under a distinct handicap, for its efforts are those of a loosely confederated alliance facing a resourceful, elusive, worldwide enemy. Certainly, the cold-blooded underworld networks that funnel narcotics from suppliers all over the world are no respecters of the bureaucratic dividing lines that now complicate our antidrug efforts.[344]
>
> —President Richard M. Nixon

In 1973, the DEA had 1,470 special agents and a budget of $75 million. Today, the DEA has 5,000 special agents and an annual budget of $2.03 billion.[345]

1986: Anti-Drug Abuse Act (Amended 1988) and the "Just Say No" Campaign

The Office of National Drug Control Policy (ONDCP) was created by a 1988 amendment to the Anti-Drug Abuse Act. The act established the ONDCP to coordinate state and federal drug-control efforts.[346] It also set harsh minimum sentencing for first-time possession offenses of crack cocaine, and it expanded U.S. efforts at drug interdiction abroad.[347] First Lady Nancy Regan kicked off the "Just Say 'No' Campaign" in a radio address, telling children to just say "no" to people who offered them drugs. Mrs. Reagan led a social movement against drugs in conjunction with President Regan's war on drugs.

The "Marijuana Dope Fiend" (to Cheech and Chong)

Contemporary society's view of the lazy, slothlike "stoner" is a complete reversal of the "marijuana dope fiend" of the early 1900s. Societal views of drug use are shaped by many factors; the full list cannot be reproduced here. An important factor that affects a drug user's experience is the "set and setting" of the drug. Early hashish users were well aware of the stark effects their surroundings played on their drug experiences:

> [The] color and peculiar phases of a hashish dream are materially affected by one's surroundings just prior to the sleep. The impressions that we have been receiving ever since we entered, the fights, odors, sounds, and colors, are the strands which the deft fingers of imagination will weave into the hemp reveries and dreams, which seem as real as those of everyday life, and always more grand. Hashish eaters and smokers in the East recognized this fact, and always, prior to indulging in the drug, surrounded themselves with the most pleasing sounds, faces, forms, etc.[348]

Researchers have found that a person's biological makeup, expectations about the drug, and interactions with the external environment and societal norms of drug use all combine to produce the so-called drug effect. This effect is referred to as "set and setting."[349]

Legal and medical studies originating in New Orleans during the 1920s connected crime across the west with marijuana and claimed that marijuana was a powerful sexual stimulant.[350] Consequently, 16 of the 22 Western states prohibited the sale or possession of marijuana before 1930.[351] This discrimination served as the basis for early marijuana legislation in Utah, New Mexico, and Texas and was affirmed in Montana and Colorado.[352] Montana newspapers such as the *Montana Standard* followed the progress of the passage of the bill prohibiting marijuana use in January 1929:[353]

> There was fun in the House Health Committee during the week when the marijuana bill came up for consideration. Marijuana is *Mexican opium*, a plant used by Mexicans and cultivated for sale by Indians. "When some beet field peon takes a few rares of this stuff," explained Dr. Fred Fulsher of Mineral County, "he thinks he has just been elected president of Mexico so he starts out to execute all his political enemies. I understand that over in Butte where the Mexicans often go for the winter they stage imaginary bullfights in the 'Bower of Roses' or put tournaments for the favor of

> 'Spanish Rose' after a couple of whiffs of Marijuana. The Silver Bow and Yellowstone delegations both deplore these international complications." Everybody laughed and the bill was recommended for passage.[354]

Also in 1929, a *Denver Post* story headlined "Fiend Slayer Caught in Nebraska[;] Mexican Confesses Torture of American Baby," and subheaded "Prisoner Admits to Officer He Is Marijuana Addict"[355] described a Mexican who kills his white stepdaughter because "his supply of the weed had become exhausted for several days before the killing and his nerves were unstrung."[356] Four days after the *Denver Post* printed this story, the governor signed a bill increasing penalties for sale, possession, and production of marijuana.[357] The public perception of marijuana's ethnic origins and crime-producing tendencies often went hand in hand, especially in the more volatile areas of the Western states.[358]

Nativist organizations were quick to link marijuana with Mexican people and violence. The American Coalition was formed with the goal of keeping "America American."[359] One of the coalition's more prominent members made the following connection between marijuana and Mexicans:

> Marijuana, perhaps now the most insidious of narcotics, is a direct by-product of unrestricted Mexican immigration. Easily grown, it has been asserted that it has recently been planted between rows in a California penitentiary garden. Mexican peddlers have been caught distributing sample marijuana cigarettes to school children. Bills for our quota against Mexico have been blocked mysteriously in every Congress since [the] 1924 Quota Act. Our nation has more than enough laborers.[360]

The rationale behind marijuana prohibition in the Eastern states was the idea that marijuana would be used by narcotics addicts to replace these prohibited drugs.[361] Commissioner Anslinger recalled that marijuana caused few problems except in the Southwestern and Western states, and there the growing alarm was directed at Mexicans.[362] These states were "the only ones then affected. . . . We didn't see it here in the East at all at that time."[363]

Nationally, from 1938 to 1951, the federal government put forth propaganda supporting the Uniform Narcotic Drug Act; the efforts culminated in the passage of the Marijuana Tax Act.[364] The annual reports of the Federal Bureau of Narcotics during its first few years indicate that control of marijuana should be vested in state governments, which found that marijuana use was a minor problem.[365] However, in 1932, the Federal

Bureau of Narcotics endorsed the Uniform State Narcotic Acts, claiming this act would prevent marijuana use.[366] Until inclusion of marijuana in the Uniform Narcotic Drug Act in 1932 and the passage of the Marijuana Tax Act in 1937, there was no nationally agreed-on policy regarding the drug.[367]

For 13 years after prohibition was achieved, marijuana drew little national attention. However, between 1951 and 1965, marijuana was portrayed as the first stepping-stone to heroin addiction. Penalties for marijuana offenses were then increased and all marijuana offenses became felonies in most states.[368] Marijuana use in the 1960s confronted a system of criminal prohibition that carried its own meaning emanating from a different time: "[d]ecades of classification as a narcotic, the implication of addiction, crime, and insanity has instilled in the public consciousness a fear of marijuana unjustified by the demonstrable effects of its use."[369] Modern commentary provides no indications why marijuana was included in New York state's narcotics laws.[370] Numerous articles existed in the press dealing with the problems of opiates, morphine, cocaine, and heroin, but only four major articles addressed marijuana.[371] Furthermore, none of the articles discussing the act after its passage refer to marijuana.[372] New York and other Eastern states enacted preventive statutes prohibiting the use of marijuana in order to keep addicts from switching to it as a substitute for other drugs.[373] These statutes were passed to apparent little effect, and marijuana use actually increased.

Marijuana and the Courts

Similar to legislatures in Washington, D.C., and across the country, courts sometimes relied on nonscientific materials to support the proposition that marijuana was an addictive, mind-destroying drug that only produced crime and insanity.[374] In *State v. Bonoa*, the Louisiana Supreme Court held that possession of marijuana plants for any reason was prohibited because the drug's deleterious properties outweighed its uses, especially since "[t]he marijuana plant is not one of the crops of this state."[375] The court relied on two "advisory opinions" in its decision. The first was a description of marijuana's effects on a user as set forth by writers Solis-Cohen and Githen in *Pharmacotheraupeutics* (1928):

> [a]n Arab leader, fighting against the Crusaders, had a bodyguard who partook of hashish, and used to rush madly on their enemies, slaying everyone they met. The name of "haschischin" applied to them has survived as "assassin."[376]

Second, a quote from Rusby, Bliss, and Ballard in *The Properties and Uses of Drugs* (1930) fed a general belief in drug-induced violence:

> The particular narcosis of cannabis in the liberation of the imagination from all restraint. . . . Not rarely, in [the depression] state, an irresistible impulse to the commission of criminal acts will be experienced. Occasionally an entire group of men under the influence of this drug will rush out to engage in violent or bloody deeds.[377]

The passage of the Marijuana Tax Act was based on this purported link between drug use and crime.[378] In addition, in *State v. Navaro*, an expert physician testified that:

> [marijuana] is a narcotic and acts upon the central nervous system affecting the brain, producing exhilarating effects and causing one to do things which he otherwise would not do and especially induces acts of violence; that violence is one of the symptoms of excessive use of marijuana. . . . That the marijuana produces an "I don't care" effect. A man having used liquor and marijuana might deliberately plan a robbery and killing and carry it out and escape, and then later fail to remember anything that had occurred.[379]

This became the medical authority for the scientific hypothesis that marijuana use causes crime.[380]

Marijuana Goes Mainstream

It took 50 years after the start of Prohibition before opposition to marijuana use was challenged in major public debates.[381] From 1965 to 1972, marijuana use increased and expanded to regular use by members of the middle class.[382] During this time, every state reduced its penalties for marijuana consumption-related offenses.[383] In 1972, the report of the National Commission on Marijuana and Drug Abuse (the Shafer Commission) recommended that consumption-related offenses be decriminalized.[384] In 1973, Oregon became the first state to decriminalize possession of small amounts of marijuana.

Recent Developments

Marijuana prohibition started in state legislatures across the West. Now, more than 100 years after federal regulation of marijuana began, it is being undone in those states. To date, Alaska, California, Colorado, Maine,

Massachusetts, Nevada, Oregon, Washington, and the District of Columbia have legalized recreational marijuana, and another 20 states have legalized medical marijuana in direct opposition to federal law.[385] The conflict between federal and state cannabis laws is a complicated issue and requires in-depth examination in its own chapter (see Chapter 8).

CHAPTER SIX

Global Marijuana Regulation

Kyle Bershok Ames

Humans have used mind- and mood-altering substances for millennia. Human groups have long interacted and exchanged ideas—and also exchanged drugs. As international trade routes became better established, trade increased and drugs traveled to new locations. Before the 20th century, little effort was made to address drug production and trafficking through international law. By the late 20th century, however, nearly every nation in the world was a signatory to three major United Nations (UN) drug treaties: the 1961 Single Convention on Narcotic Drugs,[1] the 1971 Convention on Psychotropic Substances,[2] and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[3] Similar to the evolution of U.S. federal drug control, these conventions were culminations of decades of other agreements and laws. Because the 1961 Single Convention replaced earlier international drug-control agreements, most appear solely in footnotes to the convention.[4]

Shanghai Conference (1909)

In 1909, U.S. authorities convened an international opium conference in Shanghai with the participation of 13 nations; the aim was to enact international legislation to compliment domestic drug prohibition laws.[5] In attendance were delegates from the United States, Austria-Hungary, China, France, Germany, the United Kingdom, Italy, Japan, the Netherlands,

Persia, Portugal, Russia, and Thailand.[6] However, the United States, Great Britain, and China dominated the conference.[7]

China was the world's largest importer of opium, importing 3,300 metric tons in 1906–1907. It was also the largest producer, supplying 85 percent of the estimated global total of 41,600 metric tons.[8] The conference debate was mostly over the type of control to be advocated—prohibition or regulation. The British, eager to protect their Indian–Chinese opium for silver trade, favored the latter.[9]

Britain entered into a bilateral agreement with China to reduce and eventually eliminate its opium trade with China, and China agreed to stop domestic opium production.[10] The conference ended in nine resolutions governing the prohibition of opium smoking and control of trade.[11]

The Shanghai resolutions required follow-up. Another meeting was convened three years later at a conference in The Hague, Netherlands.[12] The origin of drug-control policies in the United States, England, and the Netherlands can be traced to the Hague Convention of 1912, which sought to solve the opium problems of China and the Far East.[13] Until then, antidrug legislation was virtually nonexistent around the world.[14] Again, the United States through its diplomatic channels made all the preliminary preparations,[15] but conflicting interests were apparent early on. The British attempted to delay the convention until the conclusion of an agreement consolidating a 10-year reduction of trade between India and China.[16] Britain had a substantial economic interest in preserving the opium trade.[17] The signing parties of the Hague Convention, in a limited number, agreed to regulate the production and distribution of raw opium and medical products derived therefrom and to prohibit trade in treated opium used for nonmedical purposes.[18]

The text of the Hague Convention called for domestic rather than international regulations controlling production and distribution.[19] Because of a peculiar ratification procedure maneuvered by the German delegation, the Hague Convention did not take effect before the outbreak of World War I.[20] However, a large number of countries became parties to the Hague Convention through their ratification of the Treaty of Versailles in 1919.[21] It was the British government that took the lead in securing the ratification of the Hague Convention by this method.[22]

Geneva Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (1931 and 1935)

The representatives of 57 nations decided to control artificially produced drugs and limit their use to medical purposes only.[23] International cooperation in the prosecution of drug dealers was substantially promoted.[24]

Also, further specialization of narcotics divisions within enforcement agencies emerged.[25] The Geneva Convention of 1925 governed the regulation of drug distribution, and the Limitation Convention of 1931 limited the manufacture of opiates to the amounts necessary to meet medical and scientific needs.[26]

Single Convention on Narcotics Drugs, New York (1961) as Amended by the 1972 Protocol

Adopted by 70 nations and ratified by 133, the Single Convention has become a model for drug control policies worldwide.[27] The preamble states that the parties are "concerned with the health and welfare of mankind" and recognize "that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind."[28]

The purpose of the Single Convention was to replace all previous international agreements on drug control and impose a general and absolute prohibition on *all known drugs*, including cannabis.[29] Article 44 of the Single Convention completely replaces nine treaties on international drug control and replaces part of one other treaty.[30] Article 26 requires that countries "enforce the uprooting of all coca bushes which grow wild."[31] The convention mandated "adequate punishment" for serious crimes dealing with every activity linked to drugs.[32] In addition to earlier treaties, the Single Convention included oversight provisions that broaden the focus from solely opium to the raw material of natural narcotic drugs.[33] Finally, this convention states that every country, even those who did not sign it, has an obligation to fight against the production of illicit drugs within their own territories.[34] Article 28 relates to the control of cannabis:

> If a party permits cultivation of the cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy. . . .
>
> This convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes [fiber and seed] or horticultural purposes. . . .
>
> The parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.

This convention required signatories to apply the enforcement scheme for opium (article 23) to cannabis. The Single Convention achieved more than the unification of treaties: it established prohibition as the new global policy toward cannabis.[35] Implementation of the Single Convention was assigned

to the International Narcotics Control Board (INCB), itself a unification of previous agencies.[36] In addition, the World Health Organization (WHO) was given the role of suggesting amendments to the drug scheduling to the United Nations.[37] Article 4 outlines the obligations incurred by signatories:

> The parties shall take such legislative and administrative measures as may be necessary: a) To give effect to and carry out the provisions of this Convention within their own territories; b) To co-operate with other States in the execution of the provisions of this Convention; and c) Subject 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.[38]

The Single Convention was amended in 1972 to strengthen provisions relating to producing and trafficking of illicit narcotics.[39] The amendment also addressed the treatment and rehabilitation of drug abusers.[40]

Convention on Psychotropic Substances, Vienna (1971)

The Single Convention failed to include several substances that were causing "disquiet" in several countries.[41] The 1971 Psychotropic Substances Convention extended international control to synthetic hallucinogens, stimulants, and sedatives.[42] This convention evolved from the Single Convention and sought to differentiate among those substances that were completely prohibited except for limited scientific and medical purposes and those whose manufacture, distribution, and use was merely curtailed.[43] This convention includes a list of generally forbidden substances such as hallucinogens, amphetamines, delta-9-tetrahydrocannabinol (THC), and barbiturates.[44] Although the two conventions contain limited provisions relating to the punishment of traffickers, they are mainly regulatory and do not provide a basis for comprehensive national action aimed at punishing distribution and use.[45]

Convention against the Illicit Traffic of Narcotics Drugs, Vienna (1988)

This convention is the latest agreement and was ratified by 50 nations in 1991.[46] To promote cooperation among nations in drug policy, it called for the following:

1. that the parties deem not only the production and trade of drugs but also their possession and purchase as penal violations if the latter are done with intent to deliver the drugs to other people;

2. that the organization and financing of such activities, along with the user or conversion of profits derived there from, be deemed penal violations;
3. that the possession of drugs for personal use be of itself a crime but that together with punishment social rehabilitative treatment measures must be adopted; and
4. that similar measures can replace penal sanction when "minor violations" occur.[47]

The United Nations enacted the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988 (Narcotics Convention) in recognition that the 1961 and 1972 Conventions lacked the ability to regulate trafficking.[48]

The Narcotics Convention calls on signatory states to take specific law enforcement measures to improve their ability to identify, arrest, prosecute, and convict those who traffic in drugs across international borders.[49] These measures include establishing drug-related criminal offenses under domestic law, making these offenses the basis for international extradition between states party to the Narcotics Convention, providing for mutual legal assistance in the investigation and prosecution of covered offenses, and facilitating the seizure and confiscation of proceeds from illegal trafficking.[50]

The World Health Organization, the Commission on Narcotic Drugs, and the UN Office on Drugs and Crime

The WHO was officially tasked with suggesting amendments to the UN drug-scheduling regime by the 1961 Single Convention[51] and later had its scope expanded by the 1971 Convention of Psychotropic Substances.[52] To carry out this duty, the WHO established an Expert Committee on Drug Dependence that "evaluates the dependence-producing properties and potential harm to health of psychoactive substances. . . ."[53] The committee makes recommendations to the Commission on Narcotic Drugs (CND), a UN body elected by the UN Economic and Social Council, which determines which substances to put under international control.[54] "WHO's assessment is determinative for scientific and medical matters, but CND may also take into account legal, administrative, economic, social, and other factors in reaching its decision."[55] The UN CND was established in 1946 to oversee international drug-control treaties and became a governing body of the UN Office on Drugs and Crime (UNODC) in 1991.[56] These two UN bodies work closely together to set the international standard for domestic drug laws.

Notably, the WHO and UNODC continue to support cannabis prohibition, with the UNODC calling for cannabis possession to remain a "punishable offense"[57]:

> Recent data on smoking cannabis clearly shows that it is unhealthy and dangerous. Cannabis use is linked to addiction, cognitive impairment, motor skills deficiency, respiratory, cardiovascular and mental health problems, and it has been shown to be particularly damaging to maturing brains. The international experience with increased emergency room admissions and treatment entrants represent the dangerousness of today's highly potent cannabis, and its potential to greatly threaten both the public health and public safety. On the other hand, components of cannabis have been found to be effective for a few medical reasons, and research in this area is ongoing. Despite some increased calls for depenalization or "soft-drug" labeling, Member States of the Commission on Narcotic Drugs have not raised the subject in this formal setting, and cannabis possession should remain a punishable offense, while its use should be prevented and its continued use treated. There are several evidence-based prevention and treatment strategies that governments can implement to effectively reduce marijuana use, abuse and addiction and prevent much of the consequences and costs to society with regard to health care, social support, security and development.[58]

Cannabis Laws around the World

Every signatory to the UN convention has an obligation to enact domestic regulation to advance the goals of the 1961 Single Convention, but several different models of drug laws are currently being used across the globe that meet this obligation. Several countries, however, are in violation of the UN drug conventions. Rather than provide a complete list of each nation's drug laws, this section will highlight some of the major drug law schemes including decriminalization, legalization, harm reduction, and prohibition.

Latin America

Latin American countries have historically been firmly in the drug prohibition block. However, many Latin American countries have been liberalizing their drug policies as an approach to stemming drug-trafficking–related violence. The following countries demonstrate the range of drug control (specifically, cannabis control) in Latin America.

Mexico

Mexico prohibited the use of marijuana in 1920 after several decades of violent incidents attributed by penny journals and daily periodicals to marijuana.[59] In 1901, a *Mexican Herald* story stated:

> Among the misguided youths, both male and female of this city, are a number who have become addicted to the marihuana habit, and who congregate in the early morning hours before dawn on various plazas and smoke this poisonous weed, which produces a sort of insanity for the time. A youth addicted to this habit, was told the other night that he was pursued by brigands, and in his terror, he leaped into the sewer drain, nearly drowning before he could be extricated.[60]

Mexico maintained strict prohibition against all drugs until 1994, when the government overhauled the federal criminal code, distinguished between different drugs, increased penalties for selling and trafficking, and lowered penalties for possession for personal use and cultivation for personal consumption.[61]

The 1996 Federal Law Against Organized Crime raised penalties for drug traffickers working for organized crime. The law applies to illegal activity committed in groups of three or more people.[62] Article 12 established precautionary detentions that allow someone suspected of trafficking for organized crime to be held for as long as 80 days while they are under investigation.[63] In 2009, the Mexican parliament—the Congreso General de los Estados Unidos Mexicanos—reformed article 478 of the General Health Act to get rid of all penalties for personal use up to five grams of marijuana.[64] However, anyone found with more than five grams of marijuana can be tried as a small-scale trafficker, and anyone found with 5,000 grams (11 pounds) can be tried under the 1996 organized crime law.

Uruguay

In 2013, Uruguay became the first country in the world to completely legalize marijuana consumption, cultivation, sale, and distribution. The country, however, remains a signatory to the 1961 Single Convention on Narcotic Drugs. The UN INCB expressed concern that Uruguay was undermining international drug control,[65] stating that marijuana is a "particularly dangerous drug" and stressed the importance of a uniform approach to global drug control.[66]

In 2010, Uruguayans elected Jose Mujica, former revolutionary and senate leader.[67] President Mujica was a vocal supporter of legalization and believed that Uruguay could be the first South American country to legalize marijuana.[68] Mujica believed legalization could serve as an international experiment for the whole world to see, and he hoped that this step would lessen drug violence.[69] Legalization in the states of Colorado and Washington provided additional evidence to Mujica.[70] Uruguayan Defense Minister Eleuterio Fernandez supported legalization to reduce profits to drug cartels and to encourage drug users to switch off of harder drugs.[71]

The law consists of government regulation and registration of cannabis and its users, meaning that only registered adults can purchase or consume limited amounts.[72] The three legal options for cannabis acquisition are through pharmacies, by independent growing, and through cannabis clubs.[73] Adults can purchase 40 grams at pharmacies, grow as many as six plants, or obtain membership at a club.[74] The government sets the prices, and they are said to be consistent with prices from past illicit competitors.[75] The bill itself did not garner a vast majority of voter or representative support, and many people opposed the idea.[76]

The United Nations has not been silent on the matter. It has issued warnings to Uruguay, as well as the states of Washington and Colorado, and continues to investigate the situations that come as a result of legalization.[77] Although no concrete penalties have been enacted, the International Narcotics Control Board has continued to vocalize its displeasure with Uruguay's legalization.[78] Widespread criticism exists, however, over the decisions made by the UN in its own narcotics conventions.[79] Many of those in charge of the decision-making process in the CND and the INCB focus on the political ramifications of issues, and they are not experts on the benefits or downsides of the substances they regulate.[80] The WHO has suggested that marijuana be moved down on the scheduling scale, but the UN has disregarded that suggestion.[81] Many experts believe that the INCB is not authorized to call for changes in any country's internal policies.[82] The International Conventions on Narcotics do not produce national law, and the UN World Drug Report itself stated that the decisions could be altered if ideas changed.[83] Uruguay has offered its change to the international community in the hope of reformation.[84]

Uruguay was the first country to create a national regulatory system for cannabis.[85] The law and model created by Uruguayan leaders cannot be applied universally because every country faces different issues. There are, however, interesting techniques and approaches that can help in the process.[86]

Uruguay's history with drug regulation, especially marijuana, has been unique. Although the nation has maintained laws prohibiting the cultivation, production, sale, and trafficking of marijuana, it has never made personal use illegal.[87] In 1974, the legislature passed a law that did not establish the amount that determines whether possession is for personal use or for sale; this law was amended in 1998 but did not set a specific amount.[88] Judges were left wide discretion to interpret the law, producing inconsistent results.[89] The possession of some amount of cannabis for personal consumption was legal, but buying or growing it was not.[90] As the use of harder drugs began to increase, however, modifying the policy on marijuana became easier.[91]

Starting in 2010, Uruguayan politicians began pushing to decriminalize marijuana.[92] Many bills relating to personal use and consumption were introduced, but they were subsequently shut down because they failed to improve on the already inconsistent qualification of reasonable amounts.[93] In 2011, notable citizens were arrested for possessing marijuana plants, which sparked a public movement against criminal penalties for cultivation and personal use.[94]

Jose Mujica did not glorify the use of marijuana in order to garner support; in fact, he stated, "[M]arijuana is a plague but drug trafficking is much worse."[95] The drug situation in Uruguay is less intense in comparison to other South American nations, but in the years leading up to decriminalization, violence increased in relation to drug-trafficking crimes.[96] Uruguay became a base for the drug cartels of other nations, and the people of Uruguay started to notice the increase in crime.[97] The first version of a decriminalization bill, Bill 534, came to the Uruguayan General Assembly in May 2011.[98] Its stated purpose was to reduce harmful use and improve public welfare.[99] The bill went through years of debate and reworking, but became law in December 2013.[100]

The bill was not widely supported; in fact, 63 percent of Uruguayans opposed it.[101] Supporters claimed the new law would drive people away from more dangerous drugs, but the opposition believed that the government monopoly on marijuana will undermine the surrounding nations and not solve other drug problems.[102] The international community has had a mixed response.[103] The government hopes to isolate marijuana from other drugs in order to undercut illegal dealers and reduce the likelihood that users will come in contact with worse drugs.[104] Citizens can purchase regulated amounts of cannabis from pharmacies and cannabis social clubs, or they can grow their own.[105] Such clubs are present in other countries where marijuana remains illegal, but they were not present in Uruguay before decriminalization.[106]

Asia

Countries throughout Asia have long histories with cannabis, as well as opium, betel nut, and other stimulants. Central Asia and South Asia are the native homes to cannabis and opium. Afghanistan alone produces 90 percent of the world's supply of heroin.[107] Adjoining areas of Myanmar, Laos, and Thailand that border the Mekong River became known as the "Golden Triangle" in the 1960s and 1970s as the center of the international drug trade.[108] Currently, the government of the Philippines is in a campaign of extrajudicial killings of drug traffickers. Governments across Asia long ago enacted strict laws against trafficking and possession to counter the growing power of drug-trafficking organizations.

China

China has a well-established history of cannabis plant use for textiles and paper, as anesthesia, and as a hallucinogenic. Cannabis was well known to emperors and peasantry alike as "ma" and was used to restore one's "yin" and "yang" (feminine and masculine qualities, respectively).[109]

The current communist state government has taken a decidedly different approach. Despite the fact that Chinese firms own 309 of the 600 existing patents related to medicinal cannabis use,[110] in 1990 the Decision Against Narcotics outlawed the cultivation of marijuana, among other drugs.[111] In 2007, the Anti-Drug Law of the People's Republic of China was passed, refining the original Decision Against Narcotics and allowing strictly regulated use of medicinal marijuana.[112] Despite this, the law still strictly forbids the cultivation and use of marijuana, and the government has taken a strict enforcement policy with the goal of eradicating all drug use.[113] The government has made highly publicized drug sweeps targeting high-profile individuals to set an example. The son of actor Jackie Chan was jailed for six months for testing positive for marijuana consumption and possessing more than 100 grams of marijuana in his apartment.[114, 115] Police administer on-the-spot urine tests to individuals suspected of drug use.[116] A positive test result, even without a charge of possession or distribution of drugs, can result in criminal sanctions.[117]

North Korea

The legality, use, and enforcement of marijuana in the Democratic People's Republic of Korea (DPRK)—North Korea—is widely contested by available sources. Even with several possible sources that describe North

Korean drug policy, most information is anecdotal from expatriates, refugees, and foreign visitors to the country. There is no law specifically criminalizing the cultivation, use, or selling of marijuana. The most current information available (2009) on the DRPK's criminal laws lists use, possession, cultivating, and trafficking of illegal drug as an offense punishable by serving time in hard labor, anywhere from two years to life.[118] The ambiguity of the term "illegal drug" used in the statute and lack of official clarification has led to speculation about the legality of cannabis. Several sources claim that the law refers to "hard drugs," specifically methamphetamines, of which the country has seen sharp increases in use and addiction in recent years. These sources claim that the term "illegal drug" does not refer to cannabis at all and that it is completely legal. Other sources claim that, although it is officially illegal, marijuana enforcement is extremely lax.

Information on the use of marijuana among DPRK citizens is also widely varied. The majority of sources agree that marijuana use exists in the DPRK; however, the extent of this use is debated. Some sources claim that marijuana is widely cultivated, sold, and used among the population as a cheap alternative to the low-quality cigarettes sold in the country.[119] Others speculate that the drug is only cultivated by private citizens for personal use behind closed doors for fear of social stigma and official repercussions.[120] One particular article claimed that there was nearly no marijuana use in the country and that the "cannabis" being sold is merely a mix of green-colored potpourri that resembles marijuana but contains no THC.[121]

The Philippines

The Philippines adopted the Dangerous Drugs Act of 1972, according to the government in response to 20,000 drug users, the majority of whom used marijuana.[122] However, the Philippines has long had issues with drug trafficking and drug abuse, especially of opioids, since colonial times.[123] Although a wide variety of illicit drugs cause problems in the Philippines, currently the country plays a major role in the global production and distribution of marijuana.[124]

Since the overwhelming presidential election win of Rodrigo Duterte in May 2016, the political climate has changed dramatically.[125] Duterte has been a vocal opponent of the drug trade and openly advocates for the extrajudicial killing of drug dealers.[126] Between July and December of 2016, 6,200 deaths occurred from police-sanctioned raids and extrajudicial killings.[127] In many instances, murder scenes were turned into public spectacles to discourage drug use and dealing.[128]

Duterte has claimed that drug criminals are subhuman[129] and remarked, "If it involves human rights, I don't give a shit. I have to strike fear because the enemies of the state are out there to destroy children."[130] A list of names of people suspected to be in the drug trade was compiled through investigations by local police and was subsequently made public, resulting in many of the extrajudicial killings since Duterte's election.[131] Duterte has claimed that 3 million Filipinos are drug users, and he threatened to "finish them all."[132]

The international response has been overwhelmingly negative. The UN executive director of the Office on Drugs and Crimes released a statement condemning the developments in the Philippines:

> The United Nations Office on Drugs and Crime (UNODC) remains greatly concerned by the reports of extrajudicial killing of suspected drug dealers and users in the Philippines. I join the United Nations Secretary-General in condemning the apparent endorsement of extrajudicial killing, which is illegal and a breach of fundamental rights and freedoms.
>
> Such responses contravene the provisions of the international drug control conventions, do not serve the cause of justice, and will not help to ensure that "all people can live in health, dignity and peace, with security and prosperity," as agreed by governments in the outcome document approved at the UN General Assembly special session on the world drug problem.[133]

Europe

With few exceptions, European drug policies since World War II have been relatively liberal, and during the first half of the 1990s they became even less restrictive.[134] However, in accordance with the 1961 Single Convention on Narcotic Drugs, cannabis and its extracts are Schedule I narcotics under international law.[135] Currently, personal use of marijuana is not an offense in Austria, Belgium, the Czech Republic, Denmark, France, Italy, Malta, the Netherlands, Poland, Slovakia, Slovenia, and Turkey.[136]

Although minor differences exist, legislation in the other European states provides for various forms of punishment for drug traffickers, although therapy for addicts is universally offered in accordance with the rest of Europe.[137] Greece, Malta, Cyprus, and Portugal use long penalties of up to 14 to 20 years imprisonment for trafficking.[138] In contrast, Austria, Luxembourg, and Switzerland have much shorter drug-trafficking penalties of three to five years.[139] Penalties in Norway range from 14 days to 20 years in the case of "heavy" trafficking and money laundering.[140]

Cyprus

Some European countries retain more draconian drug policies and enforcement. For example, the small island nation of Cyprus has the harshest penalties for drug offenses in Europe. The country is a signatory to all three UN drug treaties. Under Cypriot law, cannabis is scheduled as a "Class A drug" by the Narcotic Drugs and Psychotropic Substances Law of 1977 in accordance with the 1961 UN convention.[141] The 1992 amendment changed the maximum penalty for possession or use of a Class A drug to life imprisonment.[142] Individuals who possess three marijuana plants or 30 grams of marijuana are presumed to be trafficking.[143] The maximum sentence for trafficking Class A drugs is life imprisonment.[144]

Sweden

Sweden has a strict prohibition drug policy similar to the United States. The Act on Penal Law on Narcotics still forms the basis of Swedish drug policy (Swedish Code of Statutes SFS 1968, 64). The 1970s Swedish narcotics debate reflected two different ideologies. First, the Swedish Association for Help and Assistance to Drug Abusers emphasized that drug abuse should be seen as a result of adverse social experiences. Second, solutions should be sought by improving societal conditions and through voluntary therapy.[145] The National Association for a Drug-Free Society demanded the continued use of the criminal justice system, rejecting the idea of therapy. In its view, problematic consumers are ordinary people who have not been properly brought up, and therefore treatment was a matter of teaching.[146]

In the early 1970s, the main thrust of police activity was against drug kingpins. Consumers and dealers were not considered the primary target.[147] In the early 1980s, the country's law enforcement strategy was changed, and to this day emphasis remains on street-level intervention.[148] Arresting problematic consumers makes for imposing statistics; gives the impression of determination, energy, and drive; and is thought to scare off experimenters.[149] Since the early 1980s, there has not been much debate over narcotics, and "either–or" thinking seems to be the rule in Sweden.[150]

The use of the criminal justice system has been repeatedly expanded in drug policy in Sweden. The Narcotics Drug Act of 1968 has been modified time and time again, partially as a result of the international conventions and partially by Swedish initiative.[151] Currently, the supply, production, acquisition, procurement, transport, storage, possession, and consumption

of narcotics are punishable offenses.[152] Furthermore, penalties have been significantly increased from a one-year maximum imprisonment in 1966 to as many as 16 years today.[153] For mere possession, however, the maximum sentence is three years in prison.[154] In the early 1980s, Swedish courts had sentenced drug-related prisoners to a total of 1,000 years imprisonment.[155] By the mid-1990s, this figure had doubled and parole was no longer granted after half the sentence was served.[156] In sum, Swedish law has become harsher regarding drug offenders, especially for drug traffickers and distributors.

Italy

As with other European countries, Italy has seen illegal drugs gradually spread from the late 1960s onwards, but initially there was little cause for concern.[157] The Italian drug law of 1975 did not levy criminal sanctions for possession of a "moderate" amount of drugs, deemed to be for personal use.[158] This law included French-based rules that mandated addicts be sent to the National Health Service by court order. The Catholic Church encouraged such solutions because it viewed drug addicts as afflicted people in need of treatment.[159] However, in 1990, the law was changed to forbid the personal use of drugs.[160]

In 1990, Law 162 was enacted and provided for a range of penalties for users.[161] The law had at its heart the belief that traffickers could not be defeated as long as users were not pulled into the enforcement net and prosecuted.[162] Furthermore, it was argued that drug users were a danger to themselves and others and thus must be identified by society through police task forces.[163]

In 1993 Italians voted to cancel that portion of the law that dealt with punishment of drug consumers.[164] Now simple possession of a moderate but undefined dose of an illicit drug is only punishable by minor sanctions such as suspension of a driver's license or a passport.[165] Concrete evidence of intent to distribute must exist before the judge can impose more serious penalties.[166] However, when the amount of an illegal drug possessed is greater than the average daily dose, police assume it was intended for sale and traditional criminal penalties are applied.[167] Italy treats mere possession charges as "intent" crimes, whereas distribution offenses are "strict liability" crimes. In effect, this makes distribution crimes much easier to prosecute than mere possession.

The drug question has declined as a major policy issue in Italy. Many ascribe the receding fears to recent successes against organized crime.[168] For a long time, Italian drug trafficking was considered a major activity of

organized crime networks; to a certain degree, it is still regarded as such.[169] In fact, studies indicate drug markets are not monopolies, not only because there a great many dealers but also because there are large numbers of importers and wholesalers competing with one another.[170]

The United Kingdom

Participation in the Hague Convention obligated the British government to prepare domestic legislation to control drugs.[171] The result was the first Dangerous Drugs Act of 1920.

The Dangerous Drugs Act followed the "medical model" of drug control in contrast to the "criminal model" adopted by the United States (through the Harrison Act of 1914).[172] Private physicians were allowed discretion in prescribing heroin and other controlled substances for their patients. The system worked fairly well for the next 40 years[173]—that is, the number of users remained low, they received quality-controlled drugs under medical supervision, and no substantial black market developed.[174]

Treating drug addicts through traditional medical practice as part of Britain's National Health Service (NHS) is philosophically rooted in Great Britain's 1924 Rolleston Committee report.[175] In 1926, the committee examined the issue of replacement prescribing by physicians.[176] This report recognized two facts: (1) that drug addiction is a "chronic, relapsing disease," and (2) that "the indefinitely prolonged administration of morphine or heroine may be necessary" for a segment of the addict population.[177] Though the Rolleston report was without statutory power, it removed from doctors the risk of prosecution should they continue to prescribe replacement opiates.[178] It also defined opiate addiction as a medical problem.[179] This situation allowed the relatively small numbers of opiate addicts in the United Kingdom to be managed by physicians until the 1960s.[180]

In the early 1960s, concern over illicit drug use led to two interdepartmental committees, the first in 1961 and the second in 1965.[181] Because these committees were chaired by Sir Russell Brain, they became known as the First and Second Brain Committees, respectively.[182] Although the first Brain Committee reported in 1961 that the extent of the British drug problem was of little concern at that time, the second Brain Committee recognized a new group of younger recreational users appeared with addicts being managed by physicians.[183]

Consequently, the committee recommended (1) compulsory notification of heroin and cocaine addicts to a central register, (2) setting up

specialist treatment centers staffed by specialist doctors with special interest in addiction, and (3) prescribing of heroin and cocaine should be restricted to specialist licensed doctors.[184] Gradually, the psychiatrists developed a philosophy of "less is better" and began to reduce the amounts prescribed to addicts.[185] In addition, rather than prescribing injectable opiates, they followed the lead of the U.S. treatment community by prescribing oral methadone (Physeptone).[186]

In 1968, the treatment of addicts was removed from the NHS to a "clinic system" managed by psychiatrists.[187] Thereafter, an addict would have to enroll in a drug-dependence clinic to obtain maintenance.[188] This change in policy was a response to the recommendations of the second Brain Committee.

The Dangerous Drugs Act of 1967, the Misuse of Drugs Act of 1971, and the Misuse of Drugs Regulations promulgated in 1973 all constituted a battery of legislation enacted in response to the second Brain Committee report.[189] The Dangerous Drugs Act of 1967 set up drug-dependence units between 1968 and 1970, with the majority of addicts treated by physicians with opiates (although physicians could not prescribe heroin or cocaine).[190] The Misuse of Drugs Act of 1971, Misuse of Drugs Regulation of 1973, and the Misuse of Drugs Order of 1977 classified drugs into three categories: (1) cocaine and opiates; (2) cannabis and hallucinogens, barbiturates, amphetamines, and (3) pharmaceuticals.[191] As amended, the act has offenses relating to production, cultivation, supply, and possession. For each of these, mens rea is an element in the commission of the offense. Although penalties against trafficking are severe, as in Ireland, personal use is permitted except for opium.[192] Finally, the Misuse of Drugs Regulations required any physician treating an individual and suspecting addiction to one of the 14 drugs enumerated in the Misuse of Drugs Act to notify the chief medical officer.[193] Despite these initiatives, the number of drug addicts in the United Kingdom continued to rise; by the late 1970s, the number of addicts had doubled from the number before the introduction of the misuse of Drugs Act of 1971.[194] Despite this staggering statistic, the British government exerted further restrictions over controlled substances in the United Kingdom. The Misuse of Drugs Regulations of 1985 divided controlled substances into five schedules, each of which has specific requirements governing import and export, production, supply, possession, prescribing, and record keeping associated with these activities.[195]

The "harm-reduction" concept does not support or condone drug use; rather it recognizes that although the ultimate goal for drug users may be to become drug free, for many this is an unrealistic short-term goal.[196]

Instead, patients make smaller changes while moving toward a drug-free state with each change improving their situation.[197] The harm-reduction model comprises five essential components:

1. Committed drug addicts are prescribed and maintained on drugs.
2. Through counseling, addicts are encouraged to "kick" their habits and lead drug-free lives.
3. Intravenous drug users are provided with clean syringes and hypodermic needles to prevent the spread of HIV.
4. Drug users are educated about how HIV is contracted and spread.
5. Drug users are empowered to act and think for themselves.[198]

As of 1990, there had been no new cases of HIV among intravenous drug users in England's Merseyside region for the preceding five years.[199] The Liverpool experience demonstrated that drug maintenance for drug addicts can be synonymous with drug treatment.

In accordance with the harm-reduction model, the United Kingdom minimizes the negative effects of drug use through education. The NHS's Health Advisory Service recognized that drug education and drug prevention are two distinct but complementary concepts.[200] Education was defined as "having the overall aim of preventing people from harming themselves by the use of substances," and prevention was defined as "prevention of dependent forms of substance use and misuse and prevention of physical and psychiatric disorders that may be related to substance use and misuse."[201] These definitions reflect the value judgement that the goal of minimal incidence of drug-related harm is a more practical goal than no drug use whatsoever, with education being critical to minimizing drug-related harm.

Germany

The drug control law of 1971, updated in 1981, punishes illegal distribution of drugs with imprisonment from 3 to 10 years.[202] However, penalties may be omitted if the guilty party only possessed a minimum amount for personal use.[203] Every available indicator showed that, after years of stagnation, illicit drug use increased after 1987, reaching a saturation point by 1992.[204] Germany followed the Amsterdam experience and in 1992, the Federal Drug Enforcement Act was reformed.[205] Under the revised law, the prosecutor's office is free to drop a case when further trial would be counterproductive.[206] Rehabilitative treatment may be imposed.[207]

Even a sentence of less than two years for crimes connected with drug addiction such as theft can be exchanged for therapy.[208]

In April 1994, Germany's Constitutional Court ruled that police and prosecution authorities do not have an absolute duty to bring charges against cannabis users, thus bringing this European country even closer to the policy of others such as Britain.[209]

Spain

Since 1988, the personal use of drugs has not been an offense punishable by detention in Spain.[210] The 2015 Law on the Protection of Citizens' Security established administrative fines for personal use or possession of drugs in public.[211]

Trafficking is still considered a criminal offense and is governed by the articles 368–378 of the national penal code.[212] The law considers the health consequences of the trafficked drugs and other circumstances when sentencing offenders.[213] The strictest penalty allowed for drug trafficking is 20 years and three months.[214]

Portugal

In 2001, Portugal took a radical step in solving public health and safety problems by decriminalizing all illegal drugs.[215] Such a "comprehensive form of decriminalization" greatly improved treatment rates, helped prevent the transmission of HIV and the development of AIDS, reduced drug usage by young people, and lowered the number of drug-induced deaths.[216] In removing the criminal element of "low-level [drug] possession and consumption," remarkable achievements occurred within Portuguese society. Anyone found in possession of any drug is subject to an administrative violation and ordered to appear in front of a "dissuasion commission."[217]

Empirical data validates the success of the health-centered Portuguese approach to the drug problem. For example, drug-treatment programs are voluntary, but participation rose 60 percent from 1998 to 2011 because those interested in treatment could now "pursue professional help without fear."[218] Remarkably, within that time frame HIV transmission from intravenous drug usage dropped drastically. Before decriminalization, 1,575 cases of HIV infection were reported on average per year, and this number fell to 78 cases per year after decriminalization.[219] In addition, incarceration rates for drug violations in Portugal dropped from 44 percent of the prison population in 1999 to 24 percent in 2013.[220] Finally, a downward

trend within adolescent drug use from 2001 to 2012 shows great strides in alleviating drug use among this vulnerable population.[221]

In sum, Portugal presents an excellent model for how victimless crimes may be mitigated through other means such as administrative intervention without criminal charges for everyday users. As a result, the country has seen an overall increase in public health and welfare.

Holland

In the 1960s, two committees were appointed to clarify existing narcotics problems in the Netherlands and to make policy recommendations.[222] The Hulsman Committee was formed in 1969 and consisted of a working group within the state-sponsored Institution or Mental Health that was appointed under the chairmanship of law professor Loek Hulsman.[223] The Hulsman Committee warned against placing more than minimal reliance on the penal law in controlling the drug problem.[224] It predicted that the threat of law enforcement would not only fail to deter people from engaging in drug use in their private lives but also would fail to control the supply side of the drug market for various reasons.[225] The second commission, the Working Group on Narcotics Substances or the Baan Committee, appointed by the government and with official status, proposed a revised form of the strictly prohibitionist Opium Act of 1928 in 1972.[226] This proposal was brought before the Dutch parliament in 1976, but drug control was already being relaxed during this four-year time period.[227]

As amended, the Dutch *Opiumwet* (Opium Act) of 1928 remains the main official control of drugs, although it has been amended many times, most notably in 1976.[228] The Opium Act of 1976 reflected the recommendations and warnings of the Hulsman and Baan Committees.[229] The Netherlands adopted a policy based on two principles: (1) Drug use is considered to be primarily a public health issue rather than a judicial problem, and (2) a distinction was made between "hard" drugs, which involve an unacceptable degree of risk, and cannabis products, which are known as "soft" drugs.[230] After a long debate in parliament, the act passed into law by a vote of almost three to one.[231] It also fulfilled all of the demands of the international conventions, setting out punishments for possession, trade, cultivation, importation, and exportation.[232]

The drug control laws of 1976 and 1985 allow the state attorney to avoid prosecuting offenders possessing small amounts for personal use.[233] The UN treaties only demand the law be on the books; enforcement is not required.[234] The Single Convention acknowledges explicitly that the

enforcement of statutes may be limited on the basis of principles that are a fundamental part of a nation's sovereignty.[235] The Schengen Agreement works in a similar fashion, mandating enforcement but acknowledging national sovereignty.[236]

The Dutch maintain severe punishment for trafficking imprisonment—up to 12 years for "heavy" drugs and four years for "light" drugs.[237] Since 1976, the punishment for breach of the Opiumwet has depended on whether a drug is classified as List 1 or 2.[238] The most lenient penalties are used for List 2 drugs, basically cannabis products and psychotropic substances.[239] List 1 covers drugs such as heroin and cocaine.[240] The low punishments for possession and trafficking in small amounts of cannabis reflect the compromise between the government, which fears international condemnation if cannabis is not controlled, and those who favor legalization of the drug.[241] Marijuana and hashish laws are not enforced by Dutch authorities.[242] This nonenforcement was authorized by the expediency principle, and it empowered the public prosecutor's office to refrain from initiating criminal proceedings if it is in the public interest.[243] However, public guidelines were established to assist prosecutors with these discretionary decisions.[244] As a result, cannabis was already listed on menus and available at numerous coffeehouses throughout Holland for purchase.[245] It is also available at youth centers, but under no circumstances is the sale of cannabis to children under age 16 permitted.[246]

To help prevent youth from venturing into the black market, Dutch authorities sought to create an above-ground market where cannabis could be used without fear.[247] Because the central aim of Dutch policy is still "the prevention and reduction of harm caused by drugs by reducing dangers of their use both to the community and to the individual," a 1995 memorandum published by the Dutch government set out guidelines for the coffeehouses, the above-ground market, and personal consumption.[248] For instance, no coffee shops are permitted near schools, the maximum purchase for personal consumption was limited to five grams, and bona fide coffee shops with a stock of only a few hundred grams would not be investigated.[249] Coffeehouses were also prohibited from selling alcohol.[250] Currently, Amsterdam, Arnhem, Maastricht, and various other municipalities are drafting legislation to provide a licensing system for coffeehouses.[251] A license merely entitles the holder to own a coffee shop, not to sell "soft" drugs.[252] However, a license may not be issued to anyone with a police record, and license holders must also observe the coffee shop rules.[253]

The Dutch published data that compared the U.S. National High School Survey conducted by the National Institute on Drug Abuse (NIDA)

of the U.S. Department of Health and Human Services with a similar survey of Dutch youth.[254] The data revealed that both cannabis and cocaine use by U.S. secondary school students is considerably higher than that of their Dutch counterparts.[255] Furthermore, in terms of past-month drug-use prevalence, U.S. youths use cannabis at significantly greater rates than do Dutch youth. For example, the ratio of U.S. to Dutch past-month use rates for cannabis were 2.9 times as great for 13 to 15 year olds.[256] Comparison of lifetime prevalence yields similar results.[257] Hence, Dutch authorities were successful in preventing youths from entering the black market by creating an above-ground safe market where only cannabis is accessible.

Although the principal goal of the war on drugs is to prevent all consumption of psychoactive drugs, the major objective of Dutch drug policy is to minimize problems with use. The emphasis is placed on individuals making well-informed choices.[258] Before the current drug policies were initiated, drug education was an extension of rather old-fashioned information about alcohol, threatening and rigid, that sought total abstinence. The Netherlands has changed its strategies by recognizing that today's young people are knowledgeable.[259] Consistent with this effort, Dutch education efforts are devoid of moralizing messages and value judgments and focus instead on the need to rationally calculate the "costs" versus the "benefits" of using drugs.[260] Even addicts who are convicted of crimes can choose between a prison term and voluntary treatment in an open or closed institution.[261]

The Netherlands considers this policy to be a success. In practice, the policy has helped stabilize the number of cannabis users and has led to the proliferation of coffee shops.[262] Furthermore, it seems to have prevented cannabis users from making the transition to hard drugs.[263] This conclusion emerges from the fact that relatively few cannabis users move on to become addicted to hard drugs.[264]

The Middle East and Africa

Like Asia, the Middle East and Africa have a long history with cannabis, but many countries have recently become more restrictive. Although personal use of cannabis is widespread, it is officially prohibited by most governments. However, enforcement efforts in this region have been hampered by widespread production, which is facilitated by ideal growing conditions in many of these states. Trafficking, production, and use remain prevalent.

Israel

Israel has an interesting relationship with cannabis; although recreational use is illegal, widespread medical use is allowed. The Ministry of Health has issued thousands of licenses allowing patients to receive medical marijuana for a variety of ailments.[265] The Ministry of Health acknowledges that cannabis does not have any recognized medical benefits under international law, but it still allows for its use as medicine:

> Cannabis is a substance that is defined as a "dangerous drug." Medical Cannabis is not a medicine, it is not registered as a medicine, and its efficacy and safety when used for medical purposes has not yet been established. Nevertheless, there is evidence that cannabis could help patients suffering from certain medical conditions, and alleviate their suffering. In any arrangement regarding the use of cannabis for medical purposes, the State is obligated to strictly uphold the provisions of the Dangerous Drugs Ordinance [new version] 1973 and the Regulations made under this Ordinance, as well as the provisions of the Single Convention on Narcotic Drugs 1961, including the amendments of 1972.[266]
>
> —State of Israel Ministry of Health

Israel began researching medical uses of cannabis earlier than most nations. Pioneering work in cannabis health research started in the 1960s with the work of Dr. Raphael Mechoulam in cooperation with local police.[267] Mechoulam benefited from this cooperation and did not have to deal with a legal stigma, which allowed him to discover many medicinal uses for cannabis.[268] Israel has continued this model, allowing researchers from around the world to join in researching cannabis health effects with Israeli research groups.[269] Even without legislation legalizing marijuana, Israel has become a world leader in marijuana research.[270] Many new and groundbreaking cannabis uses and treatments have been developed through university and scientific research in Israel,[271] including discovery of the endocannabinoid system in the human nervous system by Mechoulam.[272]

Saudi Arabia

Saudi Arabia has enforced death penalties for drug offenses since 1988, and many are carried out as public beheadings.[273] Saudi Arabia runs four drug-rehabilitation centers where it sends citizens who are caught using drugs, and the government has also sponsored media campaigns in

schools to discourage illegal drug use.[274] Foreigners arrested for drug offenses are jailed during investigation and then deported.[275] Although there are serious penalties for drug crimes, Saudi Arabia reports that drug abuse is on the rise. Hashish is one of the most frequently used illicit substances in the kingdom.[276]

Egypt

Possessing or using any kind of drug in Egypt is a serious offense.[277] Punishment can be 25 years to life in prison without the possibility of parole; in some cases, the penalty is death.[278] However, cannabis is grown year-round in Egypt, despite the government's harsh penalties.[279] There is an active government effort to find and destroy cannabis-growing operations.[280] Egypt is a prime route for cannabis-smuggling operations in Southeast Asia toward Europe, and the government takes trafficking seriously.[281] Historically, Egypt was one of the largest producers of cannabis, and the country has an ideal climate for growing strains high in THC. Despite government efforts, hashish is still widely used.[282]

South Africa

Cannabis, locally known as *dagga*, is the most commonly used illicit drug in South Africa, although its usage is relatively low compared with the United States and Canada.[283] In 1922, South Africa became one of the first countries in the world to prohibit cannabis by amending its Customs and Excise Duties Act.[284] The South African government pushed for cannabis to be controlled by international law.[285] Over the next several decades, the apartheid government tightened drug control with additional legislation aimed at traffickers, dealers, and growers.[286]

Cannabis is grown in the eastern and northern portions of the country, and a surplus is sold outside the country each year.[287] After the fall of apartheid, advancements in banking, trade, and transportation infrastructure turned South Africa into a major link between drug-producing countries in South Asia and consumer countries in Europe and North America.[288] Although cannabis is currently illegal in South Africa, arrests for personal possession are not a priority for police.[289] Authorities, however, have been working with other African nations on extensive cannabis-eradication efforts.[290] Despite these efforts, South Africa is estimated to produce nearly 3,000 acres of cannabis each year, and cannabis is widely available.[291]

Although cannabis is still a banned substance, the Medical Innovations Bill, which seeks to legalize medical cannabis, is currently in the national assembly for debate and vote sometime in 2017.[292] The South African Health Department has been researching medicinal cannabis for some time and is moving to regulate medicinal cannabis in 2017 in anticipation of the bill becoming law.[293] The health department envisions regulating cannabis as a prescription drug to treat an enumerated list of conditions.[294]

Bilateral Treaties

Although the UN conventions serve as the primary mechanism for setting international cannabis-control standards, treaties between countries are the primary mechanism for cannabis enforcement. The United States has bilateral extradition treaties with the following countries: Bahamas, Belize, Bolivia, Brazil, Bermuda, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, Jamaica, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, Thailand, and Venezuela.[295] The remaining countries of Afghanistan, Aruba, Cambodia, China, Hong Kong, India, Taiwan, and Vietnam have no extradition treaty with the United States and therefore will not formally extradite someone charged with drug offenses into U.S. custody.[296] The United States has encountered great difficulties in obtaining custody of foreign drug traffickers through extradition treaties.[297]

Europe has many multilateral and bilateral initiatives that directly affect drug policy. Most important in this respect are the Schengen Agreement of 1985 and Convention of 1990, the Maastricht Treaty on the European Union, and the activities of the Council of Europe.

In the area of drugs, the Schengen Agreement and Convention is directed at harmonizing legislation and policy.[298] Negotiations included strong pressure placed on the Netherlands to alter its drug policies, which were considered out of line with the strict drug enforcement in all other states.[299] Each state was permitted to decide policy within its own borders, but has a collective responsibility to all other Schengen countries when the effect of their domestic policy is felt in other Schengen countires.[300] The Schengen Convention of 1990 stresses that a permissive approach in another Schengen state could be exploited by criminals to import drugs into other Schengen countries.[301] The agreement requires each state to combat illegal import and export of drugs to the territories of other signatories.[302] Now, however, the vast majority of European nations have decriminalized possession of drugs for amounts presumed to be for personal consumption.[303]

Conclusion

When they first became available in Europe and the Near East, coffee and chocolate were viewed with suspicion and were associated with laziness and promiscuity.[304] In the 17th century, visiting a coffeehouse was a capital offense in what are now Egypt, Saudi Arabia, and Turkey, places where coffeehouses are now important components of society and business.[305] More than 200 years ago, Frederick II of Prussia tried to ban coffee because he believed it threatened the balance of trade, commercial breweries, and the fitness of soldiers.[306] He created a coffee monopoly and a special police force whose mission was to sniff out illegal coffee-roasting establishments.[307] These measures were unpopular, and corruption flourished within the special police force.[308]

Cannabis use was widespread for centuries in many of the countries that now enforce the strictest penalties. Marijuana has long been used as an energizer by sugarcane harvesters in Jamaica and by laborers in Costa Rica.[309] Egypt used to be the world's largest producer of cannabis, and many Egyptians used marijuana and opium-infused concoctions of hashish. Although many states over the last three decades have decriminalized cannabis or decreased sanctions for personal consumption, the majority still prohibit any form of cannabis use.

CHAPTER SEVEN

Recent Legalization Developments

Taylor Hart-Bowlan and Kyle Bershok Ames

On November 6, 2012, Colorado and Washington became the first U.S. states to legalize recreational marijuana. Implementation required the creation of new regulations and regulatory bodies, which took a year to set up. On January 1, 2014, Colorado became the first state to sell recreational marijuana since prohibition began nearly 100 years earlier. Washington was close behind, and by early July began selling recreational marijuana. Since then, eight states have legalized recreational marijuana, and voters and legislatures in other states have shown interest in ending marijuana prohibition.

From 2000 to 2010, three states unsuccessfully attempted to legalize the recreational purchase and possession of marijuana for individuals 18 or 21 years of age and older. The first was Alaska, with two failed attempts, in 2000 (59 percent against) and 2004 (56 percent against).[1] Voters also twice struck down Nevada initiatives with 61 percent voting against a recreational measure in 2000 and 56 percent against another in 2006.[2] Finally, Colorado had an unsuccessful measure in 2006, with 60 percent of voters opposing recreational legislation.[3]

California had a ballot initiative (Proposition 19) in 1972 that sought to remove state penalties for personal use for persons 18 and older. However, it was defeated readily, with 66.5 percent against and

35.5 percent in favor.[4] Legalization of medical marijuana first began in California in 1996. Although the medical movement continued to steadily gain popularity with state voters across the country throughout the next two decades, not until November 2010—14 years later—would recreational legalization draw national attention as a ballot issue via Proposition 19.[5]

At the time, support of recreational marijuana across the country had been rising, particularly among liberal and younger demographics.[6] According to the Gallup polling organization, 46 percent of Americans in 2010 supported marijuana legalization—and a new low of 50 percent opposed it.[7] As voter support increased, a memo released in October 2009 by Deputy Attorney General David Ogden regarding the legalization of medical marijuana in various states was taken by many as a green light by the federal government to allow legalization.[8] The memo advised prosecutors across the country that "as a general matter" they shouldn't focus limited enforcement resources "on individuals whose actions [were] in clear and unambiguous compliance with existing state [medical marijuana] laws."[9] This led to the public perception that the federal government would not intervene in state marijuana laws. An October 2009 *New York Times* article, for example, reported that "people who use marijuana for medical purposes and those who distribute it to them should not face federal prosecution, provided they act according to state law."[10] Although federal marijuana policies and law are explored further in Chapter 8, the Ogden memo, combined with ever-increasing poll support for both medical and recreational legalization, provided the backdrop for California's 2010 election.

Proposition 19 was a closely divided voter issue in pre-election polling.[11] On November 2, 2010, 59.59 percent of registered California voters participated in the state's general election—approximately 2 million more voters than the previous midterm election in 2006.[12] Proposition 19 was defeated relatively comfortably, with 53.5 percent against and 46.5 percent in favor.[13] However, a trend had begun. By the next national presidential election, three more states would present similar recreational proposals to the voters: Colorado, Washington, and Oregon.[14]

A Second Effort: Colorado, Washington, and Oregon

The year 2011 saw a shift in popular opinion.[15] According to Gallup, although 46 percent of Americans opposed marijuana legalization, 50 percent of Americans favored it, the highest number of Americans ever to support such a change.[16] These numbers not only flip-flopped

with the previous year's Gallup results (46 percent in favor, 50 percent opposed) but also marked the first time in Gallup's history wherein proponents outnumbered the opposition, creating a majority—a stark contrast to Gallup's initial poll on the subject in 1969, which found only 12 percent in favor and 84 percent against. Even compared to 2000, which polled 30 percent in favor of legalizing marijuana, 2011 was a significant jump.[17]

Despite these trends, the U.S. Department of Justice issued a second memo in June 2011 that attempted to reel in the public's interpretation of the Ogden memo.[18] Specifically, it addressed the medical marijuana commercial operations that had sprung up over the last few years in states that had legalized medical use, differentiating them from the "caregivers" mentioned in the previous memo: "The term 'caregiver' as used in the memorandum meant just that: individuals providing care to individuals . . . not commercial operations cultivating, selling, or distributing marijuana," Cole announced.[19] Furthermore, the "Ogden Memorandum was never intended to shield such activities from federal law enforcement action and prosecution, even where those activities purport to comply with state law."[20]

Despite the U.S. Department of Justice's efforts to curtail the growing medical marijuana movement, by the 2012 presidential election three states had already condoned medical cannabis—Colorado, Oregon, and Washington—and would put recreational marijuana up to a general election vote.

Colorado

Colorado's proposal to legalize recreational marijuana was Amendment 64, which gathered enough signatures and qualified to appear on the ballot on February 27, 2012.[21] The proposition encouraged regulating the drug like alcohol in many ways.[22] It suggested marijuana be legal for purchase by individuals 21 years of age or older and that it be taxed in a similar fashion.[23] Furthermore, individuals would have to provide a valid proof of age before purchase, and selling, distributing, or transferring cannabis to minors would remain illegal, as would driving under the influence of marijuana.

Amendment 64 declared that cannabis would be sold by "legitimate, taxpaying people" and not "criminal actors"—and that it would be subject to additional regulations and labeling to ensure that consumers were informed and protected.[24] The proposal passed on November 6, 2012, with

55.3 percent in favor (approximately 1.4 million votes) and 44.7 percent against (approximately 1.1 million votes).[25]

Amendment 64 additionally delineated terms for what constitutes lawful possession.[26] Under the proposition, individuals are allowed to possess, use, consume, display, purchase, or transport up to one ounce or less.[27] Transferring one ounce or less without remuneration to another individual 21 years or older is also permitted, as is assisting another person of age in any of the previously mentioned activities.[28] However, all of these permitted activities must be conducted in manner that is not public or open and does not endanger others.[29]

Notably, written into the bill is the following statement, which addresses privacy for individuals who wish to purchase marijuana:

> In order to ensure that individual privacy is protected . . . the department [regulating marijuana] shall not require a consumer to provide a retail marijuana store with personal information other than government-issued identification to determine the consumer's age, and a retail marijuana store shall not be required to acquire and record personal information about consumers other than information typically acquired in a financial transaction conducted at a retail store.[30]

Amendment 64 also addresses how drug sales are to be taxed and used.[31] It designated that a tax rate on sales should not be greater than 15 percent through 2016; the subsequent rate will be determined by the General Assembly thereafter.[32] Furthermore, the first $40 million in revenue raised annually from marijuana taxation is designated to the Public School Capital Construction Assistance Fund, which is administered by Colorado's Department of Education and handles building schools and other aspects of state education.[33]

The initiative also designated what the bill is *not* intended to imply or do.[34] First, with regard to employers, nothing in the bill was intended to require an employer to permit or accommodate marijuana in the workplace, including use, possession, sale, or growth.[35] It also stated that Amendment 64 is not intended to restrict the ability of employers to have policies restricting the use of marijuana by their employees, meaning that employers still have the right to administer drug tests, whether randomly or before employment.[36] It also stated that any individual or entity that controls, owns, or occupies property may still prohibit any use, growth, sale, and transfer of marijuana on the property.[37] This means that, for example, landlords may still prohibit tenants, both residential and commercial,

from any activity regarding marijuana on their property as terms of the lease.[38]

Amendment 64 also treats marijuana like alcohol, prohibiting its sale or transfer to minors and prohibiting driving under its influence or while impaired.[39] The proposition permits the state to enact and impose penalties for violations of these actions.[40] Currently, like the common 0.08-percent blood-alcohol-level requirement, the state limit for driving is five nanograms of active tetrahydrocannabinol (THC) in the blood system.[41] Furthermore, there are additional charges for marijuana-impaired driving with children in a vehicle, including child abuse. Also per Colorado's open container law, it is illegal to have marijuana in the passenger area of a vehicle if it is in an open container or a container with a broken seal, or if there is evidence marijuana has been consumed.[42] Consumption of the drug on any public roadway is also illegal. The state's Department of Transportation Web site notes that law enforcement officers are "trained in the detection of impairment caused by drugs," and enforcement agencies have "specially trained Drug Recognition Experts . . . on staff that can detect impairment from a variety of substances."[43] Finally, also like Colorado's alcohol regulation, the state imposes severe penalties on individuals who refuse to take a blood test for THC detection:

> Colorado revokes driving privileges for any individual who fails to cooperate with the chemical testing process requested by an officer during the investigation of an alcohol or drug-related DUI arrest. *Any driver who refuses to take a blood test will immediately be considered a high-risk driver.* Consequences include: mandatory ignition interlock for two years, and level two alcohol education and therapy classes as specified by law. *These penalties are administrative, and are applied regardless of a criminal conviction.*[44] (emphasis added)

Like driving under the influence (DUI) charges in Colorado (and many other states), charges for drugged driving have both administrative penalties regarding driver's license privileges and criminal penalties.[45] On the state level, operating a motor vehicle with blood quantities of 5 ng/ml or higher "gives rise to permissible inference that the defendant was under the influence."[46] Furthermore, by statutory law, "the fact that any person charged is or has been entitled to use one or more drugs under [state law] including, but not limited to, the legal or medical use of marijuana shall not constitute a defense against any charge violating" impaired driving laws.[47] The state also addresses those who refuse to submit to any tests requested by a law enforcement officer;[48] the refusal may be admitted into

evidence at trial.[49] On the other hand, though, when an arresting officer invokes the sanctions of the implied consent law by requesting the driver to submit to chemical testing, the officer has a corresponding duty to comply with the driver's request for a blood test.[50]

Insofar as criminal penalties for drugged driving are concerned, the state has created several tiers, depending on the nature of the offense and the number of times the offense has occurred.[51] For example, penalties for first-time offenders depend on the amount of impairment, which determines whether the charge is a DUI, a DUI per se, habitual user, or driving while ability impaired (DWAI).[52] A DWAI means driving a motor vehicle when a person has consumed alcohol, one or more drugs, or a combination of both and is affected to the *slightest degree* yet fails to meet the level for DUI impairment.[53]

- First-offense users for DUI, DUI per se, and habitual users: imprisonment in the county jail for a mandatory minimum of five days but not more than one year; a fine of at least $600 but no more than $1,000; at least 48 hours but no more than 96 hours of useful public service; and the court may impose a period of probation that shall not exceed two years but which may include any conditions permitted by law.[54]
- First offense (DWAI): imprisonment in the county jail for a mandatory minimum of two days but no more than 180 days; a fine of at least $200 but no more than $500; at least 24 hours but no more than 48 hours of useful public service; and the court may impose a period of probation that shall not exceed two years and may include any conditions permitted by law.[55]

On a second offense, criminal charges increase.[56] Imprisonment is a mandatory minimum of 10 days but no more than a year; the fine is at least $600 but no more than $1,500; and the community service requirement increases to at least 48 hours but no more than 120 hours.[57]

For third offenses and beyond, imprisonment increases to a mandatory 60 consecutive days but no more than a year, along with a court-ordered alcohol and drug driving safety education or treatment program.[58] The fine and community service requirements remain the same as for second offenders.[59]

The agency in charge of regulating and enforcing Colorado's recreational marijuana laws is the Marijuana Enforcement Division (MED), which operates under the Colorado Department of Revenue.[60] The division handles applications, licensing, and fines, and promulgates rules regarding operational procedures.[61] Although the MED handles operations on a state level, municipalities and local areas also may opt out of recreational marijuana

sales, along with certain freedoms to set additional standards regarding growth, distribution, and retail sales in its jurisdiction, such as permissible retail operating hours and locations.[62]

Currently, the state has the following four classes of recreational marijuana licenses:[63]

1. **Retail Marijuana Store:** facilities where individuals 21 or older may purchase up to an ounce (if a Colorado resident) or one-quarter ounce (if a nonresident).[64] Holders of this license may not cultivate or process marijuana under this license.[65]
2. **Retail Marijuana Product Manufacturing:** exclusively for the manufacture and preparation of retail marijuana products and concentrates. Under this license, retail marijuana may not be cultivated or sold to retail customers.[66] Instead, all sales must be wholesale and made to retail marijuana stores.[67] Notably, if a business or individual also has a retail marijuana cultivation license (following), he or she may not sell any of the marijuana cultivated beyond the retail marijuana that is contained in its products.[68]
3. **Retail Marijuana Cultivation:** used exclusively for the cultivation of retail marijuana plants and the harvesting of retail marijuana. If this licensee is not associated with a product manufacturer, the licensee may sell retail marijuana to other cultivations, stores, or product manufacturers within the Colorado regulated system.[69]
4. **Retail Marijuana Testing Facility:** a facility that performs testing and research on retail marijuana for other medical marijuana licensees.

Lawmakers have also been considering another license type, "marijuana transporter," which would allow marijuana couriers to have certain storage facilities for processing shipments.[70] The three-year licenses would cost $7,600.[71]

Applicants for licenses must also meet a number of other medical marijuana prerequisites.[72] Most notably, applicants must be current Colorado residents, have lived in Colorado for two years immediately prior to applying, be 21 years of age, and have no controlled substance felony convictions within either the 10 years immediately preceding their application or five years after May 28, 2013 (whichever is longer).[73] Also, applicants cannot be financed—in whole or in part—by an individual "whose criminal history indicates that he or she is not of good moral character . . . and reputation satisfactory to the respective licensing authority."[74] In addition, sheriffs, deputy sheriffs, police officers, prosecuting officers, and employees of local or state licensing authorities may not apply for recreational marijuana licenses of any sort.[75]

Many of the standards mentioned previously also apply to employees of marijuana facilities, regardless of license type.[76] Employees are required to obtain a MED Occupational or Associated Person license before beginning work.[77] This application process most notably requires the individual to pass a criminal history record check.[78] Similarly, licensees are banned from employing, receiving assistance, or receiving financing from (in whole or part) any individual whose criminal history indicates he or she is "not of good character and reputation."[79]

In terms of profit, by the end of 2014—the first full year of marijuana legalization—the total amount of revenue generated from taxes, licenses, and fees on marijuana sales (including medical) was $52.5 million.[80] Also that year, $8 million was allocated for youth prevention and education regarding drug use.[81]

Despite recreational marijuana legalization in 2014, Colorado's number of marijuana-related arrests continued to drop after 2010, when the state elected to decriminalize the drug.[82] In fact, from 2010 to 2014, marijuana possession arrests dropped 84 percent (9,011 in 2010 compared to 1,464 in 2014).[83] With fewer arrests translating to fewer cases adjudicated (at an average cost of $300 per case), the state saved millions—roughly $2.25 million—in the five-year period as a result of decriminalization of recreational marijuana.[84]

In 2015, sales of medical and recreational marijuana in Colorado totaled almost $1 billion and created more than $135 million in taxes and fees, with $40 million going toward school construction.[85]

Washington

Like Colorado, Washington also legalized recreational marijuana in 2012.[86] Initiative 502 passed with 56 percent of voters supporting legalization.[87] The initiative made possession of up to one ounce of marijuana legal for individuals 21 or older.[88] Like Colorado, driving under the influence remained illegal, and the initiative designated public use of marijuana as a civil infraction.[89] The initiative also proposed a 25-percent excise tax on the sale of recreational marijuana, the proceeds from which would go to the state's Healthcare and Substance Abuse Prevention and Education Program.[90]

Unlike Colorado's recreational laws, however, Washington prohibited the private growth of marijuana plants for personal consumption.[91] And rather than designating the state department of revenue as the overseeing committee for marijuana regulation as Colorado did with its Amendment 64, Washingtonians elected to entrust its Liquor

Board—now the Liquor and Cannabis Board—with ensuring compliance with the new laws.[92]

Oregon

Oregon's first attempt to legalize marijuana outright was Measure 5 in 1986, which was rejected with 74 percent of voters opposed.[93] Although in 1998 the state became one of the first to adopt medical marijuana, it was the only state with a recreational marijuana use initiative on the ballot in 2012 that failed, with 53 percent of voters opposed.[94] Also known as the Oregon Cannabis Tax Act, the initiative would have allowed both personal marijuana and hemp cultivation and use without requiring a license.[95] In addition, it proposed creating a commission to regulate sales of commercial marijuana, and 2 percent of profits resulting from cannabis sales would have been used to promote industrial hemp, along with fiber, proteins, oils, and biodiesels.[96]

Measure 80 proposed the creation of the Oregon Cannabis Commission (OCC) to regulate the use of marijuana, licensing, cultivation, and crop purchases.[97] Unlike Colorado and Washington's initiatives, under Measure 80 the OCC would have a monopoly on the amount each individual would be allowed to purchase, along with the amounts permitted to individuals over a specified length of time.[98] It also would have been able to refuse to sell marijuana to anyone who violates Measure 80's provisions or abused cannabis within the meaning of Oregon Revised Statute 474.005(1), which banned "repetitive or excessive drug use such that the individual fails to fulfill a statutory or common law duty."[99]

Measure 80 also put complete control of all marijuana sales in Oregon in the hands of the OCC. Under the measure, the agency would sell the crop at cost to pharmacies and medical research facilities, and it could elect to conduct additional for-profit sales to adults 21 and up through state-run dispensaries.[100] Ninety percent of the net proceeds were to go into Oregon's general fund, and the remaining 10 percent was to go to drug education, drug treatment, and the promotion of hemp.[101] Also unlike in Colorado and Washington, the OCC would have complete control over the price-setting of marijuana sales.[102]

However, Measure 80 failed 54 percent to 46 percent.[103] Statistically, women opposed the measure more than men did, 50 percent of seniors voted against it, and middle-aged voters were evenly split.[104] Oregon voters were wary of the fact that Measure 80 would have "turned the state, effectively, into a pot dealer" because the state, through the OCC, would have "bought the weed, packaged it, stamped it with a state seal and a

potency grade, and sold it to customers at a profit."[105] In addition, there was concern over the amount of control the state exercised over consumers because "the state could have stopped selling it to any legal, 21-and-over buyers who became pot-addled derelicts (failing to live up to 'statutory or common-law dut[ies]')."[106]

In addition, the measure failed to gather big-time donors.[107] Many donors felt that Measure 80 did not "appear as politically attractive" as similar efforts in Colorado and Washington.[108] They also did not see an incentive to donate because of how the measure was polling at the time.[109] There was also concern about the reality that the marijuana growers themselves would have decided who regulated them.[110]

During a second ballot imitative attempt in 2014, Oregon successfully legalized recreational marijuana. Measure 91, the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act of 2014, passed with 56 percent of voters in favor.[111] The law permits individuals 21 and older to purchase marijuana for recreational purposes, and it also calls for the regulation and legalization of industrial hemp.[112]

Insofar as the "making, processing, keeping or storage" of homemade marijuana is concerned, Oregon allows residents as many as four marijuana plants and eight ounces of "usable marijuana" at any time, up to 16 ounces in solid marijuana products at any time, or up to 72 ounces of liquid marijuana products at any time.[113] Regarding noncommercial transfers of these amounts, the state allows no more than one ounce of marijuana be delivered at any given time, no more than 16 ounces of solid homemade marijuana products at any given time, and no more than 72 ounces of liquid homemade marijuana products at any given time.[114]

Under the act, the Oregon Liquor Control Commission (OLCC) oversees nearly all things related to recreational marijuana, including license applications, renewals, suspensions, and appeals.[115] Measure 91 calls for assistance from the Oregon Department of Agriculture and the Oregon Health Authority on an as-needed basis.[116]

Furthermore, some discretionary measures echoing the 2012 initiative still remain.[117] For example, the OLCC may "limit the quantity of marijuana items purchased at any one time by a consumer so as effectually to prevent the resale of marijuana items."[118] Aside from individuals under 21, the OLCC may refuse to issue a license to anyone who it has reasonable grounds to believe is in the habit of using alcoholic beverages, habit-forming drugs, marijuana, or controlled substances to excess, among other reasons.[119] Although the language says that prior convictions that are "substantially related to the fitness and ability of [a licensee applicant] to lawfully carry out the activities under the license" may be grounds for

denial, Measure 91 also specifies that the OLCC may *not* consider an applicant's prior convictions for the following reasons:

1. The conviction is for the *manufacturing* of marijuana, the person has not been convicted more than once for the manufacture or delivery of marijuana, and the conviction occurred more than five years before the application date.
2. The conviction is for the *delivery* of marijuana to a person 21 years of age or older, the person has not been convicted more than once for the manufacture or delivery of marijuana, and the conviction occurred more than five years before the application date.
3. The conviction is for the possession of marijuana.[120]

In terms of licenses, Measure 91 allows for four types of licenses: production, processor, wholesale, and retail.[121] An individual or a company may hold one or more of any license type, but there are limitations regarding who can sell to whom, what constitutes a sale, and who may deliver marijuana products where.[122]

In addition, the act provides for the OLCC to examine existing research and conduct new research regarding the influence of marijuana on the ability of a person to drive and the corresponding amount of THC in a person's blood, "taking into account all relevant factors."[123] The findings were presented to the legislature in December 2016.[124] Unlike in Washington and Colorado, Oregon declined to set a THC blood limit, concluding:

> Due to restrictions on cannabis research and limited data, it is difficult to make definitive statements about the risk of THC-intoxicated driving. The body of evidence that does exist indicates that while attitudes towards driving after marijuana use are considerably more relaxed than in the case of alcohol, the risk of crashes while driving under the influence of THC is lower than drunk driving. Little evidence exists to compel a significant change in status quo policy or institute a per se intoxication standard for THC. Instead, recommendations in this report aim to find avenues to change attitudes towards THC and driving among youth, increase the quality and availability of data, and strengthen the body of research.[125]

Notably, Measure 91 states that the state has the exclusive right to tax marijuana—meaning that counties, cities, and municipalities may not charge any taxes or inspection fees in connection with the marijuana industry.[126] Insofar as the state's taxation is concerned, Oregon charges $35 per ounce on marijuana flowers, $10 per ounce on marijuana leaves,

and $5 for each immature marijuana plant.[127] These rates are proportionally applied to any quantities less than one ounce.[128]

After the establishment of a revolving fund for the OLCC, money generated from recreational legalization is allotted as follows:

- 40 percent to the Common School Fund;
- 20 percent to the Mental Health Alcoholism and Drug Services Account;
- 15 percent to the State Police Account;
- 10 percent to cities, based on proportionality of licenses (after July 1, 2017);
- 10 percent to local law enforcement, based on proportionality of licenses (after July 1, 2017); and
- 5 percent to the Oregon Health Authority for the establishment, operation, and maintenance of alcohol and drug abuse prevention, early intervention, and treatment sources.[129]

Alaska

Alaskans approved ballot measure 2 by 53.23 percent to 46.77 percent, legalizing recreational marijuana on November 4, 2014. Codified as the "Regulation on Marijuana," the statute legalizes personal marijuana use and possession for individuals 21 and up: "In the interest of allowing law enforcement to focus on violent and property crimes, and to enhance individual freedom. . . ."[130] The act establishes a Marijuana Control Board to regulate the marijuana industry. The Alaskan act's section on personal use of marijuana is the shortest of any state:

> Notwithstanding any other provision of law, except as otherwise provided in this chapter, the following acts, by persons 21 years of age or older, are lawful and shall not be a criminal or civil offense under Alaska law or the law of any political subdivision of Alaska or be a basis for seizure or forfeiture of assets under Alaska law:
>
> 1. possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana;
> 2. possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown;
> 3. transferring one ounce or less of marijuana and up to six immature marijuana plants to a person who is 21 years of age or older without remuneration;

4. consumption of marijuana, except that nothing in this chapter shall permit the consumption of marijuana in public; and
5. assisting another person who is 21 years of age or older in any of the acts described in (1)–(4) of this section.[131]

The entire act went into effect on schedule on February 24, 2015, and commercial sales began in October that same year. Under the law, cultivators—not retailers—pay state marijuana taxes. As of July 6, 2017, $1 million in tax revenue had been collected from growers.[132]

Washington, D.C.

On November 4, 2014, District of Columbia voters overwhelmingly approved Ballot Initiative 71 to legalize marijuana, 70.06 percent to 29.94 percent.[133] After the initiative passed, Representative Jason Chaffetz (R–Utah) sent a letter to D.C. Mayor Muriel Bowser informing her that: "The committee [House oversight committee] is investigating your recent assertions that Initiative 71 will, in your opinion, take effect on February 26th of 2015. . . ." The letter closes with a warning to the mayor that legalizing marijuana in accordance with Initiative 71 would be a "knowing and willful violation of the law."[134] Despite these threats, Congress failed to strike down the Initiative 71 during the 30-day congressional review period, and the initiative was codified into D.C. code and went into effect on February 26, 2015. The law has thorough provisions on the personal use and cultivation of marijuana:

(a)(1) . . . Notwithstanding any provision of this chapter to the contrary, it shall be lawful, and shall not be an offense under District of Columbia law, for any person 21 years of age or older to:

(A) Possess, use, purchase, or transport marijuana weighing 2 ounces or less;

(B) Transfer to another person 21 years of age or older, without remuneration, marijuana weighing one ounce or less;

(C) Possess, grow, harvest, or process, within the interior of a house or rental unit that constitutes such person's principal residence, no more than 6 cannabis plants, with 3 or fewer being mature, flowering plants; provided, that all persons residing within a single house or single rental unit may not possess, grow, harvest, or process, in the aggregate, more than 12 cannabis plants, with 6 or fewer being mature, flowering plants;

(D) . . . nothing in this subsection shall make it lawful to sell, offer for sale, or make available for sale any marijuana or cannabis plants.

(1A)(A) The terms "controlled substance" and "controlled substances," as used in the District of Columbia Official Code, shall not include:

(i) Marijuana that is or was in the personal possession of a person 21 years of age or older at any specific time if the total amount of marijuana that is or was in the possession of that person at that time weighs or weighed 2 ounces or less;

(ii) Cannabis plants that are or were grown, possessed, harvested, or processed by a person 21 years of age or older. . . . [135]

The legalization of possession has already significantly affected the criminal justice system. Despite remaining illegal under federal law, marijuana arrests decreased 98 percent in the first year of legalization, from 1,840 to 32.[136] This has eased the racial disparity of marijuana possession arrests; in 2013, for example, African Americans were eight times more likely to be arrested for possession. However, the code contains no provisions for the sale of recreational marijuana. Possession is legal under D.C. code, but the sale of recreational marijuana is not. Because of congressional opposition, D.C. remains unable to regulate and tax recreational marijuana sales for the foreseeable future.

Massachusetts

On November 8, 2016, Massachusetts residents voted "yes" on question four, legalizing recreational marijuana 53.66 percent to 46.34 percent.[137] The question was ultimately codified as the Regulation and Taxation of Marijuana Act. The act creates the "Cannabis Control Commission" as the sole regulatory authority over the marijuana industry.[138] Section seven of the act, regarding personal marijuana use, is similar to other states:

(a) Notwithstanding any other general or special law to the contrary, except as otherwise provided in this chapter, a person 21 years of age or older shall not be arrested, prosecuted, penalized, sanctioned or disqualified under the laws of the commonwealth in any manner, or denied any right or privilege and shall not be subject to seizure or forfeiture of assets for:

(1) possessing, using, purchasing, processing or manufacturing 1 ounce or less of marijuana, except that not more than 5 grams of marijuana may be in the form of marijuana concentrate;

(2) within the person's primary residence, possessing up to 10 ounces of marijuana and any marijuana produced by marijuana plants cultivated on the premises and possessing, cultivating or processing not more than 6 marijuana plants for personal use so long as not more than 12 plants are cultivated on the premises at once;

(3) assisting another person who is 21 years of age or older in any of the acts described in this section; or

(4) giving away or otherwise transferring without remuneration up to 1 ounce of marijuana, except that not more than 5 grams of marijuana may be in the form of marijuana concentrate, to a person 21 years of age or older, as long as the transfer is not advertised or promoted to the public.

(d) Absent clear, convincing and articulable evidence that the person's actions related to marijuana have created an unreasonable danger to the safety of a minor child, neither the presence of cannabinoid components or metabolites in a person's bodily fluids nor conduct permitted under this chapter related to the possession, consumption, transfer, cultivation, manufacture or sale of marijuana, marijuana products or marijuana accessories by a person charged with the well-being of a child shall form the sole or primary basis for substantiation, service plans, removal or termination or for denial of custody, visitation or any other parental right or responsibility.

(e) The use of marijuana shall not disqualify a person from any needed medical procedure or treatment, including organ and tissue transplants.

(f) Notwithstanding any general or special law to the contrary, except as otherwise provided in this chapter, a person 21 years of age or older shall not be arrested, prosecuted, penalized, sanctioned or disqualified and is not subject to seizure or forfeiture of assets for possessing, producing, processing, manufacturing, purchasing, obtaining, selling or otherwise transferring or delivering hemp.

Notably, the act provides protections for marijuana users for medical procedures, child custody, and civil asset forfeiture. Implementation of the act is proving difficult. As of July 2017, the Massachusetts General Court—house and senate—had not come to agreement on two newly introduced versions of the bill. The senate's bill raises the maximum tax rate for retail marijuana significantly higher than the rate voters approved—from 12 percent to 28 percent.[139] A bill delaying the licensing of pot shops until July 2018 was passed by both chambers, and legalization proponents fear that more delays are likely.[140]

Nevada

On November 8, 2016, Nevada residents approved state question number two, 54.5 percent to 45.5 percent, making the state the fifth in the nation to legalize recreational marijuana.[141] State question number two asked voters:

> Shall the Nevada Revised Statutes be amended to allow a person, 21 years old or older, to purchase, cultivate, possess, or consume a certain amount of marijuana or concentrated marijuana, as well as manufacture, possess, use, transport, purchase, distribute, or sell marijuana paraphernalia; impose a 15 percent excise tax on wholesale sales of marijuana; require the regulation and licensing of marijuana cultivators, testing facilities, distributors, suppliers, and retailers; and provide for certain criminal penalties?

Question two was codified as the Regulation and Taxation of Marijuana Act.[142] Under the statute, it is now lawful to:

1. Possess, use, consume, purchase, obtain, process, or transport marijuana paraphernalia, one ounce or less of marijuana other than concentrated marijuana, or one-eighth of an ounce or less of concentrated marijuana;
2. Possess, cultivate, process, or transport not more than six marijuana plants for personal use and possess the marijuana produced by the plants on the premises where the plants were grown, provided that:
   A. Cultivation takes place within a closet, room, greenhouse, or other enclosed area that is equipped with a lock or other security device that allows access only to persons authorized to access the area; and
   B. No more than 12 plants are possessed, cultivated, or processed at a single residence, or upon the grounds of that residence, at one time;
3. Give or otherwise deliver one ounce or less of marijuana, other than concentrated marijuana, or one-eighth of an ounce or less of concentrated marijuana without remuneration to a person provided that the transaction is not advertised or promoted to the public; or
4. Assist another person who is 21 years of age or older in any of the acts described in this section.[143]

State Senator Tick Segerblom, an early advocate marijuana legalization, estimated a strong increase in tax revenues for the state of Nevada.[144] "I'm a child of the 60s, and I saw that it didn't destroy the world. It's a no brainer to make it regulated, to tax it, to test it, and to let people enjoy it."[145] For now, however, those who partake of marijuana will have to enjoy it in private residences. Smoking marijuana on the Las Vegas Strip is not

permitted, and advertisements for marijuana cannot be shown where 30 percent or more of the audience is under 21.[146]

The state's marijuana task force was established to work out the regulatory framework. It frantically devised regulations to implement legalization ahead of the 2018 deadline. As of July 1, 2017, individuals 21 and older have been able to purchase recreational marijuana from established medicinal marijuana dispensaries. In the first week of sales, some dispensaries had lines out the door from 10:00 a.m. to midnight, and others struggled to keep up with the increased demand.[147] One Nevada store, Euphoria Wellness, estimated serving 1,000 customers in the first two days after legalization was implemented.[148]

Under the new law, alcohol wholesalers could apply to the state taxation office to become licensed marijuana distributors, bringing marijuana from the growers to retail dispensaries.[149] Individual alcohol distributors of Nevada are currently in litigation against the state taxation office after they missed the deadline to apply for licensing. As of July 10, 2017, there is an injunction against the state taxation office from issuing marijuana distribution licenses to anyone but liquor wholesalers. The state is fighting the injunction in court:

> These liquor wholesale dealers have known of their ability to apply for a marijuana distributor license since November 2016. The Department is under no legal or equitable obligation to wait for such a person to perfect their scheme for circumventing federal restrictions on their ability to simultaneously distribute liquor and marijuana.[150]
>
> —Nevada Chief Deputy Attorney General William McKean

Although regulatory kinks remain to be worked out, marijuana advocates are optimistic that Las Vegas—Sin City—has a new favorite vice. "I'm going to be the first buyer at one of the big places. I have my own strand [called] 'Segerblom Haze.' It's kind of a joke, but I heard it's pretty good,"[151] said Democratic state senator Tick Segerblom.

California

On November 9, 2016, Proposition 64 passed 56 percent to 44 percent. Codified as the Adult Use of Marijuana Act, its purpose was to: "legalize marijuana for those over 21 years old, protect children, and establish laws to regulate marijuana cultivation, distribution, sale and use, and will protect Californians and the environment from potential dangers."[152] The act

established the Bureau of Marijuana Control to regulate the marijuana industry.[153]

In addition, the act sets up a 15-percent state excise tax on retail sales, a cultivation tax of $9.25 per ounce of flowers and $2.75 per ounce of leaves, sets advertising standards and prohibits marketing to minors, allows for further local regulation and taxation of marijuana, and authorizes resentencing and destruction of records for previous marijuana convictions.[154] California residents may cultivate up to six plants per residence.[155] Smoking marijuana in public and possessing more than one ounce is a misdemeanor, and employers and property owners are allowed to prohibit marijuana.

Maine

Question one, known as the Maine Marijuana Legalization Measure, passed in November 2016 with just 2,620 votes, 50.26 percent to 49.74 percent.[156] An official recount was conducted, but it ended in December finding "no statistically significant change."[157] The measure was codified in the Maine Revised Statutes Chapter 417 as the Marijuana Legalization Act.

The state's Department of Agriculture, Conservation and Forestry was tasked with: "regulating and controlling the licensing of the cultivation, manufacture, distribution, testing and sale of retail marijuana and retail marijuana products. . . ."[158] The act deals extensively with regulating the cultivation and sale of marijuana, as well as licensing for "retail marijuana social clubs" where customers can consume marijuana and marijuana products in certain specially authorized clubs. Counties have the option of prohibiting retail marijuana stores and clubs. The rules for personal use are similar to the rules established by other states:

1. Person 21 years of age or older. A person 21 years of age or older may:
   A. use, possess, or transport marijuana accessories and up to 2½ ounces of prepared marijuana;
   B. transfer or furnish, without remuneration, up to 2½ ounces of marijuana and up to six immature plants or seedlings to a person who is 21 years of age or older;
   C. possess, grow, cultivate, process or transport up to six flowering marijuana plants, 12 immature plants and unlimited seedlings, and possess all the marijuana produced by the plants at the adult's residence;
   D. purchase up to 2½ ounces of retail marijuana and marijuana accessories from a retail marijuana store; and

E. purchase up to 12 seedlings or immature plants from a retail marijuana cultivation facility.

Home cultivation. The following provisions apply to the home cultivation of marijuana for personal use by a person who is 21 years of age or older.

A. A person may cultivate up to 6 flowering marijuana plants at that person's place of residence, on property owned by that person or on another person's property with written permission of the owner of the property.
B. A person who elects to cultivate marijuana shall ensure the marijuana is not visible from a public way without the use of binoculars, aircraft or other optical aids and shall take reasonable precautions to prevent unauthorized access by a person under 21 years of age.

However, in January 2017, the Maine legislature passed an emergency act to delay implementation of certain parts of the Marijuana Legalization Act, for the "preservation of the public peace, health and safety."[159] The legislature cited the complexity and cost of implementing the regulatory system and the need to protect minors.[160]

This bill delays the effective date of most of the provisions of the Marijuana Legalization Act as enacted by citizen initiative to February 1, 2018. The delayed effective date does not apply to the provision in the initiated bill that repeals the Maine Revised Statutes, Title 22, section 2382, subsection 1, which makes possession of up to 2 1/2 ounces of marijuana a civil violation, or the following provisions, which will be effective as of January 30, 2017:

1. A person 21 years of age or older may use, possess or transport up to 2 1/2 ounces of marijuana;
2. A person 21 years of age or older may transfer, without remuneration, up to 2 1/2 ounces of marijuana and up to 6 immature plants or seedlings to a person who is 21 years of age or older;
3. A person 21 years of age or older may possess, grow, cultivate or transport up to 6 flowering marijuana plants, 12 immature plants and unlimited seedlings and possess all of the marijuana produced by the plants at the person's residence; and
4. A person 21 years of age or older may consume marijuana in a private residence.

The bill clarifies that possession of a usable amount of marijuana by a juvenile is a crime, unless that juvenile is authorized to possess marijuana

for medical use. Finally, the bill prohibits the possession of any edible retail marijuana products until February 1, 2018.[161]

A special legislative committee is addressing the "complex issues" of full implementation. The governor and the legislature have had disagreements over devising regulations. Governor Paul Le Page, an opponent of marijuana legalization, said that implementation could not proceed until the legislature authorized the necessary funds for regulation.[162] The full provisions of the Marijuana Legalization Act are expected to be implemented by February 2018.

Vermont

The Vermont legislature passed a bill to legalize marijuana that was vetoed by Governor Phil Scott in late May 2017. This was the first instance of a state legislature passing marijuana legalization without a ballot initiative. Scott has stated that he is not "fundamentally opposed to ending the prohibition on marijuana" but expressed concerns about illegal sales to minors and wanted more comprehensive studies of the regulatory schemes of other states.

* * *

Marijuana laws and regulations are rapidly evolving. This chapter is up to date as of July 10, 2017. Those who are curious about state marijuana laws should search their statehouse Web sites for more up-to-date information.

CHAPTER EIGHT

The Conflict between Federal and State Marijuana Law

Taylor Hart-Bowlan

The purchase and sale of marijuana, along with its possession and use, remain entirely illegal at the federal level.[1] According to the U.S. government, marijuana continues to have "no currently accepted medical use and a high potential for abuse."[2] This chapter explains the relationship between the federal and state governments regarding marijuana, and it provides an overview of the myriad of ways in which the federal executive, judicial, and legislative branches have addressed state legalization.

Marijuana's complete and continued federal illegality creates a paradox for businesses and individuals in states that have legalized cannabis. For example, because banks are usually federally insured entities, they by and large decline to handle accounts for marijuana businesses, forcing them to instead run primarily cash-only operations and increasing their exposure to being victims to crimes such as theft and robbery. For banks that do accept marijuana-affiliated accounts, they may or may not be subject to federal prosecution despite complete compliance with state cannabis laws, which obviously is cause for concern.

The November 2016 election has only made matters more unclear. With Senator Jeff Sessions (R-Ala.) taking the helm as U.S. attorney general in early 2017, the role of states' rights to regulate and decriminalize marijuana has taken on new importance. Sessions has opposed both the

medical and recreational legalization of marijuana on the record, and his appointment to the White House's key drug-enforcement position has increased concerns among individuals and marijuana businesses alike as to how President Donald Trump's administration plans to handle the increasing number of states that have legalized cannabis.[3] As of February 24, 2017, White House Press Secretary Sean Spicer had indicated that the Trump administration planned to increase enforcement of federal laws against states that had legalized recreational marijuana, which he described as a "very, very different subject" than medical marijuana legalization. However, what that enforcement would look like, Spicer said, was a "question for the Department of Justice."[4]

The 10th Amendment of the United States Constitution reserves certain powers to the states rather than to the federal government.[5] This means that the U.S. laws operate under a system of *federalism*, which is when two or more governments share power over the same geographic area. Thus, citizens of a U.S. state are simultaneously subject to both the U.S. government's laws and the laws of each individual state.[6]

Article VI of the U.S. Constitution sets forth the *supremacy clause*, which states that federal law is "the supreme law of the land."[7] This means that federal law, when properly enacted under the Constitution, takes precedence over state laws and state constitutions when the two systems conflict.[8] If a state passes a law that is not properly promulgated, the Supreme Court may strike down the state law as unconstitutional.[9]

The History of the Controlled Substances Act and the Drug Enforcement Agency

In 1970, the 91st U.S. Congress passed the Controlled Substances Act (CSA).[10] The act, which was signed into law by President Richard Nixon, established five classes of drugs that it deemed *controlled substances*.[11] Recognizing that many of them had medical value, Congress created five classes—or *schedules*—as a system of categorization for individual substances.[12] The schedules indicated potential for abuse, psychological and physical dependence, and the accepted safety of the substance.[13] A Schedule V substance, for example, has markedly different addictive and dependence characteristics than a Schedule I substance—at least according to the federal government.[14]

Marijuana was placed in the Schedule I category.[15] This designation is reserved for those substances that have a high potential for abuse, no current accepted medical usage, and a lack of accepted safety for use under medical supervision.[16] To provide some context for this, marijuana was placed alongside heroin, LSD, ecstasy, and peyote, whereas cocaine,

methamphetamines, and opium were categorized as Schedule II drugs.[17] Alcohol was not considered a controlled substance and was therefore not designated within in a schedule.[18]

In 1972, shortly after cannabis was first designated a Schedule I drug, President Nixon commissioned an extensive report on marijuana that reviewed the drug's impact on social policy, its biological effects, and various considerations regarding illegalizing versus legalizing the substance.[19] The findings, officially titled the *Report of the National Commission on Marihuana and Drug Abuse*, declared:

> [W]e have carefully considered the spectrum of social and legal policy alternatives. On the basis of our findings . . . we have concluded that society should seek to discourage [marijuana] use, while concentrating its attention on the prevention and treatment of heavy and very heavy use. The Commission feels that the criminalization of possession marihuana for personal [use] is socially self-defeating as a means of achieving this objective. . . . Considering the range of social concerns in contemporary America, marihuana does not, in our considered judgment, rank very high.[20]

Despite the commission's findings, Nixon elected not to implement its recommendations. Marijuana thus remained designated a highly addictive drug with no medical value.[21]

A year later, Nixon declared "an all-out global war on the drug menace" and aggressively implemented what had already become coined by the media as the "war on drugs."[22] He merged the Office of Drug Abuse Law Enforcement and the Office of Narcotics Intelligence into a single agency, the Drug Enforcement Administration (DEA), in response to concerns that multiple agencies handling various aspects of drug enforcement were not cooperating and coordinating their activities, rendering them inadequate to combat the ever-growing trafficking of drugs.[23] Tasked with enforcing domestic drug laws, the DEA initially had 1,470 special agents. Today, that number is nearly 5,000, and the agency currently has a budget of more than $2 billion.[24]

Ultimately, Nixon's platform and strategy to battle drug addiction and use focused heavily on strict enforcement and incarceration rather than rehabilitation or socioeconomic factors.[25] As one author concluded, "In Nixon's eyes, drug use was rampant in 1971 not because of grand social pressures that society had a duty to correct, but because drug users were law-breaking hedonists who deserved only discipline and punishment."[26]

However, despite Nixon's resignation on August 9, 1974, in the wake of the Watergate scandal, both the drug policies and heavy-handed criminal laws implemented during his presidency remained in place and are today considerably unaltered—particularly the laws pertaining to marijuana. Since the establishment of the CSA and DEA in the 1970s, marijuana has never once moved from its status as a Schedule I drug.[27]

The Controlled Substances Act

Although the DEA has its own drug-enforcement agents, it has historically relied heavily on state-level agencies and officers to apply and enforce federal drug laws ever since its inception.[28] Because each state has enacted its own criminal penalties for unlawful activity involving a controlled substance that are separate from the federal drug laws of the Controlled Substances Act, most federal drug law violations are also state-level ones.[29] In turn, this means that the officers and prosecutors enforcing drug policy tend to be agents of the state, rather than of the federal government itself.[30] As the Los Angeles Times reported in 2009, of the "[s]ome 800,000 people in the [United States who] were arrested [in 2008] for a marijuana law violation—the vast majority of those were for breaking a *state* law and thus the arrests were made by *state* law enforcement agents, not federal ones."[31] Thus, most charges brought for crimes such as possession or use have been handled by local or state governments, whereas the federal government has generally focused its resources on major, criminal enterprises, such as cartel smuggling and drug-trafficking networks.[32]

Despite Nixon's zero-tolerance drug war policies, nine states had elected to decriminalize cannabis possession by the end of 1970s, meaning they had decided to replace incarceration for small amounts of marijuana with programs such as drug treatment, education, or confiscation and a fine.[33] In fact, the first state to implement decriminalization was Oregon in 1973—the same year the DEA was created by the Nixon administration.[34] Furthermore, despite marijuana's Schedule I categorization, national support for cannabis legalization had doubled by the end of the decade, jumping from 12 percent in 1969 to approximately 25 percent by 1980.[35]

However, with the election of President Ronald Reagan in 1980, the war on drugs picked up substantial momentum.[36] As the state trend toward decriminalization of cannabis possession ground to a halt, incarceration rates and penalties for nonviolent drug offenses increased over Reagan's two terms, and by the end of a decade public fears and perception

regarding the nation's drug "epidemic"—particularly the use of crack cocaine—were notably high.[37]

In 1986, Reagan signed the Anti-Drug Abuse Act into law, which, alongside the Crime Control Act and the Controlled Substances Penalties Amendments Act of 1984, created mandatory sentences for drug-related crimes and increased federal penalties for marijuana possession and distribution.[38] For example, a charge for possession of 100 marijuana plants received the same criminal penalty as possession of 100 grams of heroin under the new laws.[39]

Supplementing her husband's antidrug policies, then–First Lady Nancy Reagan spearheaded the "Just Say No" campaign, which, along with the implemented Drug Abuse Resistance Education (DARE) program, sought to inform youth about the dangers of drug use and gang membership.[40]

The election of President George Bush in 1988 only bolstered the Reagan administration's aim to eradicate and criminalize drug use. In 1989, President Bush appeared on national television shortly after winning the presidential election and declared a "new War on Drugs," continuing the policies that had been implemented under Reagan.[41]

Even after Democratic Party candidate Bill Clinton was elected president in 1992, incarceration rates for nonviolent drug offenses continued to rise throughout the mid-1990s.[42] Although Clinton publicly advocated for treatment over incarceration of drug users, his presidency ultimately did little to curb the drug war.[43] The Clinton administration supplemented the Reagan-implemented Anti-Drug Abuse Act with its "three strikes and you're out" policy, which mandated life sentences for repeat drug offenders.[44] Furthermore, it dictated that criminals categorized as "drug kingpins" could receive the death penalty.[45]

After California became the first state to legalize the medical use of marijuana in 1996, the Clinton administration used civil action such as injunctions to enforce the Controlled Substances Act.[46] One example of this occurred in 1998, when the U.S. government filed suit against the Oakland Cannabis Buyers' Cooperative (OCBC), which was providing "seriously ill patients" with medical cannabis.[47]

Seeking to stop the OCBC from cultivating and distributing marijuana, the federal government claimed that the cooperative was in violation of the CSA, which prohibited such action.[48] Furthermore, a federal judge granted an injunction against OCBC, meaning that the OCBC had to stop cultivating and distributing marijuana until the lawsuit was resolved, despite its legality under state law.[49]

The OCBC subsequently violated the injunction and refused to cease its marijuana operations, arguing that the medical necessity of their

patients was a valid legal defense.[50] That claim went all the way to the Supreme Court, where it was ultimately rejected in 2001.[51] Holding that "a medical necessity exception for marijuana [was] at odds with" the CSA, the Court concluded that Congress had made a value judgment in its decision to make marijuana a Schedule I substance with "no currently accepted medical use" when it had passed the CSA; therefore, it was not the role of the courts to find otherwise.[52] *United States v. Oakland Cannabis Buyers' Cooperative*, filed by Clinton's administration in 1998, established black letter law at the federal judicial level: when it comes to marijuana, medical necessity is no defense.[53]

From 2001 to 2009, President George W. Bush favored enforcing federal marijuana law through DEA raids and seizures rather than through the civil-litigation approach that had been used by Clinton.[54] These tactics increased in frequency and severity throughout Bush's two terms in office.[55] California provides a good example: in 2001, the first year of the Bush presidency, the DEA arrested 359 individuals on marijuana charges and confiscated 880,000 plants.[56] By 2006, those numbers were up to 594 individual arrests and 3 million marijuana plant confiscations.[57] The federal raids continued up until Bush's last day in office. Even after that, federal agents shut down dispensaries on February 3, 2009, almost two weeks after President Obama assumed office.[58]

However, this seizure strategy did not spare the George W. Bush administration from the courtroom. In fact, the Bush administration's federal raids resulted in a landmark Supreme Court decision regarding cannabis, *Gonzales v. Raich*. The *Raich* case held that federal law superseded California's legalization of medical marijuana, but it was also the final court ruling in a trifecta of cases that marked a major shift from prior Supreme Court decisions on the Constitution's Commerce Clause.[59]

Found in Article I, Section 8, of the U.S. Constitution, the Commerce Clause declares that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" certain responsibilities, including the authority to "regulate Commerce with foreign Nations and among the several States."[60] Since the nation's inception, the clause has been repeatedly controversial in terms of its application, and even the Supreme Court's own interpretations of the Congress's commerce powers under the Constitution reflect several swings of the judicial pendulum over the last century and a half.[61] At the core of these shifts has been what types of activity constitute *interstate commerce*; by the time *Raich* appeared before the Court, that question had yet again become a hot legal topic.

In the decade before the *Raich* decision, two surprising Court rulings had resurrected the Commerce Clause from its half-century-long slumber:

United States v. Lopez and *United States v. Morrison* drastically curbed and redefined what interstate commerce constituted. Before these decisions, Congress's power to make laws under the Commerce Clause had been essentially unlimited since the 1930s.[62]

Before *Lopez*, the Supreme Court's status quo regarding the Commerce Clause had remained wholly untouched since 1942 when the Court had decided *Wickard v. Filburn*.[63] In *Wickard*, the Court held that Congress had the power to regulate a single farmer's wheat grown for his personal use to feed his farm animals because the cumulative effect of thousands of other individual farmers doing the same would become substantial—which meant they would detrimentally affect interstate commerce and interfere with the New Deal's plans enacted by Congress.[64] This successful "cumulative effect" argument had remained the standard for more than 50 years, during which time the Court had not struck down a single law Congress had made under the Commerce Clause—until the 1990s.[65]

In 1995, the Supreme Court's decision in *Lopez* struck down a law passed by Congress that had prohibited possession of handguns near schools. The Court concluded that the relevant statutes passed by Congress did not directly relate to commerce or economic activity and were therefore unconstitutional, effectively ending its 53-year-long abstention from addressing the topic.[66] Then, only five years later, it found in *Morrison* that the 1994 Violence Against Women Act had also exceeded Congress's power under the Commerce Clause because the effects of violence against women on interstate commerce were "indirect" and "remote."[67] The Court rejected the government's argument that, like *Wickard*, the aggregate effects of these acts would have a substantial effect on interstate commerce.[68] That case did not apply, the Court said: the economic effects of violence against women were simply too indirect; therefore, the two cases were distinguishable.[69] Together, these cases created the framework in which *Gonzales v. Raich* was argued in 2003.

Raich was the direct result of a 2002 federal marijuana raid in which DEA agents confiscated a California medical marijuana patient's homegrown marijuana plants. Rachel Monson, a California resident who had grown and used marijuana to alleviate muscle spasms and chronic pain associated with injuries from a car accident several years earlier, claimed the plants were solely for her personal medical use.[70] Both Monson and Angel Raich, also a California medical marijuana patient, filed suit against the government, claiming that enforcement of the CSA against them would violate several constitutional provisions, including the Commerce Clause.[71]

The Supreme Court's recent curtailment of the Commerce Clause opened the door for the *Raich* defendants to argue that—like *Morrison* and *Lopez*—the act of individuals growing marijuana for their personal use was likewise only remotely and indirectly connected to interstate commerce. Given that the trend in the Supreme Court seemed to favor curbing the wide latitude previously given to Congress, opponents of federal enforcement of marijuana laws hoped that the case would continue that trend.

However, *Lopez* and *Morrison* had never formally overturned *Wickard*, and in *Raich* the government argued that the two cases were analogous to one other: both involved individuals growing an item for personal use that federal laws had forbidden. The government further argued that—if every individual were allowed to grow their own marijuana plants—the cumulative effect of those actions would undermine Congress's determinations and efforts to eradicate illegal drug use. Thus, the argument went, the outcome in *Raich* should be the same.

The Court agreed. In a somewhat surprising 6–3 decision, it held that Congress's criminalization of cannabis did affect interstate commerce and was constitutional—even when it was enforced in states that had legalized medical marijuana. Although *Lopez* and *Morrison* had both been close 5–4 decisions with Associate Justices Anthony M. Kennedy and the late Antonin Scalia voting with the majority, *Raich*'s more authoritative 6–3 holding caused some head-scratching. As *The New York Times* reported after the decision:

> The 6-to-3 decision, a firm reassertion of federal authority, revealed a deep fissure within the coalition that over the past decade has provided the majority for a series of decisions curbing Congressional power and elevating the role of the states within the federal system. Two members of that coalition, [Justices Kennedy and Scalia], voted this time to uphold federal authority.[72]

The implications of *Oakland Cannabis Buyers Cooperative* and *Raich* boded poorly for supporters of both marijuana legalization and states' rights. As the Drug Enforcement Administration continued to raid dispensaries and homes during the remainder of President George W. Bush's second term, fear of federal prosecution continued to escalate among business owners and users of medical marijuana alike. When Barack Obama won the presidential election on November 4, 2008, many expressed their hope that the tide would change.

The Obama Administration: 2009–2013

On the campaign trail, Obama had pledged to forbear raiding medical marijuana dispensaries—just like George W. Bush before he was elected.[73] Furthermore, Obama had not shied away from addressing his past marijuana use. For example, poking fun at former President Clinton's campaign statement that he had smoked marijuana "a time or two" in England but "didn't inhale," Obama told reporters in 2006, "When I was a kid, I inhaled, frequently. That was the point."[74]

While running for the U.S. Senate in 2004, Obama had supported decriminalization, calling the war on drugs "an utter failure."[75] As a senator for Illinois, he had worked to reduce crack cocaine sentences, and during his presidential campaign he had supported drug treatment and been critical of drug prohibition.[76] In 2008, he had announced he would not use Justice Department resources to "try to circumvent state [medical marijuana] laws."[77] In short, many voters hoped his presidency would put an end to the drug war—particularly its assault on marijuana.

However, as the first few years of the Obama presidency began, federal raids continued, even in states where medical marijuana use had been legalized.[78] By the end of Obama's first term in office, many of his promises on raid abstention appeared to have been empty. In early 2012, *Rolling Stone* magazine (which had endorsed Obama during his presidential campaign) published an extensive article titled "Obama's War on Pot" that called the administration's marijuana "crackdowns" a "shocking about-face" compared to his campaign pledges.[79] Included in the story was a damning quote from Rob Kampia, the executive director of the Marijuana Policy Project: "There's no question that Obama's the worst president on medical marijuana," Kampia said. "He's gone from first to worst."[80]

The numbers told the same story. Government statistics at the end of Obama's first term proved that his administration had broken his pledge to cease the Bush-era raids. By 2013, his administration had spent millions and raided more medical marijuana dispensaries than every single president before him, including George W. Bush: 270 raids on dispensaries, more than half (51 percent) of the total number of federal raids since 1996 when California legalized medical cannabis.[81] In addition, the Obama administration had spent a whopping $300 million on marijuana enforcement in states where cannabis had been legalized—$100 million more than the George W. Bush administration had totaled.[82]

However, despite reproach from the media and the foreboding DEA statistics at the time, 2009 to 2013 also marked the greatest expansion of state-legalized marijuana in the nation's history—an expansion that

had been catalyzed, supervised, and even galvanized by the same administration.[83]

The Ogden and Cole I Memos

By 2009, medical marijuana was legal in 13 states.[84] In March that year, Attorney General Eric Holder stated that the Obama administration would focus solely on medical marijuana users who were violating both federal and state laws.[85] A few months later, a memo penned by Deputy Attorney General David Ogden and released by the Department of Justice reiterated that policy.[86]

The "Ogden memo," as it has since been coined, instructed that the government's limited resources should not be directed toward prosecuting medical marijuana users who were in "clear and unambiguous compliance with existing state law" such as "individuals with cancer or other serious illnesses."[87] Rather, prosecution efforts should focus on "significant traffickers" of drugs who might be using state legalization to "mask operations inconsistent [with the] purposes of those laws."[88] It also delineated certain characteristics that typically should attract federal interest:

> Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug-trafficking activity of potential federal interest:
>
> - unlawful possession or unlawful use of firearms;
> - violence;
> - sales to minors;
> - financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
> - amounts of marijuana inconsistent with purported compliance with state or local law;
> - illegal possession or sale of other controlled substances; or
> - ties to other criminal enterprises.[89]

The release of the Ogden memo was received as a green light for state legalization, and commercial dispensaries rapidly opened in states that had legalized medical cannabis.[90] *The New York Times* article on the memo, for example, was titled, "U.S. Won't Prosecute in States That Allow

Medical Marijuana."[91] By spring 2010, cities such as Denver, Colorado, had more than 250 medical marijuana dispensaries, and the nearby town of Boulder had another 100.[92] Some 60,000 residents in Colorado had obtained state-issued medical marijuana red cards, and the estimated wait time for those applying for the cards was six months.[93]

However, in early 2010, Michele Leonhart's confirmation as DEA administrator resulted in a second memo that quickly removed the security of the Ogden policy.[94] Leonhart, who had served as acting administrator under Bush since 2007 before being confirmed by Obama, publicly endorsed the "fight against drugs," and within weeks of her appointment federal agents began rescinding the Ogden memo.[95] States and cities began receiving letters that threatened various forms of federal action if they continued with their pending developments for medical marijuana industries. Finally, on June 29, 2010, the Department of Justice issued another memo—one that severely curbed its predecessor.[96]

Written by Ogden's replacement, Deputy Attorney General James Cole, the memo differentiated medical cannabis "caregivers" from "large-scale, privately operated industrial" centers, some of which had "revenue projections of millions of dollars based on" growing cannabis plants.[97] An article in *The Nation* from late 2013 explains it well:

> While the Ogden memo hadn't been too explicit about who constituted a "caregiver," the Cole memo defined the term explicitly as an individual who cares for patients, "not commercial operations cultivating, selling or distributing marijuana."[98]

Regarding the latter group, the 2011 memo seemed to blatantly revoke the protections offered by Ogden's memo only a year and a half before:

> The Ogden memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. . . . Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.[99]

The memo also noted that individuals engaged in "transactions involving the proceeds" of the cannabis industry could additionally be "in violation of federal money laundering statutes and other federal financial laws," essentially adding *additional* federal crimes to its new laundry list of potential prosecutions.[100]

Shortly after the release of the Cole memo, the DEA launched a multifaceted crackdown, targeting marijuana growers, facilities, and dispensaries throughout the country.[101] As the federal efforts continued throughout 2012, it seemed the executive branch had unequivocally returned to drug war–style enforcement policies.[102] In September 2012, for example, federal agents attempted to shut down more than 70 medical marijuana dispensaries in one day in the Los Angeles area alone.[103]

Ironically, many of the medical marijuana businesses that were subject to federal intervention during this period were among the most structured and well organized businesses. Furthermore, the tactics used by federal agents in such "interventions" remained controversial. For example, in October 2012, the DEA showed up in the middle of the night with a battering ram and chainsaw to cut down California grower Matthew Cohen's 99 marijuana plants.[104] At the time, Cohen was an exemplary model of state-law compliance, and he had earned a reputation as a "leader who worked with local officials" to establish the state's "most renowned local regulatory program for medical cultivation."[105] For testimony illustrating raid tactics involving civil asset forfeiture, a video of Michigan residents Ginnifer Hency and Annette Shattuck's testimony during a Michigan House Judiciary Committee meeting in May 2015 is informative.[106]

Another example of questionable federal tactics was a series of federal raids and arrests associated with marijuana paraphernalia shops in Idaho that occurred in mid-2012.[107] During one such raid, federal agents pulled a local business owner's 12-year-old daughter out of bed and "marched her downstairs at gunpoint, where they made her lie facedown next to her parents."[108] They also removed the couple's two-year-old son from his crib and "refused to let [his parents] hold him," despite their requests to do so.[109]

However, in the midst of the inconsistencies and chaos surrounding the Obama administration's policies on marijuana, the introduction of another factor in the state-versus-federal battle yet again altered the national drug policy landscape. In November 2012, the citizens of Colorado and Washington voted to approve the use, sale, and possession of recreational marijuana for adults 21 and older in their states.[110]

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For the federal government, the recreational marijuana measures in Colorado and Washington presented an entirely new conundrum. The Department of Justice and the DEA now had to decide whether to enforce

federal laws in two states that had not only approved cannabis for medical patients but also broadly accepted nonmedical usage.[111] Furthermore, the citizen-based initiatives in both states had mandated the implementation of a state-government scheme for the regulation and sale of cannabis—one that would manage and oversee the exact type of "privately operated industrial" businesses that the 2011 memo had expressly threatened.[112]

On August 29, 2013, the Department of Justice issued yet another "marijuana memo," also written by Deputy Attorney General James Cole.[113] In many ways, it contradicted the Department of Justice's 2011 stance in both tone and policy.[114] For example, the memo dictated that states that had legalized recreational marijuana should not be a federal priority—so long as the industry was being adequately and reliably regulated.[115] As had memos before it, this one delineated instances in which federal prosecution should be prioritized such as exposure to youth and diversion to states in which marijuana was not legal.[116]

During an interview in 2016, James Cole explained the rationale behind his 2013 memo and the reasons for its apparent about-face from his previous one.[117] According to Cole, the federal government considered two factors in determining its policy on marijuana enforcement.[118] First, the administration sought to answer whether the federal government, operating under the guidelines set forth in the U.S. Constitution, could preempt or block states from implementing recreational marijuana. Second, could the federal government shut down the regulatory schemes offered to voters in the states' initiatives?

Ultimately, the Justice Department decided that it could not constitutionally force states to make marijuana illegal.[119] And, although it likely *could* block the regulatory schemes, without the ability to alter state legalization itself, doing so would not make much sense: it would essentially be, as Cole put it, "cut[ting] off our nose to spite our face."[120] He also noted that the administration had felt that removing regulation would likely end up providing heavy funding for drug cartels.[121]

On January 1, 2014, Colorado became the first state to offer the commercial, regulated sale of recreational marijuana to adults.[122] Although many Coloradans wondered how the DEA would react, the day passed without incident.[123] Later in 2014, Washington opened its first recreational retail stores, again without any federal interference.[124] In November 2014, Alaska and Washington, D.C., eventually joined the "adult-use" marijuana movement, although to a much smaller extent than Colorado and Washington.[125]

In addition, 2014 marked another important event for marijuana and the federal government—one that came from Congress. In May, the Rohrabacher-Farr amendment passed in the House, and in December it

became the first congressional protection offered to medical marijuana patients.[126] Supported by 170 Democrats and 49 Republicans, the measure blocked the Department of Justice, along with the DEA, from using funds to prevent states from implementing medical marijuana laws.[127]

However, the legislative action did not dissuade the Justice Department, which continued to prosecute individuals in several states, including those where medical marijuana was legal. In April 2015, Justice announced its interpretation of Rohrabacher-Farr: nothing in the law precluded its authority to prosecute individuals and organizations; it only applied to the states themselves—not state citizens.[128]

In the fall of 2016, the Ninth Circuit disagreed.[129] In *United States v. McIntosh*, the court held that individuals and organizations in compliance with state laws enjoyed Rohrabacher-Farr protection.[130] Therefore, the government *was* banned from spending funds to prosecute them.[131] This was considered a victory by many proponents of legalization, particularly because the Ninth Circuit was binding law for the states of California, Oregon, and Washington—all of which had some form of legal marijuana at the time.[132]

Although Rohrabacher-Farr expanded protection to medical marijuana patients, it is worth noting that legislative measures included in spending packages such as this one require annual renewal, which means that the House must continue to approve it annually.[133] Rohrabacher-Farr was extended by President Trump on May 5, 2017, for one year. However, Attorney General Jeff Sessions has made comments critical of legal protections for medical marijuana patients.[134]

2016: Marijuana and the Judicial Branch

Interestingly, *McIntosh* was only one of several ways in which the judicial branch played an integral role regarding the legalization of marijuana in 2016. Perhaps most notably, on March 21, 2016, the Supreme Court denied the states of Nebraska and Oklahoma leave to file a suit against the state of Colorado as a result of Amendment 64, which had legalized the recreational sale of marijuana in 2012 and allowed regulation and retail sales to start at the beginning of 2014.[135] The motion, which had requested the Supreme Court hear the case, had been filed at the end of 2014.[136] The Court did not issue an opinion as to the reasons for its denial, but its decision was viewed as an important step in securing the safety of recreational marijuana—in Colorado and in general.[137]

Furthermore, *McIntosh* was not the only instance in which the Ninth Circuit addressed marijuana in 2016. In *Wilson v. Lynch*, it faced the issue

Table 8.1 Current DEA Drug Schedules and Descriptions

Schedule	Abuse Potential	Accepted Medical Use	Accepted Safety	Example Drugs
I	High	None	Lacking under medical supervision	Heroin, LSD, marijuana, ecstasy, peyote
II	High	Yes, with potential severe restrictions	Abuse may lead to severe psychological or physical dependence	Cocaine, methamphetamine, methadone, oxycodone, Vicodin, Adderall, Ritalin
III	Less than Schedules I and II	Yes	Abuse may lead to moderate or low physical dependence or high psychological dependence	Tylenol with codeine, ketamine, anabolic steroids, testosterone
IV	Low, relative to Schedule III	Yes	Abuse may lead to limited physical dependence or psychological dependence relative to Schedule III.	Xanax, Valium, Ambien, Tramadol
V	Low, relative to Schedule IV	Yes	Abuse may lead to limited physical dependence or psychological dependence relative to schedule IV	Cough syrup with less than 200 mg of codeine per 100 ml, Lyrica, Lomotil

Source: DEA, Drug Schedules, https://www.dea.gov/druginfo/ds.shtml.

of whether medical marijuana cardholders could purchase firearms.[138] Ultimately, it held that they could not, finding that the prohibition on "unlawful users" of drugs purchasing firearms did not violate a Nevada medical marijuana cardholder's Second Amendment right to bear arms.[139]

In addition, its sister court, the Tenth Circuit, also addressed marijuana in 2016 when it held that highway patrol officers could not use the fact that individuals have license tags from states in which marijuana is legal to justify detaining an individual or searching his vehicle for drugs.[140] The decision came after a Colorado resident's car was searched by Kansas Highway Patrol officers, who said they had justified their search in part by the fact that Colorado was a "drug source area" and the highway on which the man was driving was "a known drug corridor."[141]

In the summer of 2016, the DEA reaffirmed marijuana's position in the scheduling hierarchy (see Table 8.1). Citing the lack of federally funded medical research on the substance, DEA acting administrator Chuck Rosenberg announced in response to a request for a review of cannabis scheduling that it would remain a Schedule I substance until further medical research was conducted.[142] Although the DEA pledged it would work to create more accessibility for medical research, until that point in time marijuana would continue to have no accepted medical use for controlled substance scheduling purposes.[143]

As a whole, the tension between federal and state laws regarding cannabis use remains a legitimate cause for concern within the booming marijuana industry, and the risks affiliated with marijuana businesses throughout the country will likely not disappear until the disconnect between state's rights and federal law is resolved. Although the executive, judicial, and legislative branches each possess their own unique tools to provide clarification and guidance on marijuana legalization, none have done so in a comprehensive manner. Rather, the government's laws and policies on cannabis over the last few decades have come in the form of piecemeal—and sometimes even contradictory—guidelines, many of which change with each presidential term or administration. One fact, however, remains clear: according to the federal government, both medical and recreational marijuana remain dangerous, highly addictive, and flatly illegal.

CHAPTER NINE

Conclusion

The lessons of Prohibition have become clear over the years since the great experiment ended. In a free society, the criminalization of behavior whose primary victim is the person engaging in that behavior is self-defeating. It diverts scarce judicial and enforcement resources away from addressing crimes that are *malum in se* (wrong by their very nature) and cause the greatest harm to society, consumes society's wealth and treasure on futile endeavors that could otherwise be used for rehabilitation and health, creates an entire criminal class that leaves in its wake the unsupported widow and child, invites corruption at the very heart of government, results in the release of violent criminals from scarce prison space, finances and contributes to the expansion and success of organized crime, and, perhaps most egregious of all, results in more harm to those who engage in the prohibited behavior than before the behavior was criminalized.

High rates of smoking tobacco were hardly curtailed by state laws criminalizing smoking; but education and research—as released by the U.S. Surgeon General's report on tobacco use in the 1960s—has resulted in far more curtailment of that dangerous practice than criminalization ever did.

Deaths from alcohol consumption rose dramatically during Prohibition because of the lack of legal regulation and the resulting illegal distribution ("bootlegging") and production of unregulated alcohol ("moonshine"), along with the death, blindness, and violence that accompanied consumption. Decriminalization of alcohol has allowed enforcement resources to focus on safe production and preventing drunk driving and distribution to minors.

Before the criminalization of drugs, society was not inflicted with crack houses or the ravages of organized crime and cartels, all leaving in their wake mass graves and tens of thousands of innocent victims. Because of criminalization, all the evils just described have been inflicted on the body politic. In the case of marijuana, the slogan "No price too high" has yet again raised its ugly head—not the mass graves, not the violence, not the deaths—to support the sole rationale for its criminalization: some *users* might endanger their health. In setting forth this rationale, demagogic politicians conveniently disregard the 480,000 Americans who die from the effects of smoking each year, juxtaposed with zero deaths resulting from marijuana use.[1] If these politicians were truly interested in users' health, they would allocate a small portion of the billions used on incarceration to education and treatment.

If the only issue in prohibiting tobacco and alcohol consumption was their harmfulness or addictiveness, their use would doubtless be criminalized yet again. If I, as a non-user of these substances, thought for a moment that a criminal law would put a stop to the consumption of these substances and could be enforced without creating the apparatus of a police state, I would be the first to cast my vote for their enactment. But those who know history know the speciousness of the assumption that passing such laws will in themselves result in abstention. For those who read the headlines today and persist in criminalizing such substances as marijuana, the lessons of the past remain unheeded or deliberately ignored.

As with alcohol, marijuana consumption must be legalized, strictly regulated for both safety and transparency, and taxed as high as it can be short of creating a black market and incentives for illegal production and distribution. The proceeds from such taxes should be earmarked for education, rehabilitation, health, and safety. Only by such action can organized crime be defeated, crimes malum in se prosecuted, and our prisons reserved for those whose crimes create victims other than themselves.

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Notes

Chapter 1

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Chapter 6

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opium was China, although Britain occasionally maintained market access to Chinese users against the wishes of the Chinese government. Opium was the first drug to receive sustained abolitionist attention. Opposition to the opium trade first developed in China, where the harm of forced opium importation was widespread. In the United States, religious groups such as the Quakers were the first to take up the cause of opium prohibition. A strong anti-opium movement began in the late 19th century, ultimately culminating in the Shanghai Conference of 1909. This was the first ever international conference on drugs and was shortly followed by the 1912 Hague Convention on Opium, the first international treaty by which nations agreed to cooperate in preventing drug trafficking.

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