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# “Dope” Dilemmas in a Budding Future Industry: An Examination of the Current Status of Marijuana Legalization in the United States

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# “Dope” Dilemmas in a Budding Future Industry: An Examination of the Current Status of Marijuana Legalization in the United States

Steven A. Vitale\*

*This Comment provides an in-depth analysis of the current status regarding legalization of marijuana in the United States. It begins by tracing a brief history of the legalization movement in this country. The next section addresses the federal-state law conflict issue, coupled with a thorough analysis of two recent and relatively unexamined developments—the Department of Justice’s August 29, 2013 memorandum issued as a guide to federal prosecutors concerning marijuana law enforcement, and the September 10, 2013 judicial committee hearing on the conflict between federal and state marijuana laws. So long as the federal-state law conflict exists, it seems that the current climate, filled with uncertainty and ambiguity, allows for possible arbitrary abuse of power and selective prosecution by the federal government. A particularized focus on the current activities of Colorado and Washington places many of these issues into context, and enables us to study the progression of legalization in action. One section is dedicated to addressing the detrimental effects of current federal drug policy, and serves to highlight federal, state, and local reform efforts around the country. This newly emerging “cannabusiness” also creates some ethical dilemmas for lawyers seeking to aid clients in their business endeavors; thus, part of this Comment seeks to unpack these ethical quandaries and provide some clarity and guidance to attorneys. The role of the Fifth Amendment privilege against self-incrimination and its potential effect on this budding and*

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*lucrative industry is also closely examined. The final section discusses what the future of federally legalized marijuana might look like— how marijuana might be dealt with as a controlled and regulated substance in the business sector, how the law would handle such a shift, and what overarching effects this shift might have on the criminal justice system.*

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I. INTRODUCTION

Marijuana legalization has been a historically controversial topic sparking significant public discourse in the United States. Indeed, recent developments have catapulted the issue to the forefront of political debates, legal quandaries, and business opportunities. Despite the proliferation of this issue, and even with a mild familiarity regarding some of the discussions, it can be exceedingly difficult to locate and understand the latest research-based information on marijuana and its progression on the path to legalization. Health effects, conflicts of law, business ethics, and legal status are all compelling tangential issues shrouded in uncertainty. This confusion is fueled by self-serving messages presented by popular culture, the media, and political agendas.

The purpose of this Comment is to provide some level of clarity by first tracing a brief history of legalization in this country, with a particularized focus on the current activities of Colorado and Washington. The federal-state law conflict issue will also be addressed,

coupled with a thorough analysis of two recent and relatively unexamined developments—the Department of Justice’s August 29, 2013 memorandum issued as a guide to federal prosecutors concerning marijuana law enforcement, and the September 10, 2013 judicial committee hearing on the conflict between federal and state marijuana laws. The next major section will seek to unpack the ethical dilemma lawyers might face in aiding clients in the newly emerging marijuana business, with a specialized focus on the role of the Fifth Amendment privilege against self-incrimination, and its potential effect on this budding and lucrative industry. So long as the federal-state law conflict exists, it seems that the current uncertain and ambiguous climate allows for possible arbitrary abuse of power and selective prosecution by the federal government. The final section will briefly address what the future of federally legalized marijuana might look like—how marijuana might be dealt with as a controlled and regulated substance in the business sector, how the law would handle such a shift, and what overarching effects this shift might have on the criminal justice system.

## II. A BRIEF HISTORY OF MARIJUANA AND ITS INTRODUCTION TO THE UNITED STATES

Marijuana is the most commonly used illicit drug in the world.<sup>1</sup> It is derived from the flowering hemp plant, bearing the scientific name *Cannabis sativa*.<sup>2</sup> Cannabis can be found in a variety of forms, but the most common and familiar form is marijuana.<sup>3</sup> Its primary psychoactive ingredient is delta-9-tetrahydrocannabinol, better known as THC, and it is just one of the many cannabinoids found in marijuana.<sup>4</sup> “Different parts of the plant, plants of different genetic strains, and plants grown under different conditions contain different mixes of these chemicals,”<sup>5</sup> and these factors contribute to the varying potency of a particular specimen.<sup>6</sup> Potency is measured by the concentration of cannabinoids—THC specifically—and, due to technological improvements, better growing methods, and selective breeding, marijuana has become increasingly potent over the past few decades.<sup>7</sup> With so many varying

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<sup>1</sup> See JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 3 (2012).

<sup>2</sup> See JERROLD S. MEYER & LINDA F. QUENZER, PSYCHOPHARMACOLOGY: DRUGS, THE BRAIN, AND BEHAVIOR 328 (1st ed. 2005).

<sup>3</sup> *Id.*

<sup>4</sup> See CAULKINS ET AL., *supra* note 1, at 7.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.* at 9.

cannabis strains continually discovered and grown, and due to the variety of preparation methods available, the potency of marijuana is constantly changing, influencing both its popularity and price.

The increase in potency over the years has been a topic of debate, but there has been an even greater dispute over whether or not this increased potency even matters. To the average consumer looking for a fix, more potent marijuana is preferred because a user requires less to attain the desired high. Smoking less pot could be additionally beneficial to the user in the sense that less pot equals less throat irritation, less exposure reduces the possibility of lung damage, and, since it takes less time to get high, less probability of getting caught.<sup>8</sup> Yet, some research suggests that more potent pot can lead to a greater likelihood of negative effects, such as panic attacks and anxiety fits, unfamiliar and intense intoxicating sensations, a higher probability of dependency, and other health risks.<sup>9</sup>

Marijuana has been used since ancient times as both a means for achieving a euphoric effect, as well as for medicinal purposes, such as treating pain, nausea, lack of appetite, and many other conditions. The oldest known written record of cannabis use comes from a Chinese medical compendium dating back to circa 2727 BCE.<sup>10</sup> Apart from its biological, religious, and therapeutic utility, the hemp plant has many industrial uses. In fact, there is archeological evidence of hemp rope dating back between 8,000–10,000 years ago, before farming was even invented.<sup>11</sup> Use of marijuana spread west to India, North Africa, and to the Arab world, where consumption became commonplace.<sup>12</sup> Western interest in marijuana came much later, around the early to mid-nineteenth century, when Napoleon's soldiers returned from Egypt with not only the Rosetta stone, but also the practice of smoking marijuana for recreational use.<sup>13</sup> The history of cannabis in the United States dates back to the colonial era, when the Virginia Company commissioned domestic production of hemp for industrial purposes.<sup>14</sup> The plant was an agricultural commodity with great economic importance to England. It was used to make rope, cloth, and paper. Medical use of cannabis began in the 1850s, when it became available in American pharmacies.<sup>15</sup> As its

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<sup>8</sup> See *id.* at 11.

<sup>9</sup> See *id.* at 11.

<sup>10</sup> See *Cannabis, Coca, & Poppy: Nature's Addictive Plants*, DEA MUSEUM, <http://www.deamuseum.org/ccp/cannabis/history.html> [hereinafter DEA MUSEUM].

<sup>11</sup> See CAULKINS ET AL., *supra* note 1, at 18.

<sup>12</sup> See DEA MUSEUM, *supra* note 10.

<sup>13</sup> See Michael Berkey, Note, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 420 (2011).

<sup>14</sup> See ROBERT DEITCH, HEMP—AMERICAN HISTORY REVISITED: THE PLANT WITH A DIVIDED HISTORY 16 (2003).

<sup>15</sup> See Berkley, *supra* note 13, at 420.

medicinal usefulness grew, efforts were made to regulate its sale, and pharmaceutical laws were created on a state-by-state basis.

Use of marijuana as an intoxicant in America did not emerge until the early 1900s.<sup>16</sup>

[H]istorians believe that the social practice of consuming cannabis (mainly marijuana smoking) was brought into the United States . . . by Mexican immigrants crossing the Mexican–American border, and by Caribbean seamen and West Indian immigrants entering the country by way of New Orleans and other ports on the Gulf of Mexico.<sup>17</sup>

The history of marijuana regulation in the United States is a sad one.<sup>18</sup> “Marijuana in the early twentieth century was negatively associated in the popular consciousness with African–Americans and Mexican–Americans, a fact directly tied to the initial movement to criminalize it.”<sup>19</sup> The word “marijuana” itself is derived from the Mexican word *maraguanquo* (meaning “an intoxicating plant”).<sup>20</sup> Hostility towards Mexican immigrants eventually morphed into hostility toward “what was thought of as a Mexican drug.”<sup>21</sup> According to some scholars, marijuana’s growing popularity and use took off in the 1920s as a cheap and effective alternative to alcohol, which was prohibited throughout the county at the time.<sup>22</sup> From 1914 to 1930, state and local governments began enacting anti-marijuana laws to initially regulate pharmaceutical products, but were later aimed at restricting and prohibiting importation, distribution, sale, and possession.<sup>23</sup>

In the 1930s, the federal government initiated an anti-marijuana campaign, grossly exaggerating the drug’s negative effects to instill fear and deter use. Harry Anslinger was appointed in 1930 as the first Commissioner of Narcotics in the Bureau of Narcotics of the United States Treasury Department.<sup>24</sup> “He spear-headed a public relations

<sup>16</sup> CAULKINS ET AL., *supra* note 1, at 19.

<sup>17</sup> MEYER & QUENZER, *supra* note 2, at 329.

<sup>18</sup> Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 872 (2013).

<sup>19</sup> *Id.*

<sup>20</sup> MEYER & QUENZER, *supra* note 2, at 328.

<sup>21</sup> CAULKINS ET AL., *supra* note 1, at 19.

<sup>22</sup> LYNN ZIMMER, CHAPTER ONE: THE HISTORY OF CANNABIS PROHIBITION 2, *available at* <http://www.bisd.ro.uni-bremen.de/boellinger/cannabis/03-zimme.pdf> (last visited Oct. 5, 2014).

<sup>23</sup> *See id.*

<sup>24</sup> MEYER & QUENZER, *supra* note 2, at 327.

campaign to portray marijuana as a social menace capable of destroying the youth of America.”<sup>25</sup> During this period, the government was feeding misinformation to the media, resulting in a stream of propaganda warning about the evils of marijuana use. Magazine and news articles with titles like “Marihuana: Assassin of Youth” and “Sex Crazying Drug Menace” permeated society.<sup>26</sup> Anti-marijuana movies such as *Reefer Madness*, which seems to artistically portray the conflicting duality of progress and degeneration, acted rather as a cautionary tale to the children of the country and to any other would-be users. The government’s anti-marijuana campaign culminated in the passage of the Marihuana Tax Act of 1937, which effectively made possession and transfer of the drug as an intoxicant illegal throughout the United States under federal law.<sup>27</sup> “In congressional hearings that preceded passage of [the Act], Anslinger testified [that] ‘those who are habitually accustomed to use of the drug are said to develop a delirious rage after its administration, during which they are temporarily, at least, irresponsible and liable to commit violent crimes.’”<sup>28</sup>

Although Anslinger’s zealous advocacy was a strong impetus for federal anti-marijuana legislation, he should not be given full credit for creating the “anti-marijuana consensus.”<sup>29</sup> Its origin can be traced back to before the introduction of marijuana into American culture. The sentiment is deeply rooted in the country, exemplified by the founding of the American temperance movement, whose members “were particularly concerned with the detrimental effects of alcohol and drugs on their own families and communities”<sup>30</sup> and sought to restrict and abolish the use of intoxicating substances. By 1942, cannabis was removed from the Pharmacopoeia, the nation’s official list of approved pharmaceutical substances.<sup>31</sup> In 1951, the Boggs Act was passed by Congress, labeling cannabis as a “narcotic” and establishing minimum sentencing guidelines for marijuana-related offenses.<sup>32</sup> Despite continued regulation and harsh penalties, marijuana remained widely used and was embraced by the counterculture movement of the 1960s.<sup>33</sup>

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<sup>25</sup> *Id.* at 327.

<sup>26</sup> *Id.* at 328.

<sup>27</sup> CAULKINS ET AL., *supra* note 1, at 19.

<sup>28</sup> MEYER & QUENZER, *supra* note 2, at 327.

<sup>29</sup> ZIMMER, *supra* note 22, at 3.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> REP. EARL BLUMENAUER & REP. JARED POLIS, THE PATH FORWARD: RETHINKING FEDERAL MARIJUANA POLICY 4 (2013), available at [http://polis.house.gov/uploadedfiles/the\\_path\\_forward.pdf](http://polis.house.gov/uploadedfiles/the_path_forward.pdf) [hereinafter THE PATH FORWARD].

<sup>32</sup> Boggs Act of 1951, Pub. L. No. 82-235, 65 Stat. 767 (repealed 1970).

<sup>33</sup> CAULKINS ET AL., *supra* note 1, at 19.

In the landmark case of *Leary v. United States*, the Supreme Court determined that the Marihuana Tax Act of 1937 was unconstitutional because it violated the Fifth Amendment privilege against self-incrimination.<sup>34</sup> The Court held that the statute compelled the petitioner to expose himself to the risk of self-incrimination by requiring him to identify himself in the course of obtaining an order form as an unregistered transferee who had paid the occupational tax.<sup>35</sup> The Marihuana Tax Act of 1937 was repealed, but President Nixon urged Congress to “get tough” on drugs,<sup>36</sup> in response to what “many saw as the self-indulgent excesses of the 1960s.”<sup>37</sup>

As a result, the Comprehensive Drug Abuse Prevention and Control Act was passed in 1970, which included the Controlled Substances Act, the prevailing federal regulatory scheme to this day. The Act created a scheduling system and classified marijuana as a Schedule I drug along with heroin and LSD.<sup>38</sup> Schedule I drugs are classified as such due to their potential for abuse and lack of approved medical uses.<sup>39</sup> The Act also authorized the creation of a National Commission on Marijuana and Drug Abuse.<sup>40</sup> Raymond Shafer was appointed as chairman and formed what would later become known as the “Shafer Commission.”<sup>41</sup> The commission issued a report in 1972 entitled *Marijuana: A Signal of Misunderstanding*, which concluded that “neither the marijuana user nor the drug itself can be said to constitute a danger to public safety”<sup>42</sup> and recommended the “decriminalization of possession of marijuana for personal use on both the state and federal level.”<sup>43</sup> Naturally, the report drew immediate and fierce opposition from the Nixon administration and was strongly criticized.<sup>44</sup> Its publication, however, indicated the continuing shift of “elite opinion,”<sup>45</sup> and sparked a movement among the states to decriminalize possession of marijuana and reduce associated penalties.

The decriminalization movement began in Oregon in 1973, when the state passed legislation that reduced the penalty for possession of small

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<sup>34</sup> *Leary v. United States*, 395 U.S. 6 (1970).

<sup>35</sup> *Id.* at 20.

<sup>36</sup> Kamin & Wald, *supra* note 18, at 873.

<sup>37</sup> *Id.* at 873.

<sup>38</sup> *See* Controlled Substances Act, 21 U.S.C. § 812 (2012).

<sup>39</sup> *Id.*

<sup>40</sup> CAULKINS ET AL., *supra* note 1, at 20.

<sup>41</sup> *Id.* at 20.

<sup>42</sup> Patrick K. Nightingale, *A Brief History of Marijuana in the United States and a Case for Legalization in Pennsylvania*, PITTSBURGH NORML.

<sup>43</sup> *Id.*

<sup>44</sup> CAULKINS ET AL., *supra* note 1, at 21.

<sup>45</sup> *Id.* at 21.



amounts of marijuana to a simple fine.<sup>46</sup> In the next few years, several more states including Colorado, Alaska, Ohio, and California had similarly passed laws decriminalizing possession of small amounts of cannabis, reducing the offense from a felony to a misdemeanor and lowering the accompanying penalties.<sup>47</sup> “With the advent of the Reagan administration [however], the 1980s saw increasing levels of anti-marijuana rhetoric.”<sup>48</sup> During this resurgence of prohibitionist fervor, many states reinstated imprisonment for possession, and arrests for marijuana-related offenses were on the rise.<sup>49</sup>

Despite such opposition, marijuana usage nearly doubled in the early to mid-1990s.<sup>50</sup> The next major transition occurred in 1996, when California legalized the sale and use of medical marijuana with the passage of Proposition 215 (the Compassionate Use Act).<sup>51</sup> Since that time, the medical marijuana movement has gained momentum; currently twenty-three states and the District of Columbia have adopted programs and enacted laws removing criminal sanctions for the medical use of marijuana in order to treat a myriad of illnesses and conditions.<sup>52</sup> These states, however, approach the permissible use of medical marijuana in significantly diverse ways, creating a kaleidoscope of regulatory schemes. This makes it well-nigh impossible for the emerging business model to navigate, especially taking into account the conflict of state and federal approaches to the drug.

The federal government’s adamant refusal to either reschedule marijuana under the Controlled Substances Act, or craft legislation to better manage this acute state-federal conflict, leaves an intolerable tension wherein law enforcement resources are not efficiently allocated, and the opportunity for individual states to garner much-needed tax revenue is squandered. With complete legalization fully implemented in Colorado and Washington, the current political climate allows for possible arbitrary abuse of power and selective prosecution by the federal

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<sup>46</sup> See OR. REV. STAT. § 475.864(3)(c) (which incorporates the decriminalizing language of the 1973 legislation).

<sup>47</sup> For an example of such state legislation, see CAL. STATE OFFICE OF NARCOTICS AND DRUG ABUSE, A FIRST REPORT OF THE IMPACT OF CALIFORNIA’S NEW MARIJUANA LAW, SB 95, Appendix I (1977), available at <https://www.ncjrs.gov/pdffiles1/Digitization/45532NCJRS.pdf>.

<sup>48</sup> CAULKINS ET AL., *supra* note 1, at 22.

<sup>49</sup> Zimmer, *supra* note 22, at 8.

<sup>50</sup> CAULKINS ET AL., *supra* note 1, at 22.

<sup>51</sup> See Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

<sup>52</sup> 23 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated July 31, 2014).

government. What remains is an unfair and unequal application of justice. Perhaps it is time for the government to recognize when the existing mechanisms no longer work and the status quo must be changed.

## II. THE FEDERALISM ISSUE

State laws occasionally conflicting with federal laws have been a continuing and inevitable feature of the American federalist system. The aforementioned Controlled Substances Act is the current regulatory regime in place today regarding federal enforcement of marijuana laws. However, twenty three states and the District of Columbia have enacted laws decriminalizing possession and the use of medical marijuana despite the fact that the Drug Enforcement Agency ("DEA") still classifies marijuana as a Schedule I drug. These states and their residents are in direct conflict with federal regulations, and the marijuana issue continues to engender both confusion and outright conflict. In recent years, various efforts were made by states to legalize marijuana for recreational use. California's Proposition 19 (2010) and Oregon's Measure 80 (2012) came close to being passed by voters.<sup>53</sup> Then in the fall of 2012, Colorado and Washington became the first states to pass voter initiatives legalizing the sale and possession of marijuana for recreational use.<sup>54</sup>

"[The] interplay between state and federal law has prompted a unique legal result,"<sup>55</sup> where federal prohibition and state exemption coexist with one another. Pursuant to the statutory framework of the Controlled Substances Act, cultivation, distribution, or possession of marijuana is a federal crime.<sup>56</sup> The Supreme Court has determined that

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<sup>53</sup> See California Secretary of State, *Proposition 19: Legalize Marijuana in CA, Regulate and Tax*, (Jan. 5, 2011, 12:58 PM), <http://www.sos.ca.gov/elections/sov/2010-general/maps/prop-19.htm> (California's Proposition 19 was defeated 53.5% to 46.5%); see also *Oregon 2012 Election Results*, OREGONLIVE (Nov. 9, 2012, 10:14 AM), <http://gov.oregonlive.com/election/2012/Map/Measure-80/> (Oregon's Measure 80 was defeated 54% to 46%).

<sup>54</sup> See *Amendment 64: Legalize Marijuana Election Results*, DENVER POST (Nov. 8, 2012), <http://data.denverpost.com/election/results/amendment/2012/64-legalize-marijuana/> (Colorado's Amendment 64 passed with 54.8% of the vote.); see also Washington Secretary of State, *Initiative Measure No. 502 Concerns Marijuana*, (Nov. 27, 2012, 4:55 PM), <http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana.html> (Washington's Initiative 502 passed with 55.7% of the vote.).

<sup>55</sup> TODD GARVEY, CONG. RESEARCH SERV., R42398, *MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAW* 16 (2012).

<sup>56</sup> Controlled Substances Act, 21 U.S.C. §§ 801-971 (2012).

Congress has the power to enact federal prohibitions on marijuana.<sup>57</sup> However, “even if the federal government sought to preempt state marijuana laws, its power to do so is inherently limited.”<sup>58</sup> Principles of federalism, such as the limitations of the Tenth Amendment and state sovereignty, prevent the federal government from compelling states to participate in enforcing a federal regulatory scheme, and prohibit it from commandeering state legislatures and executive officers to act as a conduit for implementation and enforcement of federal law.<sup>59</sup> However, under the Supremacy Clause, state laws conflicting with federal law are generally preempted and therefore invalid because “the Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”<sup>60</sup> Despite this, in *Rice v. Santa Fe Elevator Corp.*, the Court makes clear that there is a presumption against federal preemption, noting that “we start with the assumption that the historic police powers of the States [are] not to be superseded.”<sup>61</sup> The courts have generally accorded this presumption to states’ medical marijuana laws, and have viewed the relationship between federal and state marijuana laws in a different manner.

Preemption is divided into three general classes: *express* preemption, *conflict* preemption, and *field* preemption.<sup>62</sup> Determining the issue of preemption requires an analysis of congressional intent. Express preemption is self-explanatory: the statutory language will explicitly state the degree of preemption in some cases, but preemption can also be implied in two circumstances. “[U]nder conflict preemption, a state law is preempted ‘where compliance with both federal law and state regulation is a physical impossibility . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>63</sup> Field preemption is the second implied situation, and occurs when a federal regulatory scheme is so

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<sup>57</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>58</sup> Kamin & Wald, *supra* note 18, at 880.

<sup>59</sup> *See* *South Dakota v. Dole*, 483 U.S. 203 (1987); *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”); *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”).

<sup>60</sup> U.S. CONST. art. VI, cl. 2.

<sup>61</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>62</sup> *See generally* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *see also* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (“But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick.”).

<sup>63</sup> *Garvey*, *supra* note 55, at 8 (citing *Gade v. Nat’l Solid Waste Mgmt Ass’n.*, 505 U.S. 88, 98 (1992) (internal citations omitted)).

comprehensive that a reasonable inference could be drawn that Congress “left no room for the States to supplement it.”<sup>64</sup> Looking to the language of the Controlled Substances Act reveals Congress’ preemptive intent in regard to the relationship between federal and state marijuana laws. Section 903 of the Act states:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.*<sup>65</sup>

On its face, Section 903 rejects the idea that the Controlled Substances Act creates any congressional intent to freeze states out of legislating in this area, except in the instance of a “positive conflict,” which renders federal and state law incompatible with one another. Furthermore, the emphasized portion of Section 903 acts as a reserve clause for the federal government to retain effective enforcement power. Yet, the evolution of state regulations has made determining what constitutes such a conflict exceedingly difficult, and courts have reached starkly different results.

The bulk of preemption challenges have fallen short when it comes to state medical marijuana exemptions, and some states have taken such successes and attempted to push the boundaries of the preemption doctrine. Moving beyond “merely exempting qualified individuals from prosecution under state drug laws,”<sup>66</sup> some states have attempted to explicitly allow and regulate medical marijuana use. California, for instance, passed the Medical Marijuana Program Act, seeking to increase state control over the use of marijuana within its jurisdiction.<sup>67</sup> The Act required proof of registration in the form of I.D. cards issued to patients and caregivers who were legally qualified.<sup>68</sup> The registration and identification card provisions were sustained by a California appellate court, which found that the specific provisions at issue did not rise to a

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<sup>64</sup> Garvey, *supra* note 55, at 9 (citing *Santa Fe Elevator Corp.*, 331 U.S. at 230).

<sup>65</sup> Controlled Substances Act, 21 U.S.C. § 903 (2012) (emphasis added).

<sup>66</sup> Garvey, *supra* note 55, at 11.

<sup>67</sup> See Medical Marijuana Program Act of 2003, CAL. HEALTH & SAFETY CODE §§ 11362.7 – 11362.9 (West 2003).

<sup>68</sup> See CAL. HEALTH & SAFETY CODE §§ 11362.71(a)(1), (b)(5).

positive conflict and thus were not preempted by Section 903 of the Controlled Substances Act.<sup>69</sup>

In direct contrast, a court in Oregon held that similar registration and identification card provisions of the Oregon Medical Marijuana Act rose to the level of a “positive conflict,” and was therefore preempted by the Controlled Substances Act.<sup>70</sup> The takeaway from these two examples reveals a distorted landscape, in which different state courts employ diverging legal interpretations. These types of nuanced distinctions exemplify the larger context of marijuana legalization. Such a confusing legal climate creates an atmosphere of uncertainty and raises several constitutional queries and countless complications.

Notwithstanding the numerous unresolved issues surrounding preemption, other questions inevitably emerge. To what degree will the federal government enforce federal law in states that have legalized marijuana under state regulatory schemes? With so much confusion and uncertainty as regulations continue to change and conflict, how will the federal government identify and deal with the black market for marijuana, which poses a serious challenge to law enforcement as it seeks to apply existing drug policies?<sup>71</sup>

Despite their operation in the medical market, dispensaries in California, Washington, and Montana have been the recent victims of federal raids. In 2011, twenty-six Montana dispensaries that were “seemingly compliant with state law”<sup>72</sup> were raided. The raids seemed to send a clear message—the federal government intends to enforce the Controlled Substances Act and prohibit marijuana distribution.<sup>73</sup> Then in July 2013, the DEA raided four dispensaries in Washington, the first major raid on marijuana retailers in the state since voters passed Initiative 502, which legalized small amounts of marijuana for recreational use.<sup>74</sup> This string of seemingly arbitrary enforcement by the federal government stifles legitimate business, impairs access for medical usage, and results in a conflict that creates a constitutional conundrum, pitting the right of state voters to choose how they live

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<sup>69</sup> See *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 481-83 (Cal. Ct. App. 2008).

<sup>70</sup> See generally *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 230 P.3d 518 (Or. 2010).

<sup>71</sup> See THE PATH FORWARD, *supra* note 31, at 11.

<sup>72</sup> Nicole Flatow & Joseph Diebold, *Feds Raid Washington Medical Marijuana Dispensaries*, (July 25, 2013, 1:30 PM), <http://thinkprogress.org/justice/2013/07/25/2353361/dea-raids-washington-marijuana/>.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

according to local community standards against the federal government's power to preempt state law under the Supremacy Clause.<sup>75</sup>

The doctrine of *prosecutorial discretion* enables the federal government to exercise broad discretionary power "as to when, whom, and whether to prosecute for violations of federal law."<sup>76</sup> Courts have recognized this power of the executive branch, and have deemed it "particularly ill-suited to judicial review,"<sup>77</sup> for it includes factors "not readily susceptible to the kind of analysis the courts are competent to undertake."<sup>78</sup> Prosecutorial discretion, although broad, is still subject to a few limitations such as the Equal Protection Clause.<sup>79</sup> The decision to prosecute must not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification."<sup>80</sup> So long as the prosecutor's decision to move forward on a case does not have an underlying discriminatory purpose, he is free to prosecute any individual or organization that violates federal law, including the Controlled Substances Act. Utilizing its own investigative and prosecutorial resources, the federal government can bring charges against anyone who produces, possesses, or distributes marijuana, regardless of their compliance with state law. To clarify its position and power, the Department of Justice crafted memoranda in 2009 and 2011 to guide federal prosecutors with the enforcement of federal marijuana laws.<sup>81</sup> However, recent developments on the marijuana frontier, particularly the legalization of marijuana for recreational use by Colorado and Washington, have obligated the Department of Justice to act once again.

"In light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale,"<sup>82</sup> the Department of

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<sup>75</sup> See THE PATH FORWARD, *supra* note 31, at 11-12.

<sup>76</sup> Garvey, *supra* note 55, at 16 (citing *United States v. Goodwin*, 457 U.S. 368, 380 (1982)).

<sup>77</sup> *Wayte v. United States*, 470 U.S. 598, 607 (1985).

<sup>78</sup> *Id.*

<sup>79</sup> See *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

<sup>80</sup> *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

<sup>81</sup> See Memorandum from David W. Ogden, Deputy Attorney Gen., DOJ, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>; see also Memorandum from James A. Cole, Deputy Attorney Gen., DOJ, on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

<sup>82</sup> Memorandum from James A. Cole, Deputy Attorney Gen., DOJ, on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter Cole Memo 2013].

Justice (“DOJ”) issued a memorandum on August 29, 2013, to give guidance once again to federal prosecutors on marijuana law enforcement under the Controlled Substances Act. The DOJ reaffirmed its determination “that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large scale criminal enterprises.”<sup>83</sup> Enforcing the Controlled Substances Act and utilizing the federal government’s limited resources “to address the most significant threats in the most effective, consistent, and rational way”<sup>84</sup> remains the primary focus of the DOJ. In guiding federal prosecutors in the enforcement of the Controlled Substances Act, the DOJ has provided a list of priorities that are of particular importance to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.<sup>85</sup>

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<sup>83</sup> *Id.* at 1.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1-2.

The department urged that enforcement resources and efforts focus on activity that affects any one or more of these priorities. Outside of these enumerated interests, the federal government has typically relied on, and will continue to rely on, state and local law enforcement agencies to deal with marijuana-related activities and offenses via their own narcotics laws.<sup>86</sup>

This traditional joint effort between federal and state approaches to drug policies is now precarious due to the recent passage of Colorado and Washington marijuana laws and regulatory schemes. Sam Kamin, Professor of Law at University of Denver Sturm College of Law, has made numerous contributions to the issue of marijuana legalization. In a recent essay, Kamin advocates for an ideal of cooperative federalism, where he proposes an amendment to the Controlled Substances Act that would allow states to opt-out of the Act's marijuana provisions.<sup>87</sup> Such a model, according to Kamin, would enable states "to function as laboratories for new ideas with regard to marijuana regulation and taxation."<sup>88</sup> This Comment argues that the model could defuse federal-state tensions, and allow the emerging marijuana industry to naturally establish efficient market conditions within the framework of a rational regulatory system. Unfortunately, Congress has made no indication that it would amend the Controlled Substances Act by including such an opt-out clause, and states are forced to operate in this legally gray area.

The proliferation of possibilities related to marijuana legislation at both the state and federal levels creates an atmosphere of uncertainty. The DOJ has emphasized its expectation that the states formulate robust regulation and enforcement systems that prove to be strong and effective, not just on paper, but in practice.<sup>89</sup> So long as these systems effectively control the cultivation, distribution, sale, and possession of marijuana, the federal priorities listed remain less likely to be threatened.<sup>90</sup> If these systems fail to protect against the harms set forth above, then the federal government reserves the right to challenge the state's regulatory structure, and continue to prosecute individuals and organizations alike in violation of federal law.<sup>91</sup>

In exercising prosecutorial discretion, federal prosecutors are to take a number of factors into consideration including, but not limited to, the size and commercial nature of the marijuana enterprise, and the

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<sup>86</sup> See *id.* at 2.

<sup>87</sup> See Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1120 (2014).

<sup>88</sup> *Id.*

<sup>89</sup> See Cole Memo 2013, *supra* note 82, at 2.

<sup>90</sup> See *id.* at 3.

<sup>91</sup> *Id.*



operation's compliance with state laws and regulations.<sup>92</sup> However, “[t]he primary question in all cases—and in all jurisdictions—should be whether the conduct at issue implicates one or more of the enforcement priorities”<sup>93</sup> announced in the 2013 memorandum. The DOJ concludes with the disclaimer that the federal government retains the authority to enforce any and all federal laws regardless of state law, even in the absence of any one of the factors aforementioned.<sup>94</sup> The memo notes that nothing in this memorandum provides a legal defense to a violation of federal law, and that “[t]his memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.”<sup>95</sup> Overall, “the decision to limit prosecutions appears to be based on enforcement priorities and the allocation of resources,”<sup>96</sup> and, in exercising its prosecutorial discretion, the DOJ is under no obligation to prosecute *all* violations of federal law.<sup>97</sup>

Just days after the issuance of the DOJ's August 29, 2013 memorandum, the Senate conducted a congressional hearing to discuss the state and federal marijuana laws conflict. Kevin Sabet, current director of project SAM (“Smart Approaches to Marijuana”) and former senior drug policy advisor to the Obama Administration, was one of the first to speak to the Senate Judicial Committee. After quickly observing the niceties, Sabet delved into the crux of his speech, remarking that he “found the recent guidance by the U.S. Deputy Attorney General [(Cole Memo 2013)] disturbing on both legal and policy grounds.”<sup>98</sup> Sabet believes that by issuing this particular guidance, the DOJ has deferred its right to challenge and preempt state marijuana laws, as well as disregarded the provisions of the Controlled Substances Act and other policies aimed at protecting public health and safety.<sup>99</sup> However, Sabet underemphasizes the DOJ's recognizable attempt to reserve enforcement power in its memorandum, as well as the reserving language in Section 903 of the Controlled Substances Act. Sabet fears that the “new guidance endangers Americans since it will facilitate the creation of a large

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<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See id.* at 4.

<sup>95</sup> *Id.*

<sup>96</sup> Garvey, *supra* note 55, at 16.

<sup>97</sup> *Id.* (emphasis added).

<sup>98</sup> *Hearing on Conflicts between State and Federal Marijuana Laws Before the S. Comm. on the Judiciary*, 113th Cong. 1 (2013) (statement of Kevin Sabet, Director, University of Florida Drug Policy Institute, Department of Psychiatry, Division of Addiction Medicine; Director, Project SAM (Smart Approaches to Marijuana); Author, Reefer Sanity: Seven Great Myths About Marijuana) [hereinafter Statement of Sabet].

<sup>99</sup> *See id.*

industry for marijuana use, production, trafficking, and sale.”<sup>100</sup> He commended the Controlled Substances Act for its purpose to promote public health, and how it has been an effective tool used to target drug traffickers and producers.<sup>101</sup> But now, according to Sabet, the DOJ has given its stamp of federal approval to the states of Colorado and Washington to go ahead and “start a massive for-profit, commercial industry for marijuana.”<sup>102</sup>

The next major segment of Sabet’s speech was devoted to addressing some of the priorities listed in the DOJ’s memorandum, and how these federal interests have already been compromised. He pointed out how the DOJ claims to be concerned with minors’ access to marijuana; yet, according to Sabet, from the time marijuana was legalized for medical use, minors have been exposed to the drug in larger numbers than ever before, there has been an increase in unintentional marijuana poisonings among children, and “peer-reviewed papers are finding that medical marijuana is [being] easily diverted to youth.”<sup>103</sup> Sabet condemned Colorado for its “mass advertising, promotion,”<sup>104</sup> and usage of items that are attractive to kids—“like ‘medical marijuana lollipops,’ ‘Ring Pots,’ and ‘Pot-Tarts.’”<sup>105</sup> Although, it is not unheard of to disguise medicine for children in order to get them to take it or to alter their perception of treatment. Examples range from a mother waving a spoon-full of cough syrup around like an airplane, to the A.C. Camargo Cancer Center that disguises chemotherapy treatment for children as superhero formula.<sup>106</sup> A young child suffering from something like undifferentiated soft tissue sarcoma, a rare but aggressive form of cancer, may be more inclined to ingest medical marijuana in the form of a lozenge or lollipop to ease intense pain, when morphine has proven ineffective and only continues to cause severe nausea. The very nature of marijuana as a legal business lends itself to all the trappings of any normal business, including advertising aimed at glamorizing a product or service. This is a relatively standard model, and sometimes citizens have to deal with all the consequences of living in a capitalistic society that espouses profit over moral sensibility.

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<sup>100</sup> *Id.* at 2.

<sup>101</sup> *See id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.* at 3.

<sup>105</sup> *Id.*

<sup>106</sup> *See* Carmen Chai, *Children’s Cancer Wing Transforms into Superhero Ward Offering ‘Superformula’ Chemotherapy*, GLOBAL NEWS (July 7, 2013, 1:00 PM), <http://globalnews.ca/news/623040/childrens-cancer-wing-transforms-into-superhero-ward-offering-superformula-chemotherapy/>.

That being said, the federal government has restricted advertising of certain industries (specifically the area of tobacco), and has tightly regulated others (such as alcohol). Sabet, however, closed with a section entitled “experience shows that ‘Regulation’ is anything but.”<sup>107</sup> He referenced two independent reports by the Colorado State Auditor, where both suggest that the newly implemented regulatory system is not well regulated at all.<sup>108</sup> Yet, there are some who believe that this regulatory system is only in the infancy stage of development and needs time to grow and adapt. Colorado has dealt with a legal marijuana industry for more than a decade, and according to Paul Armentano, Deputy Director of NORML (National Organization for the Reform of Marijuana Law), “[w]e’ve been told that the reason we can’t change [marijuana policy] is because if we do, the sky will fall,” but “[t]he sky is not falling in Colorado. People that live in Colorado recognize that, and people outside of Colorado will recognize that as well.”<sup>109</sup>

The September 10, 2013 judicial committee heard from several other prominent figures directly involved in the marijuana legalization issue and who are dealing with the complex questions arising. James Cole, Deputy Attorney General of the United States Department of Justice, defended his position in the August 29, 2013, memorandum issued as a guide to federal prosecutors all over the nation.<sup>110</sup> He reiterated the list of federal enforcement priorities and emphasized cooperation between federal and state law enforcement efforts in the area of drug policy.<sup>111</sup> He clarified that the DOJ reserves its right to challenge any state law or regulatory scheme, despite that the duty of developing comprehensive laws and well-funded regulation systems falls to the states.<sup>112</sup> The next few speakers—Patrick Leahy, Chairman of the Senate Judiciary Committee; John Urquhart, Sheriff of King County Seattle, Washington; and Jack Finlaw, Chief Legal Counsel for the Office of Colorado

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<sup>107</sup> Statement of Sabet, *supra* note 98, at 8.

<sup>108</sup> See Colorado Office of the State Auditor, (June 2013), *Medical Marijuana Regulatory System Part II Performance Audit*, available at [http://www.leg.state.co.us/OSA/coauditor1.nsf/All/C9112BFFDE1559CE87257BA5007AE40F/\\$FILE/2194B%20MedMarijPart2%20June%202013.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/C9112BFFDE1559CE87257BA5007AE40F/$FILE/2194B%20MedMarijPart2%20June%202013.pdf); see also Office of the Auditor, Audit Services Division, City and County of Denver, (July 2013), *Medical Marijuana Licensing Performance Audit*, available at [http://www.denvergov.org/Portals/741/documents/Audits%202013/Medical\\_Marijuana\\_Licensing\\_Audit\\_Report\\_07-18-13.pdf](http://www.denvergov.org/Portals/741/documents/Audits%202013/Medical_Marijuana_Licensing_Audit_Report_07-18-13.pdf).

<sup>109</sup> Jacob Sullum, *Audit rips Denver’s Pot Regs as Ineffective, and That’s Not a Bad Thing*, (July 26, 2013), <http://completecolorado.com/pagetwo/2013/07/26/audit-rips-denvers-pot-regs-as-ineffective-and-thats-not-a-bad-thing/>.

<sup>110</sup> See *Hearing on Conflicts between State and Federal Marijuana Laws Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of James M. Cole, Att’y Gen. of the United States).

<sup>111</sup> See *id.* at 2.

<sup>112</sup> See *id.* at 3.

Governor John W. Hickenlooper—all highlighted two significant federal obstacles to effective state implementation and regulation of marijuana—existing federal law in the areas of banking and taxation.

Sheriff Urquhart pointed out that “under federal law, it is illegal for banks to open checking, savings, or credit card accounts for marijuana businesses. The result is that marijuana stores will be operated as cash-only businesses, creating two big problems.”<sup>113</sup> In terms of public safety, these businesses become targets for criminal activity. Regulation and enforcement issues also arise with cash-only businesses because it is “more difficult to account for and track revenues and audit tax payments of businesses that do not use financial institutions.”<sup>114</sup> However, as of February 14, 2014, the Obama administration, via the Department of the Treasury, has issued guidance to the banking industry regarding how to conduct business with these state-legal marijuana industries.<sup>115</sup> This is a potentially major step toward legitimization and could eliminate one of the main hurdles preventing effective implementation and regulation. Budding entrepreneurs may now be able to utilize the federal banking system and achieve some level of financial stability and economic certainty, enabling them to deploy and test their business models more effectively.

In the February 14, 2014 guidance, the Financial Crimes Enforcement Network attempted to clarify the Bank Secrecy Act and the rules for banks providing financial services to marijuana businesses.<sup>116</sup> The banks will be required to assess several factors based on their individual institutional objectives, the associated risks, and their ability to manage such risks effectively when providing financial services.<sup>117</sup> They are to notify federal regulators of any suspicious activity by filing a Suspicious Activity Report (“SAR”), despite any state law that legalizes marijuana.<sup>118</sup> Financial institutions will also be required to file what is

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<sup>113</sup> *Hearing on Conflicts between State and Federal Marijuana Laws Before the S. Comm. on the Judiciary*, 113th Cong. 2 (2013) (statement of John Urquhart, Sheriff, King County, Washington) [hereinafter Statement of Urquhart].

<sup>114</sup> *Hearing on Conflicts between State and Federal Marijuana Laws Before the S. Comm. on the Judiciary*, 113th Cong. 8 (2013) (statement of Jack Finlaw, Chief Legal Counsel, Office of Colorado Governor John W. Hickenlooper) [hereinafter Statement of Finlaw].

<sup>115</sup> See Memorandum from the Financial Crimes Enforcement Network, Dep’t of the Treasury, on BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014), available at [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf) [hereinafter Treasury Memo 2014].

<sup>116</sup> See David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL’Y REV. 359, 370 (2014).

<sup>117</sup> Treasury Memo 2014, *supra* note 115, at 2.

<sup>118</sup> *Id.* at 3.

called a “Marijuana Limited” SAR report when the institution reasonably believes that the marijuana-related business “does not implicate one of the Cole Memo priorities or violate state law.”<sup>119</sup> The financial institution should file a more comprehensive “Marijuana Priority” SAR report when it does reasonably believe that one or more of the Cole Memo priorities have been implicated, or state law has been violated.<sup>120</sup> Despite potentially lucrative rewards for participation (\$2.57 billion in marijuana sales expected this year),<sup>121</sup> and despite the Department of Justice directing federal prosecutors not to pursue financial institutions that do business with legal marijuana industries,<sup>122</sup> problems still exist. Some banks still harbor a fear that, by accepting money from a business involved in activity considered illegal under federal law, they run the risk of violating money-laundering statutes.<sup>123</sup> Also, this new guidance does not protect banks from the threat of future prosecution in the event that a new administration decides to flip the switch and prosecute these violations of federal drug laws. Doing business with marijuana dealers now may result in the banks painting a target on their backs, attracting the unwanted attention of the federal government.

The Colorado Bankers Association (CBA) was quick to recognize this reality and released a statement immediately following the DOJ and the Department of Treasury’s guidance to financial institutions. “The guidance issued today . . . only reinforces and reiterates that banks can be prosecuted for providing accounts to marijuana related businesses.”<sup>124</sup> The CBA goes on to say that this guidance is only a modified reporting system and places a heavy burden on banks to know and control their customers’ activities.<sup>125</sup> It is a situation where the CBA believes that “no bank can comply.”<sup>126</sup> There is currently a bipartisan House bill circulating called the Marijuana Businesses Access to Banking Act, which aims to create protections for depository institutions (*e.g.*, banks, credit unions, etc.) that provide financial services to marijuana-related

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<sup>119</sup> *Id.* at 3.

<sup>120</sup> *See id.* at 4.

<sup>121</sup> *See* Danielle Douglas, *Obama Administration Clears Banks to Accept Funds from Legal Marijuana Dealers*, WASHINGTON POST (Feb. 14, 2014), [http://www.washingtonpost.com/business/economy/obama-administration-clears-banks-to-accept-funds-from-legal-marijuana-dealers/2014/02/14/55127b04-9599-11e3-9616-d367fa6ea99b\\_story.html](http://www.washingtonpost.com/business/economy/obama-administration-clears-banks-to-accept-funds-from-legal-marijuana-dealers/2014/02/14/55127b04-9599-11e3-9616-d367fa6ea99b_story.html).

<sup>122</sup> *See* Serge F. Kovalski, *U.S. Issues Marijuana Guidelines for Banks*, N.Y. TIMES, Feb. 15, 2014, at A10.

<sup>123</sup> *See* Douglas, *supra* note 121.

<sup>124</sup> *CBA Statement Regarding DOJ and Treasury Guidance on Marijuana and Banking*, COLO. BANKERS ASS’N, <http://www.coloradobankers.org/?60>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

businesses.<sup>127</sup> The bill was referred for committee review on July 10, 2013<sup>128</sup>; unfortunately, it has a small chance of getting through the committee, and an even smaller chance of being enacted. In truth, as long as marijuana is classified as a Schedule I drug and no legal clearance is provided to remove the threat of future federal prosecution, “bank[s] will remain reluctant to do business with dealers, even if they are operating within the confines of state laws.”<sup>129</sup>

In regard to the taxation problem, Jack Finlaw discussed Section 280E of the Internal Revenue Code, which “prohibits a business considered to be trafficking substances under the Controlled Substances Act from claiming any tax deductions on their federal tax returns.”<sup>130</sup> This provision effectively bars legally operating marijuana businesses in Colorado from receiving the same kind of tax breaks that other legal businesses enjoy. In order to address this tax issue and provide some assistance to the marijuana businesses, Colorado has enacted legislation to allow for a state income tax deduction, where “owners of medical and recreational marijuana businesses [will be able] to deduct their business expenses from their state income tax returns even though they cannot do so on their federal income tax returns.”<sup>131</sup>

#### IV. A CLOSER LOOK AT COLORADO AND WASHINGTON

##### A. Colorado’s Amendment 64

Jack Finlaw, as Chief Legal Counsel to Colorado’s Governor, is uniquely positioned to provide insight into the implementation, enactment, and promulgation of Colorado’s new marijuana laws, enabling legislation, and regulatory system. In his address to the Judicial Committee, he discussed the passage of Amendment 64 in November 2012.<sup>132</sup> It became law a month later, codified as Article XVIII, Section 16 in the Colorado Constitution, which states that

in the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of Colorado find and declare that the use of marijuana should be legal for

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<sup>127</sup> See Marijuana Businesses Access to Banking Act, H.R. 2652, 113th Cong. (2013).

<sup>128</sup> See *id.*

<sup>129</sup> Douglas, *supra* note 121.

<sup>130</sup> Statement of Finlaw, *supra* note 114, at 4 (citing I.R.C. § 280E (1982)).

<sup>131</sup> *Id.*

<sup>132</sup> Statement of Finlaw, *supra* note 114, at 1-4.

persons twenty-one years of age or older and taxed in a manner similar to alcohol.<sup>133</sup>

The statute allows for adults, ages twenty-one and older, to possess, purchase, use, and transport up to one ounce of marijuana, and also allows for the personal home growth of up to six marijuana plants.<sup>134</sup> Restrictions on home grows stipulate that growing must be “in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale,”<sup>135</sup> although Finlaw points out that up to an ounce can be gifted to another adult twenty-one years of age or older.<sup>136</sup>

Section 16 goes on to lay out what constitutes lawful operation of marijuana-related facilities,<sup>137</sup> and mandates the implementation of procedures for the “issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment,”<sup>138</sup> as well as a regulatory system for the “cultivation, harvesting, processing, packaging, display, and sale of marijuana.”<sup>139</sup> The statute contains a provision aimed at protecting the privacy of individuals:

The department 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 in a financial transaction conducted at a retail liquor store.<sup>140</sup>

Furthermore, the statute “permits local governments in Colorado to regulate the time, place, manner, and number of marijuana establishments in their communities.”<sup>141</sup> These local governments have the power to ban marijuana establishments within their jurisdiction.<sup>142</sup> However, if a locality opts-in, then it not only gets to take part in a tax share-back scheme (i.e. as the state collects taxes from marijuana-related businesses, it must “share-back” a certain percentage with the local authorities), it also has the ability to levy a locality tax, thus generating

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<sup>133</sup> COLO. CONST. art. XVIII, § 16(1)(a).

<sup>134</sup> COLO. CONST. art. XVIII, § 16(3)(a).

<sup>135</sup> COLO. CONST. art. XVIII, § 16(3)(b).

<sup>136</sup> Statement of Finlaw, *supra* note 114, at 1-2.

<sup>137</sup> See COLO. CONST. art. XVIII, § 16(4).

<sup>138</sup> COLO. CONST. art. XVIII, § 16(5)(a)(I).

<sup>139</sup> Statement of Finlaw, *supra* note 114, at 2.

<sup>140</sup> COLO. CONST. art. XVIII, § 16(5)(c).

<sup>141</sup> Statement of Finlaw, *supra* note 114, at 2.

<sup>142</sup> See *id.* at 2.

more revenue.<sup>143</sup> Employers in the state are still able to have restrictive policies regarding the use and possession of marijuana by employees,<sup>144</sup> and property owners may prohibit or regulate “possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.”<sup>145</sup> The statute also authorizes “the cultivation, processing and sale of industrial hemp,”<sup>146</sup> and mandates that an excise tax not to exceed fifteen percent (15%), and a sales tax of ten percent (10%), be imposed on marijuana sold or transferred by businesses.<sup>147</sup> The “first forty million dollars in revenue raised annually from any such excise tax shall be credited to the Public School Capital Construction Assistance Fund . . . or any successor fund dedicated to a similar purpose.”<sup>148</sup> The purpose of this tax regime is to ensure that Colorado has the necessary financial resources available for executing a robust regulatory and enforcement system, as well as “for an effective education and prevention program to protect youth . . . and for the health and public safety costs associated with the retail marijuana industry.”<sup>149</sup>

During the implementation process, a special task force co-chaired by Jack Finlaw and Barbara Brohl, Executive Director of the Department of Revenue, was commissioned to deal with and resolve any legal, policy, or procedural issues likely to arise.<sup>150</sup> The task force was composed of a diverse group of representatives, who focused on devising a regulatory framework, working with local authorities, dealing with tax, funding, and civil law matters, while helping to develop consumer safety and criminal laws.<sup>151</sup> Enabling legislation was also created during this period to buttress Amendment 64—bills were drafted to address retail stores, tax deductions, drugged driving, and the regulation of industrial hemp.<sup>152</sup> The Department of Revenue performed extensive work in a short timeframe to develop comprehensive rules and regulations governing retail marijuana establishments and medical marijuana businesses, tackling issues like “Licensing, Licensed Premises, Transportation, and Storage; Licensed Entities and Inventory Tracking; Record Keeping, Enforcement and Discipline; Labeling, Packaging, Product Safety & Marketing; and Medical Differentiation.”<sup>153</sup> The 401-

<sup>143</sup> Blake & Finlaw, *supra* note 116, at 379.

<sup>144</sup> See COLO. CONST. art. XVIII, § 16(6)(a).

<sup>145</sup> COLO. CONST. art. XVIII, § 16(6)(d).

<sup>146</sup> COLO. CONST. art. XVIII, § 16(5)(j).

<sup>147</sup> See COLO. CONST. art. XVIII, § 16(5)(d).

<sup>148</sup> *Id.*

<sup>149</sup> Blake & Finlaw, *supra* note 116, at 373.

<sup>150</sup> Statement of Finlaw, *supra* note 114, at 3.

<sup>151</sup> See *id.*

<sup>152</sup> See *id.* at 3-4.

<sup>153</sup> *Id.* at 4.



page Permanent Rules Relating to the Colorado Retail Marijuana Code<sup>154</sup> is the manifestation of Colorado's guiding principle throughout the whole process—"to create a robust regulatory and enforcement environment that protects public safety and prevents diversion of Retail Marijuana to individuals under the age of 21 or to individuals outside the state of Colorado."<sup>155</sup>

Colorado's system, however, is not perfect. Seven months after legalization, the state has encountered some unexpected problems. The Colorado Department of Revenue points to the lower-taxed medical marijuana market as the cause for some disappointing revenue figures in Fiscal Year 2014.<sup>156</sup> This illustrates the difficulty of forecasting revenue and other economic effects of marijuana legalization. Colorado has also faced several state law enforcement challenges. The numerosity and complexity of these issues could be the subject of a separate article, but it is important to highlight a few that warrant special attention. Three particular issues have given state law enforcement much difficulty—the definition and application of the "open and public consumption" policy, drugged driving, and the "home-grow grey market."<sup>157</sup> Other important enforcement issues include: "licensing, background checks for owners and employees of marijuana-related businesses, employee rights, addiction in the context of family law, enforcement of marijuana-related contracts, cultivation-practices, potency limits, labeling, advertising, and online sales."<sup>158</sup> Despite these formidable challenges, Colorado is seemingly fulfilling the federalist ideal, and serving as a laboratory for novel social and economic ideas. If its health, public safety, and education initiatives are ultimately effective, Colorado could show the rest of the nation that legalization can yield positive results.

### B. *Washington's Initiative 502*

Colorado's efforts to implement laws and create a regulatory framework in the marijuana legalization movement have served as a model for marijuana advocates around the country. The state of Washington and its representatives have worked closely with Colorado

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<sup>154</sup> Retail Marijuana Code, COLO. CODE REGS. § 212-2 (2013).

<sup>155</sup> *Id.* (COLO. DEP'T OF REVENUE, MARIJUANA ENFORCEMENT DIV., PERMANENT RULES RELATED TO THE COLORADO RETAIL MARIJUANA CODE *i-ii*, available at <http://www.colorado.gov/cs/Satellite%3Fblobcol%3Durldata%26blobheader%3Dapplication%252Fpdf%26blobkey%3Did%26blobtable%3DMungoBlobs%26blobwhere%3D1251883847085%26ssbinary%3Dtrue>).

<sup>156</sup> See COLO. DEP'T OF REVENUE, MARKET SIZE AND DEMAND FOR MARIJUANA IN COLORADO (2014).

<sup>157</sup> Blake & Finlaw, *supra* note 116, at 373.

<sup>158</sup> *Id.*

to become the only other state to legalize and regulate the use and sale of recreational marijuana. The citizens of Washington passed Initiative 502 in November 2012.<sup>159</sup> The new Washington marijuana laws mirror those of Colorado in many respects. Adults (ages 21 and older) are now allowed to possess up to one ounce of marijuana for personal use in both states.<sup>160</sup> Washington has also adopted a similar approach to the issue of drugged driving:

the department shall suspend, revoke, or deny the arrested person's license, permit, or privilege to drive . . . [i]n the case of an incident where a person has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was 0.08 or more, or that the THC concentration of the person's blood was 5.00 or more.<sup>161</sup>

There are some notable differences however. Washington laws seem to be a little less liberal, and do not allow for home grows or personal production of any kind related to recreational use. The taxes implemented in Washington will be somewhat higher, with a state excise tax equal to twenty-five percent (25%) imposed on three separate transactions—the sale of marijuana from the producer to the processor, from processor to retailer, and from retailer to consumer.<sup>162</sup> Washington's tax structure could run the risk of driving experienced and inexperienced users to search for cheaper prices elsewhere. Such a taxation scheme could spawn a potential growth in sales of marijuana on the black market, ultimately undermining Washington's highest priority—to promote public health and safety.<sup>163</sup> The industry structure in Washington also differs. While Colorado has a vertically integrated market, such a market is not envisioned for Washington.<sup>164</sup> Initiative 502

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<sup>159</sup> See Wash. Legis. Serv. Ch. 3 (I.M. 502) (2013); see also Washington Secretary of State, *Initiative Measure No. 502 Concerns Marijuana*, (Nov. 27, 2012, 4:55 PM), <http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana.html> (Washington's Initiative 502 passed with 55.7% of the vote.).

<sup>160</sup> See COLO. CONST. art. XVIII, § 16(3)(a); see also WASH. REV. CODE § 69.50.4013(3).

<sup>161</sup> WASH. REV. CODE § 46.20.3101(2).

<sup>162</sup> See WASH. REV. CODE § 69.50.535.

<sup>163</sup> See Washington State Liquor Control Board Rule Highlights (Dec. 6, 2013), available at [http://www.liq.wa.gov/publications/Marijuana/I-502/I-502\\_Draft\\_Rule\\_Summary\\_IX\\_12-06-13.pdf](http://www.liq.wa.gov/publications/Marijuana/I-502/I-502_Draft_Rule_Summary_IX_12-06-13.pdf) [hereinafter Liquor Control Board].

<sup>164</sup> See John Walsh, *Q&A: Legal Marijuana in Colorado and Washington*, Brookings, May 2013, at 2, available at <http://www.brookings.edu/~media/research/files/papers/2013/05/21%20legal%20marijuana%20colorado%20washington%20walsh/qa%20legal%20marijuana%20in%20colorado%20and%20washington%20web.pdf>.

directed Washington's Liquor Control Board to draft and enforce the rules and regulations governing implementation.<sup>165</sup> The commercial market in Colorado, however, is supervised and regulated by the newly created Marijuana Enforcement Division of the Department of Revenue.<sup>166</sup> The Liquor Control Board in Washington sought to create a tightly regulated and controlled market for marijuana. One of the major highlights from the rules includes a three-tier regulatory system covering producers, processors, and retailers.<sup>167</sup> In order to obtain a license on any level, applicants must be a resident of the state, go through extensive background checks, pay an application fee, abide by production limitations, submit to taxation, and carry liability insurance.<sup>168</sup> Unlicensed production and distribution remains a class C felony under state law.<sup>169</sup> The Liquor Control Board has made a commendable attempt to design the rules in a way that supports public health and safety. A traceability system will be employed, violation standards will be adopted, and restrictions on advertising will be enforced.<sup>170</sup> Businesses will also be required to take steps ensuring security and safety, such as installing alarm systems, placing warnings on packages and labels, and adhering to strict record-keeping requirements.<sup>171</sup> The window to register for licenses is now closed, and retail stores are set to open sometime this spring.

In the September 10, 2013, judicial committee hearing, the Sheriff of King County, Washington, John Urquhart, emphasized that what was happening in Washington was "not the Wild Wild West."<sup>172</sup> The state is "committed to continued collaboration with the DEA, FBI, and DOJ for robust enforcement"<sup>173</sup> of the new drug laws. Sheriff Urquhart claimed he is a strong supporter of Initiative 502 because the people have spoken, and it is what the people want.<sup>174</sup> After thirty-seven years as a police officer, twelve of which were spent as a narcotics detective, Urquhart testified that his experience has shown him that "the War on Drugs has been a failure,"<sup>175</sup> and the citizens of Washington have decided "to try

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<sup>165</sup> See WASH. REV. CODE § 69.50.342.

<sup>166</sup> See Walsh, *supra* note 164, at 3.

<sup>167</sup> Liquor Control Board, *supra* note 163.

<sup>168</sup> *Id.*

<sup>169</sup> See Nathaniel Counts, *Initiative 502 and Conflicting State and Federal Law*, 49 GONZ. L. REV. 187, 190 (2014).

<sup>170</sup> Liquor Control Board, *supra* note 163.

<sup>171</sup> *Id.*

<sup>172</sup> Statement of Urquhart, *supra* note 113, at 2.

<sup>173</sup> *Id.*

<sup>174</sup> See *id.* at 1.

<sup>175</sup> *Id.*

something new.”<sup>176</sup> Sheriff Urquhart may have a valid point regarding the failure of the “war on drugs.”

## V. THE DETRIMENTAL EFFECTS OF FEDERAL DRUG POLICY AND RECENT REFORM EFFORTS

### A. *Mass Incarceration and Associated Costs*

The demand for, the potency of, and the exposure to drugs has only increased over the years. Beginning in the 1970s, with the rise of tough-on-crime politics and the War on Drugs, America’s prison population has increased exponentially. The United States has had the highest incarceration rate in the world for over a decade.<sup>177</sup> The war on marijuana in particular has been “waged at a tremendous cost of money and impact on human lives.”<sup>178</sup> According to the Federal Bureau of Investigation (FBI), in 2011 there were over 1,500,000 arrests for drug-related offenses, and approximately eighty-two percent (82%) of those were for possession.<sup>179</sup> A vast majority of these arrests occur at the state and local level.<sup>180</sup> “It has been estimated that enforcement of federal marijuana laws (including incarceration) costs a minimum of \$5.5 billion dollars each year.”<sup>181</sup>

Of course, these numbers are only estimates because it is practically impossible to calculate the number of people serving prison time for marijuana possession alone and the cost of their incarceration. Convictions for possession often result from the plea bargaining process. Also, whether incarceration follows from a conviction for possession of marijuana is influenced by many factors, such as quantity possessed, the geographic area, prior criminal record, and violations while on probation or parole.<sup>182</sup> Calculating the total cost of incarceration related to marijuana possession is even more difficult. A major factor to consider is whether a person is incarcerated *solely* because of marijuana possession,

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<sup>176</sup> *Id.*

<sup>177</sup> Tyjen Tasi & Paola Scommegna, *U.S. Has World’s Highest Incarceration Rate*, (Aug. 2012), <http://www.prb.org/Publications/Articles/2012/us-incarceration.aspx>.

<sup>178</sup> THE PATH FORWARD, *supra* note 31, at 6.

<sup>179</sup> See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2011: PERSONS ARRESTED, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested>.

<sup>180</sup> See Kamin & Wald, *supra* note 18, at 875.

<sup>181</sup> THE PATH FORWARD, *supra* note 31, at 6 (citing CRS Report R41535 and CATO Study, “The Budgetary Impact of Ending Drug Prohibition”).

<sup>182</sup> See CAULKINS ET AL., *supra* note 1, at 50

or whether that conviction is coupled with other offenses.<sup>183</sup> Additionally, not every person is sent to prison; many go to city or county jails and are held pending trial, sentencing, and arraignment, which accrue even more costs.<sup>184</sup>

*B. Discrimination, Collateral Consequences of Conviction, and For-Profit Prisons*

The war on marijuana has resulted in prison overcrowding, has been a substantial drain on federal, state, and local resources, and has been a cancer within society, disproportionately affecting racial minorities.<sup>185</sup> Patterns of discrimination can be found nationwide. According to the American Civil Liberties Union, black Americans are about 3.7 times more likely to be arrested for marijuana possession than white Americans, even though both races use marijuana at equally similar rates.<sup>186</sup> The for-profit prison system may be one of the main reasons for this increasing trend of mass incarceration. These prison companies make contracts with the state, and enforce lockup quotas to guarantee that their “private prisons turn a profit.”<sup>187</sup> If a state fails to incarcerate a certain amount of people and does not meet the quota obligation, it must pay these for-profit prisons for their empty beds.<sup>188</sup> One might imagine that an effective way to guarantee occupancy requirements is to increase incarceration for drug-related offenses.

Throughout the years, there has been an abundance of evidence suggesting that large-scale incarceration is not the most effective means of achieving public safety.<sup>189</sup> “Few people still believe the lurid stories spread so widely during 1930s antimarijuana [sic] campaign. And yet marijuana remains a highly controversial subject in our society,”<sup>190</sup> masked with misinformation and uncertainty. Every year, thousands of

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<sup>183</sup> See *id.* at 51.

<sup>184</sup> *Id.*

<sup>185</sup> See generally Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), [http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?ref=todayspaper&\\_r=1](http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?ref=todayspaper&_r=1).

<sup>186</sup> See AMERICAN CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 47 (2013), available at <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rell.pdf>.

<sup>187</sup> Katy Hall & Jan Diehm, *One Disturbing Reason for Our Exploding Prison Population (Infographic)*, HUFFINGTON POST (Sept. 9, 2013, 3:41 PM), [http://www.huffingtonpost.com/2013/09/19/private-prisons\\_n\\_3955686.html](http://www.huffingtonpost.com/2013/09/19/private-prisons_n_3955686.html).

<sup>188</sup> See *id.*

<sup>189</sup> See *Hearing on Rising Prison Costs: Restricting Budgets and Crime Prevention Options Before the S. Comm. on the Judiciary*, 112th Cong. (2012) (testimony of Marc Mauer, Executive Director, The Sentencing Project).

<sup>190</sup> MEYER & QUENZER, *supra* note 2, at 328.

people's lives are destroyed for simple possession,<sup>191</sup> but the effects of mass incarceration are not confined to the cellblock. Both legal and social barriers exist long after a person has successfully completed their sentence. The collateral consequences of a conviction or an arrest can follow a former inmate for life. Society continues to demonize these individuals long after they have completed their court-imposed sentences. They carry the social stigma of being a "criminal" or a "felon" or a "convict," and they are constantly regulated to second-class citizenship, where they are deprived of certain rights, their property is forfeited, and their financial and employment opportunities are negatively impacted.

Mass incarceration and collateral consequences are the tragic results of the decades-old war on drugs. Legal substances like alcohol, tobacco, and prescription medication have well-documented detrimental effects on public health and safety.<sup>192</sup> So why the animosity toward marijuana? Perhaps people are beginning to recognize that U.S. drug policy in regard to marijuana is both costly and futile at best, and that the system is broken.

What some people fail to see, however, is that the system was never broken, it was built this way. That being said, there have recently been some positive steps signaling a shift in the nation's approach to criminal justice, particularly illegal drugs. In mid-July 2014, the U.S. Sentencing Commission decided that nearly 50,000 federal drug offenders currently in prison are eligible for reduced sentences.<sup>193</sup> Furthermore, state marijuana legalization initiatives are now emerging across the country, indicating a change in both political and social attitude and opinion.

### C. *State and Local Initiatives*

Although faced with staunch opposition, many states are moving away from archaic policies, and modernizing their approach to the issue of legalized marijuana. Florida is one of those states. This Comment notes that Florida's penalties for possessing small amounts of marijuana

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<sup>191</sup> See Christopher Ingraham, *The Share of Arrests for Marijuana Possession Has More than Tripled Since 1991*, WASH. POST (Aug. 13, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/13/the-share-of-arrests-for-marijuana-possession-has-more-than-tripled-since-1991/> (providing a year-by-year and state-by-state comparison of arrest rates for marijuana possession).

<sup>192</sup> See THE PATH FORWARD, *supra* note 31, at 6 (citing to statistics compiled by the Center for Disease Control from its website, [www.cdc.gov](http://www.cdc.gov)).

<sup>193</sup> Press Release, U.S. Sentencing Commission, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences (July 18, 2014), available at [http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718\\_press\\_release.pdf](http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf).

are among the country's most draconian. Despite this, Florida Governor Rick Scott signed the Compassionate Medical Cannabis Act (nicknamed the "Charlotte's Web" bill) on June 16, 2014.<sup>194</sup> The law allows for the limited use of medical marijuana with low levels of THC by patients who meet certain requirements.<sup>195</sup> Through the initiative process, the Florida Right to Medical Marijuana Initiative, Amendment 2 is set to appear on the November 2014 ballot.<sup>196</sup> The voter-approved measure would legalize medical marijuana in the state, specifically guaranteeing the following:

- The medical use of marijuana by a qualifying patient or personal caregiver is not subject to criminal or civil liability or sanctions under Florida law except as provided in this section.
- A physician licensed in Florida shall not be subject to criminal or civil liability or sanctions under Florida law for issuing a physician certification to a person diagnosed with a debilitating medical condition in a manner consistent with this section.
- Actions and conduct by a medical marijuana treatment center registered with the Department, or its employees, as permitted by this section and in compliance with Department regulations, shall not be subject to criminal or civil liability or sanctions under Florida law except as provided in this section.<sup>197</sup>

The measure also defines a "debilitating medical condition" as

cancer, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis or other conditions for which a physician believes that the medical use of marijuana

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<sup>194</sup> See 2014 Fla. Laws 157.

<sup>195</sup> See § 381.986 (2), Fla. Stat. (2014).

<sup>196</sup> Use of Marijuana for Certain Medical Conditions 13-02 (2014 GEN), <http://election.dos.state.fl.us/initiatives/fulltext/pdf/50438-2.pdf> (proposed constitutional amendment art. X, § 29(a)(1)-(3)).

<sup>197</sup> FLA. CONST. art. X, § 29(a)(1)-(3) (Proposed Amendment 2014).

would likely outweigh the potential health risks for a patient.<sup>198</sup>

The Florida Department of Health would be in charge of regulating production, distribution, and use of medical marijuana in the state.<sup>199</sup> The department would issue identification cards to patients and personal caregivers, as well as develop procedures related to treatment centers.<sup>200</sup>

Other state and local governments have also jumped aboard the marijuana legalization train, and are seeking to implement new marijuana legislation. Portland, Maine became the first east coast city to legalize recreational marijuana for adults twenty-one and older.<sup>201</sup> Citizens in the Michigan cities of Lansing, Jackson, and Ferndale voted to allow the possession of up to an ounce of marijuana on private property.<sup>202</sup> Advocates are reportedly pushing for full commercial legalization of marijuana for recreational use in Alaska, which would then join Colorado and Washington to have such drug laws.<sup>203</sup> Pro-recreational initiatives could be on the 2016 ballot in Oregon, and are expected to appear in Arizona, California, Maine, Massachusetts, Montana, and Nevada.<sup>204</sup> As of July 31, 2014, twenty-three states and the District of Columbia have enacted laws legalizing medical marijuana, the latest being New York and Maryland.<sup>205</sup> Florida, Pennsylvania, North Carolina, and Ohio currently have pending legislation or ballot initiatives to legalize use of medical marijuana.<sup>206</sup>

According to a Gallup poll taken in late October 2013, a majority of Americans, for the first time ever, believe that marijuana should be legalized in some form (the figure stands at fifty-eight percent (58%), a notable increase since Colorado and Washington voted for legalization

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<sup>198</sup> FLA. CONST. art. X, § 29(b)(1).

<sup>199</sup> *See id.* at (d).

<sup>200</sup> *See id.* at (d)(1) and (2).

<sup>201</sup> *See* Robin Wilkey, *Portland, Maine, Legalizes Recreational Marijuana*, HUFFINGTON POST (Nov. 5, 2013, 9:56 PM), [http://www.huffingtonpost.com/2013/11/05/portland-maine-marijuana\\_n\\_4221919.html](http://www.huffingtonpost.com/2013/11/05/portland-maine-marijuana_n_4221919.html).

<sup>202</sup> Ray Sanchez & Michael Martinez, *Colorado Pot Law Called Springboard for Other States*, CNN (Jan. 6, 2014, 10:29 PM), <http://www.cnn.com/2014/01/03/us/marijuana-laws-united-states/>.

<sup>203</sup> *See id.*

<sup>204</sup> *See id.*

<sup>205</sup> 23 *Legal Medical Marijuana States and DC*, PROCON.ORG (July 31, 2013), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

<sup>206</sup> *See Six States with Pending Legislation to Legalize Medical Marijuana*, PROCON.ORG (Aug. 27, 2014), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481>.



back in November 2012).<sup>207</sup> The momentum is building, and the trajectory is unmistakably toward some form of legalization in most states. The structure and fate of these future initiatives and pending propositions depend in large part on the outcomes and successes in Colorado and Washington in the course of the next few years, as well as on the response of the federal government. For now, this transitory period is marked by a dependence on federal discretion, and the necessity to allocate limited investigative and prosecutorial resources. The future of this current policy of restraint, however, remains uncertain, as any shift in executive power after 2016 could unravel any progress made on legalization.

## VI. “CANNABUSINESS” AND ITS ETHICAL IMPLICATIONS

Legal marijuana presents numerous business opportunities to those seeking profit in the emergent industry. “This potentially explosive growth in the marijuana business will create large opportunities for investors [and all types of prospectors], but also an exponential increase in the number of people affected by the current web of overlapping and contradictory state and federal regulation[s].”<sup>208</sup> As the industries for both medical and recreational marijuana use expand, more and more people find it increasingly difficult to determine where the line between permissible and impermissible conduct ought to be drawn. The reality of the situation is this: owning and operating licensed dispensaries, legal ventures under state law, are nonetheless subject to felony prosecutions and exist at the mercy of federal discretion.

Professor Sam Kamin posits that Rule 1.2 from the Model Rules of Professional Conduct<sup>209</sup> allows clients much needed access to lawyers in this complex and confusing area of conflicting law.<sup>210</sup> Kamin argues that since the states are choosing to adopt laws contrary to the federal government by implementing regulatory systems to govern the marijuana industry within their borders, “access to law and lawyers becomes a necessary aspect of . . . this policy decision.”<sup>211</sup> The current legal climate is in such a state of flux and confusion that this fundamental tenant of our society becomes more important than ever. If state laws create the regulatory scheme, within which clients are permitted to apply for

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<sup>207</sup> See Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP POLITICS (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>.

<sup>208</sup> Kamin & Wald, *supra* note 18, at 885-86.

<sup>209</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983).

<sup>210</sup> Kamin & Wald, *supra* note 18, at 872.

<sup>211</sup> *Id.* at 907.

licenses, negotiate leasing agreements, offer employment contracts, and do all things necessary for a business to legally thrive, “denying [them] the assistance of counsel triggers questions of access to law, lawyers, and legal services.”<sup>212</sup>

With the newly emerging marijuana business complicated by the fact that production, sale, possession, and use of the drug remains a federal crime, lawyers are forced to navigate an ethical labyrinth fraught with uncertainty as they counsel and assist their clientele. “Because all lawyers have an obligation not to knowingly assist criminal conduct”<sup>213</sup> pursuant to Rule 1.2, taking on marijuana-related business clients exposes them to ethical, criminal, and disciplinary consequences. In the realm of criminal law, Kamin looks to accomplice and coconspirator liability doctrines as guides in the first step of his analysis, and he draws a critical distinction between mere *knowledge* and requisite *intent* when providing legal services to these marijuana clients.<sup>214</sup> Rule 1.2(d) of the Model Rules is then closely examined, along with its conflicting interpretations and Kamin’s proposed reading of it. With the ever-present threat of federal prosecution held at bay by only prosecutorial discretion and restraint, lawyers must tread carefully when representing clients in this newly budding business.

According to Kamin, in order for a lawyer to be criminally liable for providing legal services to marijuana clients under either an accomplice or coconspirator theory of liability, the lawyer must possess the requisite intent, or mental state.<sup>215</sup> An effective way of understanding this difficult concept is to try and determine whether the lawyer intentionally associates himself with a criminal venture or participates in such a way that his actions demonstrate a desire to make it succeed.<sup>216</sup> In expounding on the distinction between a knowledge requirement and an intent standard, Kamin makes a relatively faulty analogy that he later admits is improper, but nonetheless helps to establish his idea. He equates a lawyer with a merchant, and notes that “a merchant is not liable for failing to take steps to keep her lawful goods or services from being misused”<sup>217</sup> by clients. This analogy later unravels because the attorney-client relationship is unique and incomparable to the relationship between a merchant and a customer.

An attorney-client relationship more often than not requires the exchange of confidential communications and the disclosure of

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<sup>212</sup> *Id.* at 920.

<sup>213</sup> *Id.* at 871.

<sup>214</sup> *Id.*

<sup>215</sup> *See id.* at 886-92.

<sup>216</sup> *See id.* at 898.

<sup>217</sup> *Id.* at 889.

information in order to advance the interests and objectives of the client, whereas a merchant-customer relationship does not, being more impersonal in nature. Kamin remarks that “it is intuitive to argue that the case for punishing knowing facilitation of a crime is stronger vis-à-vis lawyers than it is with regard to other merchants.”<sup>218</sup> Yet, because the exchange of information and knowledge is more important in the attorney-client relationship, and because lawyers provide an often constitutionally based societal good,<sup>219</sup> punishing them based on a mere knowledge basis severely undermines their purpose and effectiveness. Thus “a mens rea of true intent is an important protection against prosecutorial overreaching in the event of prosecution of marijuana lawyers”<sup>220</sup> as either accomplices or conspirators to violations of federal law. Although such prosecutions are rare, lawyers are still subject to criminal liability, but are more likely to face some form of professional discipline.<sup>221</sup>

Legal rights exist to protect an individual’s autonomy, essential to human dignity. “Access to law and lawyers in a highly regulated society is fundamental to the informed exercise of autonomy by clients.”<sup>222</sup> Providing effective representation presupposes the ability to counsel and assist clients with their legal needs, even those with marijuana-related legal quandaries. Rule 1.2 outlines the scope of such representation, and paragraph (d) states that

[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with the client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of law.<sup>223</sup>

Federal law makes the production, sale, and possession of marijuana a federal crime.<sup>224</sup> If a client is looking to gain a foothold in the marijuana business by operating a dispensary, he is in violation of federal law. A lawyer called upon to counsel and assist the client in such conduct would seemingly have actual knowledge of his client’s criminal activity, thus violating Rule 1.2(d), which prohibits the lawyer from participating in

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<sup>218</sup> *Id.* at 896.

<sup>219</sup> *See id.*

<sup>220</sup> *Id.* at 897.

<sup>221</sup> *See id.* at 890.

<sup>222</sup> *Id.* at 907.

<sup>223</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (1983).

<sup>224</sup> *See* Controlled Substances Act, 21 U.S.C. § 903 (2012).

the commission of crime, regardless of whether the state permits such conduct.<sup>225</sup> Kamin suggests that this plain reading of the Rule with a traditional interpretation is impractical, for such a mechanical approach precludes a lawyer “from drafting documents, representing the client, negotiating on her behalf, or offering any kind of [meaningful] legal services”<sup>226</sup> related to the marijuana business, effectively denying the client access to the law. Whether such a plain reading can be dismissed so easily may well depend on the evolution of both law and societal ethos as it relates to marijuana use and its perceived economic benefits.

Indeed, the argument has been made that counseling clients on how to avoid federal prosecution for marijuana-related offenses using state laws as a shield contravenes the purpose of Rule 1.2.<sup>227</sup> Many believe that the legal advice given should not go beyond explaining legal consequences for certain conduct, and determining the “validity, scope, meaning, or application of the law.”<sup>228</sup> In 2010, the Maine Ethics Commission released an opinion regarding the ethical dilemma lawyers might face aiding medical marijuana clients.<sup>229</sup> The Commission proposed a cautionary approach, warning lawyers that “participation in this endeavor . . . involves a significant degree of risk which needs to be carefully evaluated,”<sup>230</sup> and a determination must be made as to “whether the particular legal service being requested rises to the level of assistance in violating federal law.”<sup>231</sup> If so, such conduct may represent an ethical breach. On the other hand, the Arizona Bar Ethics Committee released a similar opinion the following year, but came to a vastly different conclusion.<sup>232</sup> The Arizona Committee declined

to interpret and apply [Rule 1.2] in a manner that would prevent a lawyer who concludes that the client’s proposed conduct is in “clear and unambiguous compliance” with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the

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<sup>225</sup> See Kamin & Wald, *supra* note 18, at 903.

<sup>226</sup> *Id.* at 902.

<sup>227</sup> See A. Claire Frezza, *Counseling Clients on Medical Marijuana: Ethics Caught in Smoke*, 25 GEO. J. LEGAL ETHICS 537, 552 (2012).

<sup>228</sup> *Id.* (quoting MODEL RULES OF PROF’L CONDUCT R. 1.2(d)).

<sup>229</sup> Maine Prof’l Ethics Comm’n, Op. 199 (2010), available at [http://www.mebaroveseers.org/attorney\\_services/opinion.html?id=110134](http://www.mebaroveseers.org/attorney_services/opinion.html?id=110134).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> See State Bar of Arizona, Formal Op. 11-01 (2011), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government.<sup>233</sup>

The contradiction between these two opinions at first glance seems insurmountable. Maine stresses extreme caution in response to federal prohibition, while Arizona seeks to carve out an area for lawyers to ethically represent marijuana clients within the context of state law. This dichotomy exemplifies the difficulties attorneys have to face, as distinct state landscapes lead to divergent interpretations of the ramifications federal law has on the sphere of legal ethics. In order to bridge the gap between these two conflicting opinions, Kamin relies on his criminal law distinction approach, discussed earlier, between mere knowledge and true intent, which he believes will provide some level of stability for lawyers bemused by the ethical challenges.<sup>234</sup>

Kamin's use of true intent, however, takes on an amorphous quality as he lays out distinctions in an attempt to define its scope and function. The distinctions he makes between different criminal acts, state and federal venues, criminal courts and professional disciplinary hearings, all tend to make "intent" within a particular setting murky at best. Lawyers require some level of certainty to effectively represent their clients, especially in the business world. However, with the fluid status of the state-federal tension, lawyers may just have to cope with speculative analysis and some ambiguities for the time being. Kamin's ingenious analysis attempts to forge clarity, and succeeds to the extent possible in coming to grips with this complex ethical quandary. One distinction Kamin emphasizes is when dealing with *mala in se* crimes, such as murder, rape, robbery, and assault, as opposed to *mala prohibita* crimes—deemed crimes merely because they are prohibited (for example, violations of the Controlled Substances Act).<sup>235</sup> In relation to *mala in se* crimes, Kamin believes that a mere knowledge requirement on the part of lawyers may be more justified to hold them liable for certain conduct.<sup>236</sup> On the other hand, *mala prohibita* crimes do not warrant such limited access and "strong policy reasons support the reading of an intent requirement into Rule 1.2(d)."<sup>237</sup> Production, possession, use, and sale of marijuana would fall under the category of *mala prohibita* crimes, thus Kamin argues "that an intent to facilitate such behavior is necessary in

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<sup>233</sup> *Id.*

<sup>234</sup> Kamin & Wald, *supra* note 18, at 905-06.

<sup>235</sup> *Id.* at 907-08.

<sup>236</sup> *Id.* at 908.

<sup>237</sup> *Id.*

order for an attorney to be deemed to have engaged in unethical or criminal conduct."<sup>238</sup>

Whether a lawyer always forms an intent, in the legal sense, to help their clients is a critical question.<sup>239</sup> Rule 1.2(b) reminds us that "a lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social, or moral views or *activities*."<sup>240</sup> Yet, one could argue that the ability to effectively represent a client depends upon an understanding of that client's activities, which could form the requisite intent and trigger a violation of Rule 1.2(d). Throughout this ongoing process of change, however, more questions are raised than answers provided, but according to Kamin, so long as a lawyer provides the same services and issues the same charges to marijuana clients that she does to the rest of her business clientele,<sup>241</sup> and does not form the requisite intent read into Rule 1.2(d),<sup>242</sup> then that lawyer acts ethically and is permitted to provide competent legal representation and assistance. This type of definite fixing of ethical clarity is the main driving force behind Kamin's exhaustive Article.

## VII. TAXATION ISSUES AND THE ROLE OF THE FIFTH AMENDMENT

Apart from possible ethical concerns, some federal laws, particularly in the area of taxation, pose other challenges to lawyers and create significant obstacles to the success of these marijuana industries. As noted by several of the speakers in the September 10<sup>th</sup>, 2013, Senate Judicial Committee hearing, Section 280E of the Internal Revenue Code prohibits a taxpayer from claiming a federal income tax deduction for a "business considered to be trafficking substances under the Controlled Substances Act . . . .Section 280E effectively bars legal marijuana businesses operating in Colorado [and other states] from claiming the types of business expense deductions that other legal businesses can claim."<sup>243</sup> In response, Colorado has enacted legislation that gives both medical and recreational marijuana enterprises the ability to deduct business expenses from their state income tax returns, even though Section 280E bars such action at the federal level.<sup>244</sup> Advocates in Colorado are joined by others from several states in urging Congress to

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<sup>238</sup> *Id.* at 909.

<sup>239</sup> *Id.* at 911.

<sup>240</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (1983) (emphasis added).

<sup>241</sup> *See* Kamin & Wald, *supra* note 18, at 920.

<sup>242</sup> *See id.* at 921.

<sup>243</sup> Statement of Finlaw, *supra* note 114, at 4.

<sup>244</sup> *See id.* (referencing H.B. 13-1042, Reg. Sess. (Colo. 2013)).

revise the federal tax code, so that it would allow for marijuana businesses to claim such deductions.<sup>245</sup>

There have also been novel interpretations of current federal tax law that attempt to avoid the impact of Section 280E. One recent Article proposes a resolution to the problem by recasting the marijuana industry in the guise of community based “economic development corporations” that promote social welfare.<sup>246</sup> This would enable these businesses to qualify for tax-exempt status under § 501(c)(4) of the federal tax code.<sup>247</sup> According to the author, some of the federalism concerns would be resolved, specifically in the area of tax law.<sup>248</sup> Under his scheme, federal taxation issues would yield to a genuinely new vision of the emerging marijuana industry. This Comment believes, however, given the economic realities and expectations inherent in the growing legal marijuana market, that this reconfiguring of the new industry probably dissipates in the face of the capitalist imperative to generate revenue and maximize profits. The current tax issue, coupled with the unwillingness of banks and credit card companies to back the marijuana industry, has made it exceedingly difficult for these businesses to function and succeed.

Sophisticated and unsophisticated clients alike may struggle to comprehend the conflicting and complex marijuana regimes of both the state and federal government, turning to lawyers for sound advice and clear guidance.<sup>249</sup> The taxation problem not only deprives marijuana businesses from enjoying the deductions that other legitimate businesses enjoy, but filing federal income taxes potentially invites the federal government to exercise its discretion and enforce federal drug policy. In this context, the Fifth Amendment’s right against self-incrimination is implicated. The relevant language states that “no person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>250</sup> When filing a federal tax return, how should a marijuana business describe their business activity, or indicate what kind of product or service they provide? Pursuant to the Internal Revenue Code, returns or return

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<sup>245</sup> See *id.* at 8.

<sup>246</sup> Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 537-43 (2014).

<sup>247</sup> See *id.*

<sup>248</sup> See *id.* at 568.

<sup>249</sup> See Wei-Chih Chiang, Yong-Gyo Lee & Jianjin Du, *Judicial Guidance on Medical Marijuana Tax Issues*, 92 PRACTXST 266 (2014) (concluding that under the current interpretation of Section 280E, medical marijuana businesses cannot deduct business expenses on their federal tax returns, but they could potentially deduct costs of goods sold to derive gross income, regardless of Section 280E).

<sup>250</sup> U.S. CONST. amend. V.

information may be disclosed for use in criminal investigations.<sup>251</sup> With Colorado and Washington dispensaries now manufacturing and selling recreational marijuana, is it only a matter of time before the federal government kicks down their doors, armed with tax records indicating conduct in violation of the Controlled Substances Act? The likely answer is no.

As a general proposition, "Fifth Amendment jurisprudence does not allow the privilege against self-incrimination to be invoked in order to avoid generally applicable reporting requirements that do not target inherently suspect activities."<sup>252</sup> Many federal and state statutes require individuals to submit documents containing information that may prove self-incriminating, but this does not make them unconstitutional *per se*. Generally as a threshold issue, the Fifth Amendment privilege only comes into play if there is a real and substantial threat of prosecution and risk of self-incrimination.<sup>253</sup> The production and sale of marijuana for any purpose, medicinal or recreational, constitutes a federal crime. Although the Department of Justice's August 29, 2013, memorandum instructs federal prosecutors throughout the country to exercise their prosecutorial discretion and direct their use of limited resources to address the most significant threats, the memorandum is careful to reserve the federal government's right to enforce federal law, even in the absence of any one of the listed enforcement priorities.<sup>254</sup> Under the Controlled Substances Act, marijuana dispensaries face a real and appreciable risk of prosecution subject only to federal discretion and restraint.<sup>255</sup> Thus it appears that the "merits of a Fifth Amendment defense to the tax filing requirement"<sup>256</sup> warrants closer examination.

In a pithy opinion published in 1927, the Supreme Court in *United States v. Sullivan* upheld a conviction when a defendant failed to file an income tax return.<sup>257</sup> The Court noted that "[i]t would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."<sup>258</sup> A few years later in *Garner v. United States*, the Court refused to find that the use of a tax statement violated

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<sup>251</sup> I.R.C. § 6103(i)(1)(A)(i-iii) (2006).

<sup>252</sup> Memorandum from State of Ariz., Office of the Att'y Gen. on Transaction Privilege Tax Upon Med. Marijuana Sales to the Ariz. State S. 7 (July 7, 2011), available at <https://www.azag.gov/sites/default/files/I11-004.pdf> [hereinafter Ariz. Memo].

<sup>253</sup> See *id.* at 5.

<sup>254</sup> See Cole Memo 2013, *supra* note 82, at 4.

<sup>255</sup> See *infra* p. 14.

<sup>256</sup> Ariz. Memo, *supra* note 252, at 7.

<sup>257</sup> *United States v. Sullivan*, 274 U.S. 259 (1927).

<sup>258</sup> *Id.* at 263-64.



defendant's Fifth Amendment privilege.<sup>259</sup> Courts since have analyzed the issue with the presumption that a "statutory reporting requirement is essential to a public, regulatory scheme, rather than designed to obtain private information or evidence of criminal activity."<sup>260</sup> Thus, a company answering a generally innocent question on a tax return form, such as indicating what product or service the business provides, cannot be said to have been *compelled* within the meaning of the Fifth Amendment.<sup>261</sup>

A federal income tax return may pose a real and appreciable risk of self-incrimination, but it is not designed to compel the disclosure of *testimonial* information that would bring it within the purview of the Fifth Amendment. The information generally disclosed in the filing of such a tax statement is essentially considered a "noncriminal and regulatory area of inquiry."<sup>262</sup> Marijuana dispensaries are basically considered to be retail stores engaged in the activity of "selling tangible personal property at retail . . . [and] can hardly be characterized as a selective group inherently suspect of criminal activities."<sup>263</sup>

The case of *California v. Byers* delivers an enlightening summary that provides some clarity on the taxation issue and the role of the Fifth Amendment:

An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere . . . .

In each of these situations there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information that the law compels a person to supply . . . .But under our holdings the mere possibility of incrimination is

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<sup>259</sup> See *Garner v. United States*, 424 U.S. 648 (1976).

<sup>260</sup> CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 403-4 (2008).

<sup>261</sup> See *id.* at 401.

<sup>262</sup> *California v. Byers*, 402 U.S. 424, 430 (1971) (internal citations omitted).

<sup>263</sup> *Ariz. Memo*, *supra* note 252, at 9 (internal quotation marks omitted).

insufficient to defeat the strong policies in favor of disclosure called for by [federal] statutes.<sup>264</sup>

Following the majority, Justice Harlan's concurring opinion in *Byers* articulates this policy approach.<sup>265</sup> In balancing the state's interests against those of the individual, Harlan contends that the "assertedly non-criminal governmental purpose in securing information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosure required"<sup>266</sup> effectively estops a defendant from raising a valid Fifth Amendment defense "to a generally applicable requirement to report sales revenues and remit sales tax."<sup>267</sup> Whether Harlan's reasoning waters down constitutional guarantees is open for debate. Regardless, the key consideration to address in this potentially problematic area is whether the taxation scheme (in this case the federal income tax return) "is designed to facilitate the government's legitimate needs for regulatory information rather than undercut the adversary system by covertly aiding the investigation and prosecution of crime."<sup>268</sup> Thus far, the former inference has prevailed; but with much change on the marijuana legalization horizon, it is difficult to determine what the future might hold. Will this seemingly well-settled area of law remain resolute, or will legalized marijuana force it to evolve and adapt as this movement gains momentum?

### VIII. FUTURE MUSINGS

There has been an undeniable shift in the United States regarding marijuana legalization. The topic has fluttered in and out of national conversation and debate for almost a century, and according to recent opinion polls, public perceptions about the drug have come a long way. History has shown time and time again that progress is a powerful and ultimately inevitable force. Prohibition has been a "blunt" tool before, and was shown to be ineffective. Nationwide prohibition of alcohol began in 1920 with the ratification of the Eighteenth Amendment.<sup>269</sup> Despite prohibitionist efforts, alcohol consumption continued to rise in several areas of the country, and organized crime increased in an effort to produce and distribute the highly demanded product. A "disconnect

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<sup>264</sup> *Byers*, 402 U.S. at 427-28.

<sup>265</sup> *Byers*, 402 U.S. at 434-58 (Harlan, J., concurring).

<sup>266</sup> *Id.* at 454.

<sup>267</sup> WHITEBREAD & SLOBOGIN, *supra* note 259, at 405.

<sup>268</sup> *Id.* at 406.

<sup>269</sup> *See* U.S. CONST. amend. XVIII.

between strong official condemnation and widespread popular acceptance led to the failure of Prohibition,”<sup>270</sup> and the Twenty-First Amendment was passed, repealing the ban on alcohol.<sup>271</sup> Scholars, however, point to an inherent difference between alcohol and marijuana, noting that history, custom, and practicality played a vital role because “centuries of tradition and decades of marketing . . . left alcohol use a deeply ingrained feature” of our societal psyche.<sup>272</sup> Marijuana, on the other hand, is not as equally entrenched . . . at least, not yet.<sup>273</sup>

With so much ongoing change, and more guaranteed to come, many people speculate on what the future holds. Marijuana advocates are constantly trying to decriminalize marijuana at both the state and federal level and ignite reform. Legislative bills like the Ending Federal Marijuana Prohibition Act<sup>274</sup> and the Respect State Marijuana Laws Act<sup>275</sup> have been presented to Congress as part of the decriminalization effort.

On July 28, 2014, the Charlotte’s Web Medical Hemp Act was introduced in the House of Representatives.<sup>276</sup> This bipartisan bill seeks to amend the Controlled Substances Act by excluding “therapeutic hemp” and “cannabidiol” from the definition of marijuana.<sup>277</sup> Furthermore, a bipartisan coalition of House members voted on an appropriations amendment that seeks to restrict the DEA from utilizing funds “to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>278</sup> Advocate groups have also attempted to reschedule marijuana by navigating the alternative route of judicial review. In October 2002, Americans for Safe Access, the Coalition to Reschedule Cannabis, and Patients Out of Time petitioned the DEA to reschedule marijuana as a Schedule III, IV, or V drug. Nine years later, in July 2011, the DEA denied the petition. The petitioners subsequently filed for a timely review of the DEA’s action. Unfortunately in January 2013, the United States Court of Appeals in the District of Columbia Circuit struck down the petition to reschedule the drug in *Ams. for Safe Access v. Drug*

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<sup>270</sup> Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 166 (2012).

<sup>271</sup> See U.S. CONST. amend. XXI.

<sup>272</sup> CAULKINS ET AL., *supra* note 1, at 136.

<sup>273</sup> See *id.*

<sup>274</sup> Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013).

<sup>275</sup> Respect State Marijuana Laws Act of 2013, H.R. 1523, 113th Cong. (2013).

<sup>276</sup> Charlotte’s Web Medical Hemp Act of 2014, H.R. 5226, 113th Cong. (2014).

<sup>277</sup> See *id.*

<sup>278</sup> The Commerce, Justice, Science, and Related Agencies Appropriations Act of 2015, H.R. 4660, 113th Cong. (as amended by House, May, 30, 2014).

*Enforcement Admin.*<sup>279</sup> The Court held that there was substantial evidence supporting the DEA's findings that no adequate and well-controlled studies have established any currently accepted medical uses for marijuana.<sup>280</sup> A future determination as to the federal-state law conflict issue could clear the air of uncertainty surrounding many topics of concern.

With "any potential conflict between state and federal authority, . . . lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy."<sup>281</sup> The legal profession is comprised of individuals endlessly "pursing a learned art as a common calling in the spirit of public service."<sup>282</sup> This "calling" encourages lawyers to represent their clients without fear and to the fullest extent possible, although it is necessarily bound by ethical and legal constraints, which may sometimes dictate a cautionary approach.

Significant obstacles still lie ahead for the marijuana legalization movement,<sup>283</sup> and lawyers will continue to work on resolving such issues. Present and future state implementation and regulation efforts remain hindered by current uncertainty connected with the fluid state of federal banking regulations. If forced to be cash-only enterprises, marijuana dispensaries will continue to be targets for criminal activity. Banks and credit companies may still be hesitant to do business with marijuana industries while federal enforcement remains unpredictable in the absence of new congressional legislation. On top of such frustration, these businesses cannot claim the tax deductions that other legitimate businesses enjoy. Now although the invocation of the Fifth Amendment in regard to federal tax returns has been considered generally ineffective, in the context of the rising recreational marijuana industry, the Amendment poignantly highlights a growing constitutional uneasiness that must soon be addressed.

Marijuana use will continue to increase—whether for medical or recreational purposes—and the confusion and conflict over the current legalization movement will eventually prompt federal action because "when it comes to the overlapping regulation of marijuana in the United

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<sup>279</sup> See *Ams. for Safe Access v. DEA*, 706 F.3d 438 (D.C. Cir. 2013).

<sup>280</sup> *Id.* at 452.

<sup>281</sup> State Bar of Arizona, Formal Op. 11-01 (2011), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

<sup>282</sup> *Id.* at 910 (quoting ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953)).

<sup>283</sup> See *infra* pp. 20-23.

States, the status quo is clearly untenable.”<sup>284</sup> The federal government may elect to respond in a manner of different ways.<sup>285</sup> It could attempt to

(1) sue to invalidate the state laws under the Supremacy Clause and to enjoin state authorities from issuing licenses to marijuana growers and sellers; (2) use injunctions, threats of asset forfeiture, or criminal prosecution to shut down state-licensed marijuana businesses; (3) unilaterally establish a set of enforcement priorities to de-emphasize attacks on state-legal businesses; or (4) enter into cooperative enforcement agreements with the states that could implicitly allow state-regulated systems to function, though without making them legal under federal law.<sup>286</sup>

Under the Supreme Court’s federalism jurisprudence however, “the federal government is prohibited from commandeering the state legislatures or state executive officials by mandating that states enact certain legislation or implement or enforce a federal law.”<sup>287</sup> The preemptive language in the Controlled Substances Act limits Congress’ power to compel the states to enforce its provisions, and gives leeway to the states to pass marijuana-related legislation so long as a “positive conflict” is not created. Thus far, states have taken advantage of this, steadily increasing their control over the production, possession, sale, and use of marijuana within their borders. Now, the federal government most likely cannot direct the states to completely prohibit marijuana or repeal their existing exemptions and regulations, but they may be able to elicit support for federal policy among the states by directing monetary incentives in the form of federal funds in return for cooperation to further a federal interest (for example, state legislation consistent with the Controlled Substances Act.<sup>288</sup> As far as option (2) is concerned (see above), limited investigative and prosecutorial resources already hamper

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<sup>284</sup> Kamin, *supra* note 270, at 165.

<sup>285</sup> See generally Counts, *supra* note 169, at 209 (providing some general recommendations and possible responses of the federal government if it wishes to continue pursuing policies underlying the Controlled Substances Act, or if it wishes to reconsider these policies in light of changing public opinion on marijuana).

<sup>286</sup> John Walsh, *supra* note 164, at 5.

<sup>287</sup> See *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”); see also *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”).

<sup>288</sup> See *South Dakota v. Dole*, 483 U.S. 203, 203 (1987) (“Incident to the spending power, Congress may attach conditions on the receipt of federal funds.”).

drug enforcement, and have already led to options (3) and (4) taking effect. The August 29, 2013, DOJ memorandum established a set of enforcement priorities to guide federal prosecutors across the country in the allocation of their resources. The memorandum also developed the expectation that state and local governments will enact and enforce strong and effective regulatory systems that promote the enumerated federal interests.<sup>289</sup> This reliance is an important step in the development of cooperative enforcement efforts.

Such an alliance could yield several potential advantages. Federal, state, and local governments can lend a hand in shaping the marijuana industry and benefit from its success; such a joint effort and pooling of resources could focus enforcement on more significant concerns. If marijuana was to be declassified as a Schedule I drug, and the federal government implemented regulatory and taxation systems similar to those in place for alcohol and tobacco, the resulting revenue could help reduce the national debt, allow for reallocation of law enforcement resources, and fund education and medical studies.<sup>290</sup> This new kind of regulatory framework, bound by principles of common sense and clear priorities, could enhance individual freedom, while at the same time, further the important goal of public safety. Lawyers will play an important part in formulating and implementing such a legalization regime, which will encompass both law enforcement and the regulation of the new marijuana industry. Such a movement will certainly pose practical obstacles and ethical dilemmas for legal practitioners, made more difficult by having to adapt to the fluid state of the law. Serious thought should be given to these issues now before the increasing momentum for legalization forces haphazard responses and empty rhetorical flourishes. Whatever the case may be, the prospect of some federal action seems inevitable.

## IX. CONCLUSION

The social, political, and economic implications of this pro-marijuana movement are difficult to anticipate. How might legalization affect past, present, and future drug violations, incarceration rates, allocation of state and federal resources, and use and dependence among society? Answers remain unclear, for even the wisest cannot foresee all ends. The efforts of Colorado and Washington will be like the falling of small stones that start an avalanche of change. Something has begun. Amendment 64 and Initiative 502 have come to embody an expression of

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<sup>289</sup> See Cole Memo 2013, *supra* note 82, at 2.

<sup>290</sup> See THE PATH FORWARD, *supra* note 31, at 14.

state sovereignty, a manifestation of individual liberty, and an opportunity to be a part of a potentially multi-billion dollar “green rush.” Have these steps toward legalization been part of a smarter, more common-sense approach? Or will Kevin Sabet’s cautionary closing declaration come to fruition—“would we open the floodgates, hope for the best, and try with limited resources to patch everything up when things go wrong?”<sup>291</sup> Only time will tell.

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<sup>291</sup> Statement of Sabet, *supra* note 98, at 11.