

Marijuana Legalization

Alex Kreit*

After decades of waging war on marijuana, a majority of Americans have come to see prohibition as a costly failure and believe that legalization is a better option. Since 2012, eight states have passed marijuana-legalization laws. Polls now consistently show a majority of adults nationwide favor legalizing marijuana. To date, however, legislatures have mostly remained on the sidelines. Every state to legalize marijuana has done so via ballot measure. Legislators should not miss the opportunity to shape this important issue, especially because the details matter a great deal when it comes to marijuana legalization. This chapter outlines the case for marijuana legalization, including the evidence from states that have already implemented legalization laws, and highlights key recommendations for lawmakers and stakeholders who may be interested in reforming their state's marijuana laws.

INTRODUCTION

Not long ago, marijuana legalization was considered to be far outside the political mainstream. The idea that it could actually become law seemed so remote that when President Barack Obama was asked for his thoughts on marijuana legalization in a 2009 online town-hall event, he treated the question as a joke. “I don’t know what this says about the online audience,” he chuckled, before tersely answering that, no, he did not think legalizing marijuana would be “a good strategy to grow our economy.”¹ President Obama’s drug czar was similarly dismissive when asked about the topic in 2009, saying that

* Alex Kreit, Professor of Law and Co-Director of the Center for Criminal Law and Policy, Thomas Jefferson School of Law. I thank Erik Luna for inviting me to contribute to this project, Chad Snow and the student editors for their excellent work editing this chapter, and Jessica Berch, Doug Berman, Richard Bonnie, Darryl Brown, Douglas Husak, Alexandra Natapoff, and Gary Wells for their valuable comments on my initial draft.

1. Sam Stein, *Obama Takes Pot Legalization Question During Townhall*, HUFFINGTON POST (Apr. 26, 2009), http://www.huffingtonpost.com/2009/03/26/obama-takes-pot-legalizat_n_179563.html.

“[l]egalization was not in the President’s vocabulary.”² On the same night Obama was elected to a second term, however, Colorado and Washington became the first states to pass marijuana-legalization ballot measures. All of a sudden, marijuana legalization was no longer a laughing matter.

Since then, six more states—Alaska, California, Maine, Massachusetts, Nevada, and Oregon—have legalized marijuana, all via ballot initiative. In Washington, D.C., voters approved a law making it legal to possess and grow small amounts of marijuana, although commercial distribution and sale remain prohibited. Politicians have, slowly, started to come around on the issue. In California, Lieutenant Gov. Gavin Newsom—who was ahead of many other politicians on the issue of marriage equality—has also become a leading voice in favor of marijuana legalization. Marijuana-legalization bills have also received serious consideration in a few state legislatures, including in New Hampshire, Vermont, and Rhode Island.

Meanwhile, the threat of federal interference continues to lurk in the background. Even as states have passed sweeping marijuana reforms (with state medical-marijuana laws dating back to California’s 1996 Compassionate Use Act), marijuana’s legal status under federal law has remained unchanged. When the federal Controlled Substances Act was passed in 1970, marijuana was placed in the most restrictive category, Schedule I, alongside heroin. And there it stays. Despite this fact, the Department of Justice adopted an enforcement policy in 2013 that advises federal law enforcement officials not to use their resources to go after people in compliance with state marijuana-legalization laws. Since that time, states have been able to implement marijuana-legalization laws with minimal interference from the federal government. Whether this will continue to be the case under President Donald Trump remains to be seen.

This chapter discusses why so many states have begun to legalize marijuana and examines some of the key issues state policymakers who are interested in reforming marijuana laws should consider. Part I outlines the evidence that marijuana prohibition has not worked. Despite expending significant law-enforcement resources on enforcing laws that criminalize marijuana, marijuana use and availability have remained relatively steady for decades. At the same time, marijuana-possession arrests can have devastating consequences for the users, who might lose their jobs, government benefits, or even their freedom. Finally, marijuana prohibition is unevenly enforced. For a variety of reasons, people of color are much more likely than whites to be arrested and

2. Nick Gillespie, “*Legalization Is Not in the President’s Vocabulary ... Marijuana Is Dangerous and Has No Medical Benefit*,” Love, Obama’s Drug Czar, REASON HIT & RUN BLOG (July 23, 2009), <http://reason.com/blog/2009/07/23/legalization-is-not-in-the-pre>.

prosecuted for violating marijuana laws. Part II provides recommendations for policymakers and other concerned parties who may be interested in reforming state-level marijuana laws. Part III concludes.

I. THE PROBLEMS WITH PROHIBITION

A. A BRIEF HISTORY OF MARIJUANA PROHIBITION

Marijuana-prohibition laws in the United States date back to the early 1900s, when the first state laws criminalizing marijuana emerged. New York Sanitary Laws prohibited marijuana “as early as 1914” and “in 1915, Utah passed the first state statute prohibiting sale or possession of the drug.”³ By 1931, 22 states had adopted marijuana-prohibition laws.⁴ One year later, marijuana made its way into the Uniform Narcotic Drug Act, the model legislation for state drug-prohibition laws. And, in 1937, Congress effectively adopted federal prohibition with passage of the Marihuana Tax Act. Between the Marihuana Tax Act and the Uniform Narcotic Drug Act, marijuana prohibition was national policy by the end of the 1930s.⁵

Like other early federal anti-drug laws, the Marihuana Tax Act prohibited marijuana through a “cumbersome system of taxes,”⁶ an approach necessitated by the narrow interpretation of the interstate commerce power that held sway at the time. By the late 1960s, the Supreme Court had adopted a broader interpretation of Congress’s commerce authority and Congress set about transforming what had been a “patchwork”⁷ approach to drug prohibition into a single drug-control regime.

This effort led to passage of the 1970 Controlled Substances Act (CSA), which is still with us today. The CSA replaced nearly every federal drug law then in existence with a comprehensive scheme for controlling and prohibiting

3. Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970).

4. *Id.*

5. Richard J. Bonnie, *The Surprising Collapse of Marijuana Prohibition: What Now?*, 50 U.C. DAVIS L. REV. 577 (2016) (“Pretty much the whole country was already covered by state drug prohibitions before the Marihuana Tax Act was enacted.”).

6. Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 CATH. U. L. REV. 586, 606 (1973); *see also id.* at 600 (describing how the Marijuana Tax Act operated).

7. *See Nat’l Org. for the Reform of Marijuana Laws v. Bell*, 488 F. Supp. 123, 126–28 (1980) (explaining that the CSA “ended the patchwork federal effort against drug abuse and signaled a national commitment to deal with this problem by committing federal funds for rehabilitation programs”).

drugs with recreational uses. The CSA divides drugs into five “schedules” based on their potential for abuse, medicinal value, and addictiveness. Marijuana is a Schedule I substance, meaning that the Drug Enforcement Administration (DEA) has concluded it has (a) a high potential for abuse (b) no currently accepted medical use in treatment in the United States and (c) a lack of accepted safety for use under medical supervision.⁸

After the federal Controlled Substances Act became law, most states reformed their own anti-drug laws in its image. Today, almost every state has enacted a version of the Uniform Controlled Substances Act, which was drafted by the National Conference of Commissioners on Uniform State Laws in order to maintain consistency between state and federal drug laws.⁹ In most of these states, marijuana remains illegal to manufacture, sell, or possess, at least for non-medical purposes.

After passage of the Controlled Substances Act, the federal government declared “war” on drugs, including marijuana. As discussed below, the drug war saw a dramatic rise in marijuana enforcement, especially arrests. Meanwhile, people convicted of marijuana offenses found themselves subject to an increasing number of collateral restrictions. Despite the significant expenditure of resources, the war on marijuana has not achieved its stated goals.

B. ARRESTS AND POLICE RESOURCES

There is perhaps no clearer manifestation of drug-war ideology than the strategy of “seek[ing] out and punish[ing] casual, nonaddicted drug users.”¹⁰ In 1970, when the Controlled Substances Act was passed, there were a little more than 400,000 drug arrests nationwide.¹¹ This number climbed quickly during the Nixon administration, to over 600,000 by 1974, followed by a period of relative stability until 1980.¹² Then, beginning in 1980, drug arrests rose fairly steadily and dramatically, from 581,000 to a height of almost 1.9 million in 2005.¹³

8. 21 U.S.C. § 812(b)(1).

9. GERALD F. UELMEN & ALEX KREIT, *DRUG ABUSE AND THE LAW SOURCEBOOK* § 1:30 (2016) (providing an overview of the Uniform Controlled Substances Act).

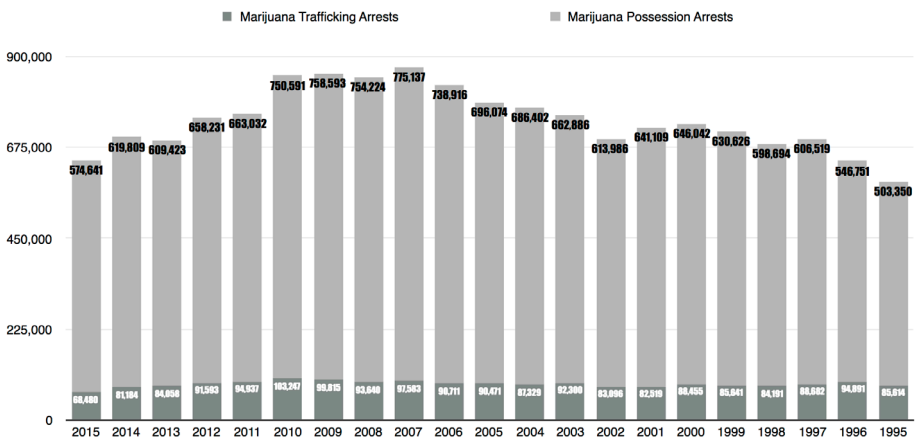
10. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 16 (1992).

11. RYAN S. KING, *THE SENTENCING PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA’S CITIES* 5 (2008), <http://www.sentencingproject.org/publications/disparity-by-geography-the-war-on-drugs-in-americas-cities/>.

12. *Id.* at 4-5.

13. *Id.* (reporting statistics from 1970 to 2005).

Marijuana enforcement was central to the rise in drug arrests. Indeed, arrests for simple possession—particularly marijuana possession—were chiefly responsible for the rise in drug arrests after 1990. Between 1990 and 2002, marijuana possession was responsible for 78.7% of the 450,000 additional drug arrests.¹⁴ While arrests for all offenses decreased by 3% during that period, marijuana arrests rose by 113%.¹⁵ The trend continued for the better part of the last decade. The year 2010 saw approximately 140,000 more marijuana arrests than 2001, with a total of 889,133—“300,000 more than arrests for all violent crimes combined—or one every 37 seconds.”¹⁶ Marijuana arrests have declined in recent years, in part because of state legalization laws. Still, in 2015, there were 574,641 arrests for marijuana possession alone, “about 13.6 percent more than the 505,681 arrests made for all violent crimes” that year.¹⁷



Source: FBI Uniform Crime Report.

State and local police are responsible for the lion’s share of marijuana arrests. The effort is a costly one. The police put resources toward investigating marijuana cases. People charged with a marijuana offense must then be processed through the court system. And, of course, the correctional system must pay to house those incarcerated for marijuana offenses and monitor probationers. In 2010, Harvard economist Jeffrey Miron estimated that state

14. Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, HARM REDUCTION J., Feb. 9, 2006, at 3, <http://harmreductionjournal.biomedcentral.com/articles/10.1186/1477-7517-3-6>.

15. *Id.* at 4.

16. ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 9 (2013), <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf>.

17. Timothy Williams, *Marijuana Arrests Outnumber Those for Violent Crimes, Study Finds*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/us/marijuana-arrests.html>.

and local police nationwide would save \$10.4 billion by legalizing marijuana, after factoring in lost revenue from fines and forfeitures.¹⁸ Miron's estimate included only costs that could be readily calculated and did not account for other ancillary costs of marijuana prohibition, such as the violence that results from black-market disputes or the property and environmental damage caused by illegal growing operations.¹⁹

C. INCARCERATION AND COLLATERAL CONSEQUENCES

Although hundreds of thousands of people are arrested for marijuana offenses every year, marijuana offenders make up only a small fraction of the prison population. As discussed above, the overwhelming share of marijuana arrests are for simple possession, which is treated as a misdemeanor in most states. In addition, in most states, the penalties for non-possession offenses, such as manufacture and distribution, are not severe. Even when a marijuana conviction exposes a defendant to the possibility of a lengthy prison sentence, judges are often able to use their discretion to impose probation or a shorter period of confinement. As a result, "few marijuana cases result in prison time ... even for distribution, and most drug offenders serve relatively short terms in prison."²⁰

There are exceptions, to be sure. In Louisiana, for example, state recidivist sentencing laws have resulted in shockingly long sentences for some small-time marijuana offenders.²¹ But, on the whole, only a small percentage of marijuana offenders serve significant time behind bars. One recent estimate put the number of state and federal prisoners with a current "controlling conviction" involving marijuana at about 40,000 with "perhaps half of them ... in prison for marijuana alone."²²

But incarceration is only one consequence of a conviction. A marijuana arrest can be a life-changing event, even if it does not result in a lengthy jail or prison sentence. An arrest record "can disrupt legitimate careers and impair

18. JEFFREY A. MIRON, *THE BUDGETARY IMPLICATIONS OF DRUG PROHIBITION* 10 (2010), http://scholar.harvard.edu/files/miron/files/budget_2010_final_0.pdf?m=1360041410.

19. *Id.* at 6. See also Jeffrey A. Miron, "Drug Prohibition and Violence," in the present Volume.

20. John Pfaff, *The War on Drugs and Prison Growth: Limited Importance, and Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 203 (2015).

21. See HUMAN RIGHTS WATCH & ACLU, *EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES* 101-02 (2016) (discussing the case of Corey Ladd, who was sentenced to 17-years in prison in Louisiana for possession of half an ounce of marijuana), https://www.aclu.org/sites/default/files/field_document/usdrug1016_web.pdf.

22. JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 99 (2016).

future job prospects.”²³ Fines and court fees can also add up—for a minimum-wage worker, a \$200 fine “could consume the take-home pay from the better part of a full week of work.”²⁴ Marijuana offenses also carry a range of collateral consequences.²⁵ These additional legal penalties can range from the revocation of a professional license to a bar on receiving food stamps or adopting a child.²⁶

The story of Rebecca Kennedy, profiled in a recent *Houston Press* article, provides an example of how an ordinary marijuana-possession arrest can disrupt a person’s life.²⁷ Kennedy, a Navy veteran living in Texas, was arrested after a police officer discovered marijuana in her car, which she “used to quell her bad episodes of post-traumatic stress disorder.”²⁸ As a result of the arrest, “Kennedy was fired from her UPS job as she sat in jail waiting for her mom to drive from Georgia to bail her out.”²⁹ Out on bond, Kennedy “had to drop out of the University of Houston because, as a condition of her bond, she would need to go live with her mom in Georgia.”³⁰ This caused Kennedy to lose her GI benefits.

Kennedy’s ordeal seems small in comparison to Penelope Harris’s. The police found about one-third of an ounce of marijuana in Harris’s Bronx, New York apartment—an amount “below the legal threshold for even a misdemeanor” in New York.³¹ Harris had a 10-year old son and was serving as a foster parent to her 8-year old niece. Even though prosecutors declined to charge Harris with a crime, the police “reported her arrest to the state’s child welfare hotline,

23. JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 42 (2015), http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR864/RAND_RR864.pdf.

24. *Id.* For a discussion of the potentially devastating impact of fines and fees resulting from a criminal conviction, see Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

25. For a discussion of collateral consequences, see Gabriel J. Chin, “Collateral Consequences,” in Volume 4 of the present Report.

26. See RICHARD GLEN BOIRE, LIFE SENTENCES: THE COLLATERAL SANCTIONS ASSOCIATED WITH MARIJUANA OFFENSES (2007), http://www.cognitiveliberty.org/pdf/col_sanc_pdfs/report_narrative.pdf.

27. Megan Flynn, *How a Small-Time Pot Possession Charge Can Ruin Your Life in 24 Hours*, HOUS. PRESS (Oct. 26, 2015), <http://www.houstonpress.com/news/how-a-small-time-pot-possession-charge-can-ruin-your-life-in-24-hours-7876104>.

28. *Id.*

29. *Id.*

30. *Id.*

31. Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES (Aug. 17, 2011), <http://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html>.

and city caseworkers quickly arrived and took the children away.”³² Harris’s son “spent more than a week in foster care” and her niece “was placed in another home and not returned by the foster care agency for more than a year.”³³ Harris did not have a criminal record “and had never before been investigated by child welfare authorities” but her marijuana arrest caused her to endure “a lengthy child neglect inquiry.”³⁴

D. PROHIBITION HAS NOT ACHIEVED ITS GOALS

Every year, we spend billions of dollars to enforce marijuana prohibition, introducing hundreds of thousands of Americans to the criminal justice system. The costs are significant. Still, marijuana prohibition might be worth the price if it were achieving its goals of significantly reducing marijuana use and availability.³⁵ Unfortunately, the evidence suggests this is not the case.

Despite our decades-long war on drugs, marijuana use remains widespread. According to the National Survey on Drug Use and Health, as of 2013, 19.8 million Americans (7.5% of people over the age of 12) were current marijuana users, defined as someone who uses marijuana at least once a month.³⁶ Of these, 8.1 million were daily or near-daily marijuana users.³⁷

With so many marijuana users in the United States, it should come as no surprise that marijuana is both relatively inexpensive and readily available, despite prohibition laws. Regarding price, “even at today’s illicit-market prices, being stoned costs an occasional user without a developed tolerance to THC less than \$1 per hour.”³⁸ At these prices, a relatively heavy user—someone in “the top 10 percent of monthly users”—spends about the same amount on their marijuana habit as a “pack-and-a-half-a-day cigarette smoker paying Vermont retail prices spends on tobacco.”³⁹

32. *Id.*

33. *Id.*

34. *Id.*

35. In addition to the costs and benefits, some argue that marijuana prohibition exceeds the proper role of government by punishing people for “victimless crimes” and contributing to the erosion of civil liberties. *E.g.*, Douglas Husak, *Illicit Drugs: A Test of Joel Feinberg’s The Moral Limits of the Criminal Law*, 10 *LIBERTARIA* 39 (2008) (considering whether drug prohibition is consistent with the harm principle); Erik Luna, *Drug Exceptionalism*, 47 *VILL. L. REV.* 753, 757-68 (2002) (examining the drug war’s effect on constitutional interpretation).

36. U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 1 (2014), <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

37. *Id.*

38. CAULKINS ET AL., *supra* note 23, at 99.

39. *Id.*

Marijuana is widely available, even for the group prohibition is most intended to protect: minors. “[O]ver the last 30 years of cannabis prohibition the drug has remained ‘almost universally available to American 12th graders,’ with approximately 80-90% saying the drug is ‘very easy’ or ‘fairly easy’ to obtain.”⁴⁰

Finally, marijuana potency sharply increased during the 1990s and 2000s. Between 1990 and 2007, “scientific monitoring of cannabis potency show[ed] that the estimated delta-9-tetrahydrocannabinol (THC) content of US cannabis” rose by about 145%, from 3.5% THC to 8.5% THC.⁴¹

Deterrence theory helps to explain why the rates of marijuana use have remained high in the face of heavy enforcement. Research has shown that “it is the certainty of apprehension not the severity of the ensuing consequences that is the more effective deterrent.”⁴² And, even though marijuana arrests soared throughout the 1990s and early 2000s, marijuana use is so widespread that the risk of getting caught remains quite low. In 2010, Beau Kilmer and colleagues estimated the risk of arrest for marijuana users in a RAND Corporation report on marijuana legalization in California. They found that, “[i]f calculated per joint consumed, the figure nationally is trivial—perhaps one arrest for every 11,000-12,000 joints.”⁴³ The team also estimated the probability that a regular marijuana user in California—a person who uses at least once a month—would be arrested during a year of consumption. They found that only approximately 3% of regular marijuana users would be arrested in a given year.⁴⁴

In sum, we pour billions of dollars into marijuana prohibition every year. Beginning in the 1990s, we ramped up marijuana enforcement by significantly increasing the number of people arrested for marijuana each year. Marijuana arrestees are subject to a range of negative consequences that can interfere with their participation in the labor force, from the loss of a driver’s license to incarceration. And yet, for all of those costs, we have seen little in the way of benefits.

40. INT’L CTR. FOR SCI. IN DRUG POLICY, TOOLS FOR DEBATE: U.S. FEDERAL GOVERNMENT DATA ON CANNABIS PROHIBITION 5 (2010).

41. *Id.* at 11.

42. Daniel S. Nagin, “Deterrence,” in Volume 4 of the present Report.

43. BEAU KILMER ET AL., ALTERED STATE? ASSESSING HOW MARIJUANA LEGALIZATION IN CALIFORNIA COULD INFLUENCE MARIJUANA CONSUMPTION AND PUBLIC BUDGETS 7 (2010).

44. *Id.* at 8-9.

E. RACE AND MARIJUANA PROHIBITION

One of the most biting criticisms of drug prohibition generally and marijuana prohibition in particular is the relationship between race and enforcement.⁴⁵ Race has been closely linked to drug prohibition long before the modern war on drugs. Indeed, many early drug laws were passed expressly for the purpose of discriminating against minority populations. An 1886 court opinion considering the constitutionality of a ban on opium dens, for example, observed that the law “proceeds more from a desire to vex and annoy the ‘Heathen Chinese’ ... than to protect the people from the evil habit.”⁴⁶ Ethnic bias also played a role in the adoption of alcohol prohibition, with anti-German sentiment in connection with World War I helping the dry cause.

For marijuana, “racial prejudice against both African Americans and Mexicans merged to prompt states to outlaw usage.”⁴⁷ At the time early marijuana-prohibition laws were passed, “not only did few middle-class Americans know about marijuana and its use, but what little ‘information’ was available provided an automatic association of the drug with Mexican immigration, crime and the deviant life style in the Black ghettos. Naturally, the impending drug legislation ... became entangled with society’s views of these minority groups.”⁴⁸

The legislative history of early marijuana-prohibition statutes is full of disturbing examples of racism. For example, a 1929 hearing at the Montana Legislature on marijuana prohibition featured testimony from a doctor who joked:

[w]hen some beet field peon takes a few [puffs] of this stuff ... [h]e 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

45. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012). For discussions of the impact of race on criminal justice, see, for example, Jeffrey Fagan, “Race and the New Policing,” in Volume 2 of the present Report; Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report; David A. Harris, “Racial Profiling,” in Volume 2 of the present Report; L. Song Richardson, “Police Use of Force,” in Volume 2 of the present Report; Paul Butler, “Race and Adjudication,” in Volume 3 of the present Report; and Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

46. *Ex parte Yung Jon*, 28 F. 308 (D. Or. 1886).

47. Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 690 (2016).

48. Bonnie & Whitebread, *supra* note 3, at 1037.

where the Mexicans often go for the winter they stage imaginary bullfights in the “Bower of Roses” or put on tournaments for the favor of “Spanish Rose” after a couple of whiffs of Marijuana.⁴⁹

More recently, there is evidence to suggest President Richard Nixon’s decision to reject a national commission’s recommendation that marijuana be decriminalized was at least partially motivated by race. Nixon’s Oval Office tapes “make clear that [he] wanted to link marijuana use and its negative effects to two groups who he held in contempt: African Americans and hippies.”⁵⁰

This sort of overt racism is mostly, though not entirely, absent from the debate about drug laws today.⁵¹ But the disproportionate impact of drug enforcement on people of color is in many ways just as troubling. About 12.6% of the U.S. population are African-American, and blacks use drugs at about the same rate as whites. Although we do not have much data on the racial composition of drug dealers, the evidence that does exist “suggests a racial breakdown among sellers similar to that among users.”⁵² And yet, 30.4% of drug arrestees in 2013 were black.⁵³ The disparity grows even more when it comes to incarceration. As of 2012, 37.7% of state drug prisoners were black.⁵⁴

A 2013 report by the American Civil Liberties Union (ACLU) examining disparities in arrests for marijuana found that a black person is 3.73 times as likely to be arrested for possession of marijuana as a white person, and that the disparity had increased 32.7% between 2001 and 2010.⁵⁵ Indeed, the ACLU found that during this period, the white arrest rate for marijuana possession had “remained constant at around 192 per 100,000, whereas the Black arrest rate has

49. *Id.* at 1014.

50. John Hudak, *How Racism and Bias Criminalized Marijuana*, WASH. POST (Apr. 28, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/04/28/how-racism-and-bias-criminalized-marijuana/?utm_term=.f4f5537000b0.

51. David A. Graham, *Paul LePage’s Racist Fearmongering on Drugs*, THE ATLANTIC (Jan. 8, 2016), <http://www.theatlantic.com/politics/archive/2016/01/racial-dogwhistling-with-paul-lepage-still-americas-most-outlandish-governor/423246/> (reporting that the governor of Maine described heroin sellers as “guys by the name D-Money, Smoothie, Shifty” who “come from Connecticut and New York” to sell heroin and “half the time they impregnate a young, white girl before they leave”).

52. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 268 (2009).

53. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2013, tbl.43 (2014), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43>; see also Fellner, *supra* note 52, at 272-73 (reviewing drug arrest rates by race from 1980 to 2007).

54. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2013, at 16 tbl.14 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

55. ACLU, *supra* note 16, at 9.

risen from 537 per 100,000 in 2001 ... to 716 per 100,000 in 2010.”⁵⁶ In other words, the increase in marijuana-possession arrests between 2001 and 2010 was almost entirely due to an increase in arrests of African-Americans for marijuana.

II. STATE MARIJUANA POLICY RECOMMENDATIONS

After decades of waging war on marijuana, voters in many states have come to see marijuana prohibition as a failure and believe that legalization is a better option. The Pew Research Center has been polling attitudes about marijuana legalization since 1969, when just 12% of Americans believed marijuana should be made legal. Its most recent survey, released in October 2016, found that 57% of U.S. adults favor legalizing marijuana while just 37% favor prohibition.⁵⁷ The numbers were nearly reversed just a decade ago, with only 32% in favor of legalization and 60% opposed in 2006.⁵⁸

In this Section, I make the case that state policymakers would be wise to follow the public on this issue and work to enact marijuana-legalization laws in their states. First, I provide a brief history of state marijuana reforms. Second, I review the evidence so far from states that have legalized marijuana. These studies show that, by and large, legalization has been a success and a much better option than prohibition. Finally, I highlight some of the considerations and choices facing policymakers when enacting marijuana legalization.

A. A BRIEF HISTORY OF STATE MARIJUANA REFORMS

The story of state marijuana legalization dates back to 1996, when California passed the first statewide medical-marijuana legalization law. The federal government did all that it could to try to stop the law in its tracks, raiding medical-marijuana dispensaries and prosecuting some of the operators.⁵⁹ Despite its best efforts, however, the federal government was not able to stop the trend. Throughout the 2000s, more and more states passed medical-marijuana laws, and marijuana stores started opening faster than the federal government could shut them down. The problem came down to resources. The federal government has the legal authority to prosecute any marijuana offense, from

56. *Id.* at 20.

57. Abigail Geiger, *Support for Legalization Continues to Rise*, PEW RESEARCH CTR. (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>.

58. *Id.*

59. AM. FOR SAFE ACCESS, *WHAT’S THE COST: THE FEDERAL WAR ON PATIENTS* 27 (2013), <https://american-safe-access.s3.amazonaws.com/documents/WhatsTheCost.pdf> (“Over the past 17 years, the Justice Department has carried out over 500 aggressive SWAT-style raids on medical cannabis patients and providers, arrested nearly 400 people, and prosecuted more than 160 cases.”).

a marijuana kingpin to a user in possession of a single joint. But it only has the manpower to go after a small fraction of marijuana offenders—almost all marijuana enforcement is carried out by state and local police.⁶⁰ As a result, the federal government did not succeed in shutting down state medical-marijuana laws. Instead, federal enforcement served mostly to make it more difficult for states to implement effective regulations.⁶¹

By the time Colorado and Washington passed the first laws legalizing marijuana for all adult use in 2012, it was clear to most observers that the federal government was fighting a losing battle. Perhaps in recognition of this dynamic, the DOJ announced a cease-fire in its war on state-legal marijuana in late 2013, in the form of a memorandum advising federal law-enforcement officials not to use scarce resources to go after people in compliance with state marijuana laws.⁶² The election of Donald Trump and his selection of Jeff Sessions to be attorney general have raised questions about whether the federal government's hands-off approach will continue. Even if the federal government reverses course, however, the experience with medical-marijuana laws suggests it will be unable to block state legalization laws entirely.

Since Colorado and Washington voters legalized marijuana, six more states have followed suit. In 2014, Oregon and Alaska passed marijuana-legalization ballot measures. And, in 2016, California, Maine, Massachusetts, and Nevada joined the club. Since 2012, voters in only two states have rejected marijuana-legalization proposals. In 2015, Ohioans decisively rejected a controversial ballot measure that would have legalized marijuana by giving the initiative's backers a monopoly on marijuana production. In 2016, an Arizona legalization ballot measure was narrowly defeated, with 51.32% against and 48.68% in favor.⁶³

60. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1463-67 (2009) (arguing that the federal government did not succeed in blocking state medical marijuana laws because of its limited law enforcement resources).

61. Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 569-75 (2010).

62. Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. The Department of Justice had issued memos related to marijuana enforcement in 2009 and 2011, which curtailed federal enforcement in some medical marijuana states, although in other states enforcement continued more or less as it had before. For a discussion of these memos, see, for example, Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 McGEORGE L. REV. 109, 115-18 (2012).

63. *Ballot Measure Races*, ARIZ. SEC'Y OF STATE (Nov. 21, 2016), <http://results.arizona.vote/2016/General/n1591/Results-State.html#ballots>.

B. LEGALIZATION: THE RESULTS SO FAR

A few organizations have released reports assessing state marijuana-legalization laws. Because marijuana-legalization laws are so new—in Colorado and Washington, the provisions permitting marijuana businesses did not take effect until 2014—the findings are necessarily preliminary. Based on the early results, however, marijuana-legalization laws appear to be succeeding at reducing law enforcement expenditures and generating tax revenue, without significantly impacting rates of marijuana use.

The Cato Institute has released the most comprehensive analysis of state marijuana-legalization laws to date, with its September 2016 report *Dose of Reality: The Effect of State Marijuana Legalizations*.⁶⁴ The report examines the legalization laws in Colorado, Washington, Oregon, and Alaska, and it considers data on marijuana use, marijuana pricing, health indicators, crime rates, and road safety. Overall, the report concludes “that state marijuana legalizations have had a minimal effect on marijuana use and related outcomes.”⁶⁵ Specifically, the data shows that “state-level marijuana legalizations to date have been associated with, at most, modest changes in marijuana use and related outcomes.”⁶⁶ Meanwhile, tax revenue following marijuana legalization has generally met or exceeded expectations. In Colorado, the state “collects well over \$10 million per month from recreational marijuana alone” and in Washington “recreational marijuana generated approximately \$70 million in tax revenue in the first year of sales—double the original forecast.”⁶⁷

A 2016 report by the Drug Policy Alliance (DPA) reaches a similar conclusion.⁶⁸ The DPA report looked at data on youth marijuana use, marijuana arrests, road safety, and tax revenue. It found that while “[i]t is too early to draw any line-in-the-sand conclusion about the effects of marijuana legalization,” the preliminary data “suggest that the effects of legalization have been either positive or negligible.”⁶⁹ Thus far, legalization appears to have had “little to no impact on the overall rate of youth marijuana use.”⁷⁰ The data also indicates

64. ANGELA DILLS ET AL., DOSE OF REALITY: THE EFFECT OF STATE MARIJUANA LEGALIZATIONS (Cato Inst. Pol’y Analysis No. 799, 2016), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa799.pdf>.

65. *Id.* at 1.

66. *Id.* at 2.

67. *Id.* at 25.

68. DRUG POLICY ALLIANCE, SO FAR, SO GOOD: WHAT WE KNOW ABOUT MARIJUANA LEGALIZATION IN COLORADO, WASHINGTON, ALASKA, OREGON, AND WASHINGTON, D.C. (2016), https://www.drugpolicy.org/sites/default/files/Marijuana_Legalization_Status_Report_101316.pdf.

69. *Id.* at 2.

70. *Id.* at 3.

that “[l]egalization has not led to more dangerous road conditions,” with “the post-legalization fatality rate” remaining consistent with pre-legalization levels in Colorado and Washington and early data from Oregon and Alaska showing the same.⁷¹ DPA found that states are realizing substantial cost savings and tax revenue. Arrests for marijuana have (not surprisingly) “plummeted since voters legalized the adult use of marijuana, saving those jurisdictions millions of dollars and preventing the criminalization of thousands of people.”⁷² Tax revenue exceeded expectations in both Colorado and Washington in 2015,⁷³ and early data from Oregon show the state collecting about \$4 million a month in marijuana taxes.⁷⁴ (Alaska did not issue its first retail marijuana license until September 8, 2016.)⁷⁵

This is not to say that marijuana-legalization laws are costless or that they do not carry public health risks. Hospital admissions and poison-control calls related to marijuana have jumped in legalization states. In both Colorado and Washington, poison-center calls involving marijuana roughly doubled following legalization, although in absolute terms the numbers are still quite low. In Washington, calls increased from 156 in 2012 to 280 in 2016.⁷⁶ In Colorado, there were 110 calls in 2012 and 224 in 2016.⁷⁷ This is a small fraction of marijuana users and much lower than poison-center calls for many common household goods (for example, 2014 saw just under 200,000 poison-control calls nationwide for cosmetics and personal-care products).⁷⁸ Nevertheless, policymakers should certainly pay close attention to this trend, particularly as it concerns the regulation of edible marijuana products.⁷⁹

71. *Id.* at 6.

72. *Id.* at 4.

73. *Id.* at 7.

74. *Id.* at 8.

75. *Id.* at 9.

76. *2016 Annual Cannabis Report*, WASH. POISON CTR., <http://www.wapc.org/toxic-trends/marijuana-and-you/2016-annual-cannabis-report/> (last visited Apr. 8, 2017).

77. ROCKY MOUNTAIN POISON & DRUG CTR., *HUMAN MARIJUANA EXPOSURES* (2016), <http://rmpdc.org/Portals/23/docs/Colorado%202016%20Marijuana%20statistics.pdf?ver=2017-02-12-140328-797>.

78. James B. Mowry et al., *2014 Annual Report of the American Association of Poison Control Centers' National Poison Data System (NPDS): 32nd Annual Report*, 53 *CLINICAL TOXICOLOGY* 962, 987 tbl.17A (2015), <http://dx.doi.org/10.3109/15563650.2015.1102927>.

79. For a discussion of the challenges involved in regulating edible marijuana products, see DANIEL G. BARRUS ET AL., *TASTY THC: PROMISES AND CHALLENGES OF CANNABIS EDIBLES* (RTI Press Publication No. OP-0035-1611, 2016), https://www.rti.org/sites/default/files/resources/12512064_Tasty_THC_Promises_and_Challenges_of_Cannabis_Edibles.pdf.

In addition, it appears adult marijuana use has increased slightly following state marijuana legalization. Legalization opponents, such as Smart Approaches to Marijuana (SAM), argue that this is cause for alarm.⁸⁰ But the data so far show at most a small increase in use, and nothing close to “the sometimes dire predictions made by legalization opponents.”⁸¹ Past-month use in Colorado rose from 14.93% of the population in 2013-2014 to 16.57% in 2014-2015.⁸² Past-month use in Washington actually *decreased* slightly during that same period, from 12.79% to 11.22%,⁸³ although use rates in Washington had been rising in the years leading up to 2014-2015.⁸⁴ Still, basic economic theory would suggest that as marijuana becomes less expensive and easier for adults to purchase, adult use will increase, at least somewhat.

Of course, policymakers should be mindful that early data may not necessarily reflect the impact of marijuana legalization over the long term. As the RAND Corporation’s Beau Kilmer recently wrote in the *New England Journal of Medicine*, “we should be skeptical of people who claim to know what the net effect of cannabis legalization on public health will be.”⁸⁵ Marijuana prices in legalization states are still higher than they are likely to be as the industry matures. Already, prices have begun to drop in Colorado and Washington.⁸⁶ With this in mind, future rates of marijuana use may depend a great deal on details like the extent to which legalization states deploy taxes and other regulatory measures to prevent prices from dropping too far. It is

80. See SMART APPROACHES TO MARIJUANA, LESSONS LEARNED AFTER 4 YEARS OF MARIJUANA LEGALIZATION (2016), <https://learnaboutsam.org/wp-content/uploads/2016/11/SAM-report-on-CO-and-WA-issued-31-Oct-2016.pdf>.

81. DILLS ET AL., *supra* note 64, at 1.

82. *National Survey on Drug Use and Health: Comparison of 2013-2014 and 2014-2015 Population Percentages* tbl.2, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/data/sites/default/files/NSDUHsaeShortTermCHG2015/NSDUHsaeShortTermCHG2015.htm> (last visited Apr. 8, 2017). But see COLO. DEP’T OF PUB. HEALTH & ENV’T, MONITORING HEALTH CONCERNS RELATED TO MARIJUANA IN COLORADO: 2016, at 5 (2017), <https://drive.google.com/file/d/0B0tmPQ67k3NVRHpuOEFYN0ZHQ0E/view> (finding that “[f]or adults and adolescents, past-month marijuana use has not changed since legalization either in terms of the number of people using or the frequency of use among users”).

83. *National Survey on Drug Use and Health*, *supra* note 82.

84. SMART APPROACHES TO MARIJUANA, *supra* note 80, at 4.

85. Beau Kilmer, *Recreational Cannabis—Minimizing the Health Risks from Legalization*, 378 NEW ENG. J. MED. 705, 707 (2017).

86. Debra Borchardt, *Marijuana Prices Fall in 2016 as Growers Flood the Market with Pot*, FORBES (Jan. 31, 2017), <https://www.forbes.com/sites/debraborchardt/2017/01/31/marijuana-prices-fall-in-2016-as-growers-flood-the-market-with-pot/#4a2444092f7f>.

also worth noting that the data we have on use is limited—rates of past-year or past-month use do not account for other important measures like the amount of marijuana people are consuming or its potency.

Still, while no one can predict the future, the experience of marijuana-legalization states so far is, on the whole, encouraging. States that have legalized marijuana have raised tax revenue in excess of pre-legalization estimates while redirecting law-enforcement and judicial resources that were previously spent on enforcing marijuana prohibition. Youth marijuana use does not appear to have increased as a result of legalization, adult marijuana use has risen at most modestly, and the overall impact of legalization on public health and safety has been small.

RECOMMENDATIONS

To date, all eight states to legalize marijuana have done so via popular vote. It might be tempting for legislators to see that as an argument in favor of leaving the issue alone, at least in states that have an initiative process. But entrusting marijuana legalization to the ballot-measure process means advocates and businesses will be the ones to draft the law. The details of legalization—tax rates,⁸⁷ rules to protect children, and so forth—matter a great deal. As marijuana legalization becomes more and more popular with voters, ballot-measure boosters may not feel as constrained by considerations like public health. As a result, it is important that legislatures not cede control of marijuana policy. Instead, state lawmakers should seize the opportunity to shape *how* marijuana legalization is implemented.

States that pursue marijuana legalization will be faced with many important policy choices. With so many moving parts, drafting legislation can seem daunting at first. Policymakers do not need to decide every detail of legalization in advance, however. Thus far, marijuana-legalization ballot measures have been written in relatively broad strokes, leaving it to regulatory agencies to draft more-precise rules through the administrative process. The discussion below highlights just a few of the key questions policymakers will want to study when considering marijuana legalization. For a detailed look

87. For an evaluation of state laws regarding marijuana taxation, see Pat Oglesby, *Marijuana Taxes—Present and Future Traps*, 83 STATE TAX NOTES 391 (2017).

at state marijuana regulations now in effect, the National Alliance for Model State Drug Laws maintains a document with a point-by-point comparison of marijuana-legalization laws.⁸⁸

1. **Manufacture and distribution.** Perhaps the most important element of any state legalization law concerns marijuana manufacture and distribution. To date, state legalization laws have adopted an alcohol-style commercial model, but with much stricter oversight of the supply chain. States have gone to great lengths to track marijuana in order to avoid diversion to the black market in prohibition states and to minors in their own states. Diversion is an especially important concern, in part because under the Department of Justice’s 2013 non-enforcement guidelines, “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states” is one of the things that states must do to avoid federal interference.⁸⁹

To guard against diversion of marijuana, the four states that have already implemented marijuana legalization—Alaska, Colorado, Oregon, and Washington—all require “seed-to-sale” tracking of the product.⁹⁰ (The legalization laws in California, Maine, Massachusetts, and Nevada, which were passed by voters in 2016, have not yet been implemented with respect to marijuana manufacture and retail sale.) These tracking systems “offer[] the state the ability to track product in ways that far surpass product tracking in most other commodity markets in the U.S.”⁹¹

88. NAT’L ALLIANCE FOR MODEL STATE DRUG LAWS, MARIJUANA: COMPARISON OF STATE LAWS LEGALIZING PERSONAL, NON-MEDICAL USE (2016), <http://www.namsdl.org/library/33FD7B09-D862-91A9-48FFEF87F5D4611/>. The RAND Corporation, in a 2013 report for the Vermont state legislature, has produced the most thorough examination of the options for policymakers when it comes to marijuana reform. The RAND report analyzes a wide range of policy options, including many that have not yet been implemented in any state. See CAULKINS ET AL., *supra* note 23.

89. Memorandum from James M. Cole, *supra* note 62.

90. Margaret Cohn, *Tracemarks: A Proposed Information Intervention*, 53 HOUS. L. REV. 421, 451-52 (2015) (discussing the seed-to-sale tracking system in Washington); Ken Helm & Logan Leichtman, *Implementation of Oregon’s Measure 91 in the State Legislature*, 52 WILLAMETTE L. REV. 1, 26-27 (2015) (discussing Oregon’s seed-to-sale tracking system); John Hudak, *Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization*, 65 CASE W. RES. L. REV. 649, 678 (2015) (discussing Colorado’s tracking system); Laurel Andrews, *Alaska Signs 5-year Contract With Marijuana Seed-to-Sale Tracking Company*, ALASKA DISPATCH NEWS (Mar. 11, 2016), <https://www.adn.com/cannabis-north/article/alaska-signs-5-year-contract-marijuana-seed-sale-tracking-system-company/2016/03/11/>.

91. Hudak, *supra* note 90, at 679.

Other considerations for regulating manufacturers and producers include whether to permit licensees to manufacture and distribute unlimited amounts of marijuana, which may contribute to driving the price down. Or, whether to place limits on the amount of marijuana a licensee can produce. California’s marijuana-legalization law, for example, establishes 19 different license types, including 13 different cultivation license types and a “microbusiness” license.⁹² Each cultivation license type is based on the size of the grow operation and its location (indoors, outdoors, etc.). Notably, the law places a moratorium on the three “large” cultivation license types—which would allow a licensee to grow up to one acre of marijuana outdoors or 22,000 square feet indoors. The state may not issue these licenses until after January 1, 2023.⁹³

Of course, it is also possible to legalize marijuana without allowing commercial manufacture and distribution.⁹⁴ Leaving all or part of the supply chain in the hands of the state is an attractive option for legalization supporters who are concerned that commercialization could result in increased use. Uruguay is in the process of implementing a marijuana-legalization law under which production is controlled by state-commissioned companies.⁹⁵ This model is not entirely unfamiliar to the United States: In a number of states, liquor is sold at state-run stores. Unfortunately, state-run marijuana stores are unlikely to be a legally viable option so long as federal prohibition remains on the books. This is because, unlike a state marijuana law that merely permits private actors to grow and sell marijuana, a system in which the state itself is violating federal marijuana law would almost surely be struck down under the Constitution’s Supremacy Clause.⁹⁶

Similarly, some argue states should consider making it legal to possess and grow small amounts of marijuana while continuing to prohibit commercial sales as a middle ground between legalization and prohibition.⁹⁷ A Washington, D.C., law takes this approach. In May 2017, the Vermont Legislature passed a proposal along these lines but the governor vetoed

92. CAL. BUS. & PROF. CODE § 26050.

93. *Id.* § 26061(d).

94. See CAULKINS ET AL., *supra* note 23 at 49-74 (comparing different marijuana supply models).

95. Alex Marshall, *Uruguay to Test World’s First State-Commissioned Recreational Cannabis*, THE GUARDIAN (Apr. 18, 2016), https://www.theguardian.com/society/2016/apr/18/uruguay-first-state-commissioned-recreational-cannibis-marijuana?CMP=edit_2221.

96. Mikos, *supra* note 60, at 1457-59.

97. CAULKINS ET AL., *supra* note 23, at 57-59 (discussing allowing adults to grow their own marijuana as a middle ground option between legalization and prohibition).

it. The Vermont bill “would [have] legalize[d] the possession of 1 ounce or less of marijuana and the cultivation of several plants by people who are at least 21 years old” but commercial manufacture and sale would have remained prohibited.⁹⁸ This approach has drawbacks in comparison to broader legalization laws. By leaving most marijuana distribution unregulated, the state cannot collect taxes and the black market will continue to thrive. In addition, as discussed below, laws that allow small-scale home cultivation may be open to abuse by illegal commercial growers using them as cover. Nevertheless, legalizing personal possession and cultivation only is an effective way to address the criminalization of marijuana users. This approach should not be confused with laws that merely reduce marijuana possession to a misdemeanor or an infraction—sometimes referred to as decriminalization laws—which can raise a number of problems of their own.⁹⁹

2. **Possession limits.** Marijuana legalization proponents often use the tagline of taxing and regulating marijuana “like alcohol.” Unlike alcohol, however, marijuana-legalization laws strictly limit the amount a person can purchase and possess. As with seed-to-sale tracking, this feature is designed to help prevent against diversion. If consumers were allowed to buy unlimited amounts of marijuana, smuggling legally produced marijuana into other states for sale would be easy and cost-effective. These limits might also have public health benefits by preventing stores from offering bulk discounts to consumers and keeping prices high.¹⁰⁰

98. April McCullum, *VT House Delays Vote on Legalizing Marijuana*, BURLINGTON FREE PRESS (March 28, 2017), <http://www.burlingtonfreepress.com/story/news/politics/2017/03/28/vermont-house-delays-vote-marijuana-legalization/99597878/>.

99. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (analyzing the impact of “misdemeanor decriminalization” laws, including marijuana decriminalization laws, throughout the criminal justice system); Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism’s Limits*, 24 CORNELL J.L. & PUB. POL’Y 319, 351 (2014) (analyzing the impact of marijuana decriminalization laws on policing and pretextual stops and concluding that “[i]t could be that nothing short of legalization is required for a true wind down to take place”); see also Alexandra Natapoff, “Misdemeanors,” in the present Volume.

100. CAULKINS ET AL., *supra* note 23, at 118 (noting that “vendors of both legal and illegal marijuana offer quantity discounts for bulk purchases” with the price per unit weight per pound approximately 38% below the price per unit weight per ounce).

With the exception of Maine, legalization states limit the amount of marijuana a person can buy to one ounce.¹⁰¹ In Maine, the limit is substantially higher, at 2.5 ounces.¹⁰² At least as long as most states retain prohibition, legalization laws should probably include a limit on the amount of marijuana a person can purchase and possess. Although one ounce is a nice, round number, states could probably adopt a lower limit. Studies suggest daily marijuana users consume between 1.3 and 1.9 grams of marijuana per day,¹⁰³ so half an ounce would last a very heavy user a little more than a week. A half-ounce limit would further reduce the risk of diversion and help to keep prices relatively high (a goal of many public health advocates). On the other hand, a lower limit on personal possession could expose more users to arrest for having more marijuana than the law allows.

3. **Cultivation for personal use.** Cultivation for personal use, or “homegrows,”¹⁰⁴ warrants special attention from policymakers. Most state legalization laws allow individuals to grow small amounts of marijuana for personal use. In Colorado, for example, adults can legally grow up to six marijuana plants for personal use.¹⁰⁵ Although there is a requirement that the marijuana be secured “in an enclosed, locked space,”¹⁰⁶ homegrows are essentially unregulated.¹⁰⁷ No license is needed to legally grow six marijuana plants or fewer for personal use in Colorado. Similarly, under Oregon’s legalization law, adults may grow up to four plants per residence.¹⁰⁸ By contrast, Washington did not legalize home cultivation—there, the only way to legally grow marijuana for recreational use is if you have a commercial license to do so.¹⁰⁹

101. See NAT’L ALLIANCE FOR MODEL STATE DRUG LAWS, *supra* note 88, at 3 (reporting that in Alaska adults 21 and older “may purchase, possess, or transport up to one ounce of marijuana”); *id.* at 9 (28.5 gram limit in California, which is approximately one ounce); *id.* at 17 (one ounce limit in Colorado); *id.* at 32 (one ounce limit in Massachusetts); *id.* at 37 (one ounce limit in Nevada); *id.* at 41 (one ounce limit in Oregon with a higher limit of eight ounces within a residence); *id.* at 46 (one ounce limit in Washington state).

102. *Id.* at 26 (2 ½ ounce limit in Maine).

103. CAULKINS ET AL., *supra* note 23, at 17.

104. See Hudak, *supra*, note 90, at 669.

105. See COLO. CONST. art. XVII, § 16(3)(b).

106. *Id.*

107. Hudak, *supra*, note 90, at 670 (“[T]he state has done little to regulate homegrows, in large part because the amendment’s language is clear.”).

108. NAT’L ALLIANCE FOR MODEL STATE DRUG LAWS, *supra* note 88, at 42.

109. *Id.* at 46.

If marijuana were legal nationwide, letting people grow small amounts of marijuana in their homes probably would not present many challenges. Growing marijuana “is much more difficult than most people understand,”¹¹⁰ not to mention resource intensive: “[t]he investment—in hydroponics, proper lighting, and humidity controls—can be substantial.”¹¹¹ It would seem, then, that home marijuana cultivation would be left mostly to hobbyists, much like home brewing by beer enthusiasts.

There is little evidence that small marijuana homegrows that comply with state laws have become a problem in the states that permit them. There is, however, reason to “worry that homegrowers may grow *more* marijuana than they are allowed and present an opportunity to divert product to illegal markets” in other states.¹¹² Anecdotal evidence suggests that this may be happening in Colorado, where law enforcement officials report that illegal growers are attempting to use Colorado’s homegrow law as a cover.¹¹³ The illegal growers take advantage of the fact that it is hard for police to distinguish the legal and illegal homegrows without gaining access to a home. But, without some evidence that a homegrower is operating outside the law, the police will not be able to get a search warrant.

States that include home cultivation in their legalization laws may want to consider adopting measures that would make it harder for illegal growers to take advantage. One option would be to require homegrowers to register with the state. States might also explore the possibility of requiring registered homegrowers to consent to warrantless state inspections based on reasonable suspicion, although such a policy could be open to a legal challenge on Fourth Amendment grounds.

CONCLUSION

This chapter outlines the case for marijuana legalization, along with a few of the key questions policymakers will want to study when considering marijuana legalization. Barring a dramatic reversal of public opinion, marijuana legalization is more a question of when than if for policymakers. And, in light of the generally positive results of state marijuana-legalization laws so far, it is exceedingly unlikely public opinion will turn. In the coming years then,

110. David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Lessons Learned*, 8 HARV. L. & POL’Y REV. 359, 377 (2014).

111. *Id.*

112. Hudak, *supra*, note 90, at 670.

113. See POLICE FOUND., COLORADO’S LEGALIZATION OF MARIJUANA AND THE IMPACT ON PUBLIC SAFETY: A PRACTICAL GUIDE FOR LAW ENFORCEMENT (2015), http://www.nccpsafety.org/assets/files/library/Legalized_Marijuana_Practical_Guide_for_Law_Enforcement.pdf.

we can expect to see more states adopt marijuana-legalization laws. While the prospects for marijuana reform at the federal level may be dim under the current administration, it is hard to imagine that a decade from now federal law will not have changed to accommodate state marijuana-legalization laws in some form or fashion.

In this environment, state policymakers would be wise to take this issue up sooner than later. Marijuana prohibition has been a costly failure, requiring states to invest a significant amount of money on enforcement while losing out on potential tax revenue, all with little to show for it. Marijuana legalization may not be as perfect as some advocates make it out to be. But if implemented well, it is far better than the status quo. By leaving marijuana legalization to the ballot-measure process, however, state legislatures have so far ceded many of the policy details to legalization advocates and marijuana businesses. It is time for state legislators to take the lead on this important criminal justice reform issue.