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A Call to Higher Action: Cannabis Prohibition in the United States and Canada Makes for an Uncertain Future

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A CALL TO HIGHER ACTION: CANNABIS PROHIBITION IN THE
UNITED STATES AND CANADA MAKES FOR AN UNCERTAIN
FUTURE

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I. INTRODUCTION

In the past decade, efforts in the United States and Canada towards cannabis legalization raise significant concerns about the conflict between federal regulation and state/province autonomy. While both countries share similar histories on the “war on drugs,”² the current political arena in each country is advancing diverging positions on the issues of cannabis prohibition and legalization at the federal level.³ Since 2013 the Canadian Liberal Party continues to provide compressive revisions to the legalization of cannabis.⁴ Such efforts have seen a remarkable expansion under the present leadership of Prime Minister Justin Trudeau. Cannabis legalization in the United States witnessed somewhat of a similar progression under President Obama’s term; however, President Trump’s tenure and his cabinet leave an indeterminate future to legalization

² Kara Godbehere Goodwin, *Is the End of the War in Sight?: An Analysis of Cana's Decriminalization of Marijuana and the Implications for the United States "War on Drugs,"* 22 Buff. Pub. Int. L.J. 199, 201 (2003).

³ Contributor article, *Canada Takes Next Step Towards National Marijuana Legalization*, ENTREPRENEUR, (Dec. 29, 2016), <https://www.entrepreneur.com/article/287046>.

⁴ *Id.*

and regulation of cannabis.⁵ A possible regression in cannabis legalization and regulation under President Trump will place the legal cannabis industry and its consumers in a precarious position. Steps towards cannabis legalization in each country provoke questions about how such legalization will affect the American-Canadian relationship, but more importantly, how far will the U.S. allow for the state legalization experiment to continue without federal action. Likewise, the two countries experience different positions in case-law regarding marijuana regulation, creating an impressive conflict of laws in the Western Hemisphere.

Each country focuses on different standards of enforcement and regulation regarding cannabis legalization; for example, Canada prioritizes health policy and the a right to security from criminal prosecution when attempting to obtain medical treatment.⁶ The experiment of legalizing medical cannabis ameliorated a few issues the illicit market imposed, as such, this became the move towards experimenting on adult use to further mitigate persistent

⁵ Associated Press in Toronto, *Canada's New Liberal Government Repeats Promise to Legalize Marijuana*, GUARDIAN, (Dec. 4, 2015), <https://www.theguardian.com/world/2015/dec/04/canada-new-liberal-government-legalize-marijuana>

⁶ Carolyn Conron, *Canada's Medical Marijuana Regulations: Up in Smoke*, 6 Albany Gov. L. Rev, 259, 267 (2013); Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.)

problems in banning cannabis. Response by the government was backed by court decisions focusing on the security of the individual from government intrusion.⁷ Contrary to Canada's focus, much of the U.S. government's case-law remains silent on the issue of individual rights⁸ regarding marijuana legalization; instead, policy is prescribed for rigorous drug regulation and crime prevention.⁹ Such distinct approaches taken by Canada and the United States makes it unclear how well the two countries will deal with a potentially emerging global market for cannabis in the future.¹⁰ Ending the state experiment through a harmonious application of cannabis law in the U.S. can address the uncertainty, while bringing substantial economic and social benefits as evidenced by the states and Canada that have addressed this issue. The lasting effects of silence will on bring unpredictable repercussions that need addressing through honest discussions about the impacts of the banning cannabis between the two governments.

This Note examines how each country's divergent policies towards cannabis reform, suggests these neighbors

⁷ Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91 (27) (U.K.).

⁸ Goodwin, *supra* note 1 at 214; *see also* Conron, *supra* note 5 at 267.

⁹ Goodwin, *supra* note 1 at 215.

¹⁰ Will Yakowicz, *Forget Colorado Weed, Marijuana Companies are Going Global*, Inc. (May 27, 2016), <http://www.inc.com/will-yakowicz/forget-indoor-weed-welcome-to-the-global-marijuana-market.html>.

deal with cannabis law in a similar way to prevent unknown impacts of legalization in one country and partial legalization in the other. Further, this note will examine how recent changes in the politics of each nation will engender more instability and conflict between the two, which need to be addressed by highest levels of government. Part II of this Note speaks to how the initial focus on the prohibition of cannabis, in both the United States and Canada, was due to discriminatory and nationalistic attitudes that were backed by the respective governments. Part III examines the prohibition effects vis-à-vis government action on cannabis reform: in the United States this was subject to state prerogatives, while, in Canada, the initiative was directly taken by Parliament. Part IV analyzes the overwhelming consequences created because of government indecision and the lack of dialogue between both countries regarding cannabis policy, whilst proposing solutions to those issues.

II. HISTORY OF MARIJUANA PROHIBITION IN CANADA AND THE UNITED STATES

A. THE GRINNO-WAY

The regulatory regime around cannabis policy in the United States witnesses a continual inconsistent development since the conception of the nation. Many suggest the *mêlée* of cannabis prohibition was motivated by misaligned judgments associating minorities with crime and

violence.¹¹ Nevertheless, within the past decade, the legalization of cannabis at the state level attempts to ameliorate the sins of the past through comprehensive regulation and enforcement of legal medicinal and/or recreational marijuana. With an awareness of the potential benefits that may bear fruit from legalization, states have heeded the widespread approval by the American populous:¹² the 2016 election concluded with 29 states legalizing cannabis in some form.¹³ However, the

¹¹ See generally Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 325 (2011) (Recounting early marijuana prohibition in U.S. as largely motivated by racism).

¹² See generally Art Swift, *Support for Legal Marijuana Use Up to 60% in US*, GALLUP.COM, (Oct 19, 2016) (demonstrating that about 60% of there the populations favor legalization for either medical use or recreational use, which is the highest data has shown in the 47-year tread), <http://www.gallup.com/poll/196550/support-legal-marijuana.aspx>

¹³ See Sara G. Miller *3 More States Legalize Recreation Use of Marijuana: How the Map Looks Now*, LIVE SCIENCE, (Nov 9, 2016), <http://www.livescience.com/56807-recreational-marijuana-california-massachusetts-nevada.html> Recreational use of marijuana is now allowed, along with the District of Columbia, in Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington. While medical use of marijuana is now allowed in Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, and Vermont.

contemporary trend towards cannabis legalization highlights significant disparities between state and federal laws. Additionally, one may wonder where the trajectory of the future of federal marijuana legalization may progress with the Trump Administration and Senator Jeff Sessions as Attorney General—a known challenger of cannabis legalization.¹⁴ Issues of federalism, coupled with the election of a republican majority government, may put the progression of cannabis legalization in limbo or regress, which could conceivably hinder U.S. relations with a promising legal market in neighboring Canada, if federal inaction ensues.

1. THE BEGINNING YEARS

The inception of cannabis prohibition in the United States began no more than a century ago. During the colonization of the free nation, the consumption, production, and sale of

¹⁴ See Christopher Ingraham, *Trump's pick for attorney general: 'Good people don't smoke marijuana'*, Wash. Post, (Nov 18 2016) https://www.washingtonpost.com/news/wonk/wp/2016/11/18/trump-pick-for-attorney-general-good-people-dont-smoke-marijuana/?utm_term=.b77ea1288eac (“At a Senate drug hearing in April, Sessions said that “we need grown-ups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized, it ought not to be minimized, that it’s in fact a very real danger.” He voiced concern over statistics showing more drivers were testing positive for THC, the active component in marijuana, in certain states”).

cannabis was legal due to a high reliance on hemp at the time.¹⁵ By the close of the nineteenth century, cannabis became, alongside tobacco and cotton, one of the leading crops produced in the Americas.¹⁶ During this time, physicians often prescribed cannabis for medical treatment;¹⁷ however, after a rise in opiate addiction following the Civil War, cannabis fell under the same fate as many other commonly persecuted drugs, such as heroin and cocaine.¹⁸ Moreover, much of the early restrictions on cannabis are documented as being under the guise of federal drug regulatory objectives backed with discriminatory sentiments,

¹⁵ RICHARD J. BONNIE & CHARLES H. WHITEBREAD, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 51-53 (1974); *See also* PATRICK ANDERSON, *HIGH IN AMERICA* 47 (1981).

¹⁶ STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS*, xv (1993)

¹⁷ STEVEN W. BENDER, *RUN FOR THE BORDER: VICE AND VIRTUE IN US-MEXICO BORDER CROSSINGS* (2012)

¹⁸ *See generally* DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 70, 71 (2007)

which were immensely supported by states until recently.¹⁹ Scholars suggest that xenophobic and racist opinions inundated early cannabis prohibition due to an influx of Mexican and Chinese immigrants into the states.²⁰

At the turn of the twentieth century, the use of cannabis was frequently and mistakenly associated with minority groups and crime, especially in Latino and Black communities.²¹ Although active legislation was put in place to combat addiction, none made mention of a direct cannabis

¹⁹ Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J. L. REFORM 707, 749–51 (1998) (“In 1937, Harry J. Anslinger was serving as the United States Commissioner of Narcotics Anslinger's appeal to racism and hysteria was unabashed. He and other proponents of the Marijuana Tax Act argued that marijuana caused criminal and violent behavior Anslinger stated that, ‘[m]arihuana [was] an addictive drug which produce[d] in its users’ insanity, criminality, and death’”).

²⁰ See generally PROVINE, *supra* note 17 at 70 -71; Carcieri, *supra* note at 10 at 325.

²¹ THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 16 (1972) <http://babel.hathitrust.org/cgi/pt?id=mdp.39015015647558;view=1up;seq=5>.

prohibition²² until Congress set out to regulate marijuana through a tax.²³ Initial federal prohibition was backed by sentiments displayed, for example, in the polemic film, *Reefer Madness* (1936),²⁴ “which depicted marijuana users as murderous fiends.”²⁵ Prohibitionist and Federal Narcotics Bureau Commissioner, Harry J. Anslinger, used the film as an exemplar of how cannabis was the “assassin of the

²² Harrison Anti-Narcotic Act, Ch. 1, 38 Stat. 785 (1914) (requiring registration and special tax to produce or dispense opium or coca leaves or their derivatives but gives no mention about similar procedures for marijuana); see also LISA N. SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R43164, STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT 3 (2013), <https://www.fas.org/sgp/crs/misc/R43164.pdf> (“Until 1937, the growth and use of marijuana was legal under federal law. The federal government unofficially banned marijuana under the Marihuana Tax Act of 1937”).

²³ Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81-82 (2015).

²⁴ Nick Wing, *Marijuana Prohibition was Racist from The Start. Not Much Has Changed*, Huffington Post, (Jan 14, 2014) (discussing *Reefer Madness* and Government discriminatory tactics in marijuana prohibition), http://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist_n_4590190.html.

²⁵ See Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 363 (2013). <http://digitalcommons.law.seattleu.edu/faculty/116>.

youth,” inducing violent behavior and repercussion more destructive than any other drug.²⁶ The vilification of cannabis permitted Congressional introduction of the Marihuana Tax Act of 1937, “bann[ing] the unlicensed and non-medicinal use” of cannabis.²⁷ The American Medical Association (AMA), vigorously opposed marijuana’s drop from the Federal Pharmacopeia, contending that the use of cannabis could be useful for medicinal purposes, and that there was no legitimate evidence demonstrating cannabis to provoke criminal conduct.²⁸

Notwithstanding credible opposition, Congress approved the Act and reclassified cannabis as a controlled substance.²⁹ Though the Act did not declare cannabis *per se* illegal, the cumbersome imposition of the tax on

²⁶ ISAAC CAMPOS, HOME GROWN: MARIJUANA AND THE ORIGINS OF MEXICO’S WAR ON DRUGS 19 (2012) (describing Anslinger’s article ‘Marihuana: Assassin of Youth’ attributing more than two dozen cases relating to murder or sex attacks because of marijuana, and how in later years Anslinger retreated from claims and emphasized the supposed role of marijuana as a gateway drug).

²⁷ BENDER, *supra* note 16, at 97.

²⁸ See ANDERSON *supra* note 14 at 8; see also LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA: THE FORBIDDEN MEDICINE (1997).

²⁹ See Chemerinsky, *supra* note 22 at 82.

administrative and regulatory measures made it impossible for any legitimate involvement in the cannabis industry.³⁰

2. FEDERAL PROHIBITION

Official illegality of cannabis began through the enactment of the Controlled Substance Act (“CSA”) in 1970, providing the “statutory framework through which the federal government regulates the lawful production, possession, and distribution of controlled substances.”³¹ By criminalizing cannabis, the purposes of the CSA was to “combat drug abuse, prevent the diversion of drugs from legitimate to illicit channels, and eliminate ‘[t]he illegal importation, manufacture, distribution, possession, and improper use of controlled substances.’”³² A multitude of substances are placed by the CSA in five distinct schedules based on each substance’s medical use, potential for abuse,

³⁰ JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* 25 (2d ed. 2012); *see also* BENDER, *supra* note 16 at 202.

³¹ 21 U.S.C. § 812 (2012); *see also* TODD GARVEY, CONG. RESEARCH SERV., R42398 *MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL* 2 (2012).

³² David Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 *CARDOZO L. REV.* 567, 577 (2013) (citing Pub. L. No. 91-513, 84 Stat. 1236 (1970) and *Gonzales v. Raich*, 545 U.S. 1, 10 (2005)).

and liability on safety or dependency.³³ Under the notion that cannabis has “no currently accepted medical use” and “high potential for abuse,” Congress listed cannabis as a Schedule 1 drug, which is the most restrictive category.³⁴ Effectively, this made the cultivation, distribution, or possession of cannabis a federal crime.³⁵ Serving as a standard for various state laws, the CSA brought a new era of cannabis reform, and, within a few years of its passing, cannabis was criminalized in all fifty states.³⁶ Nevertheless, due to cannabis’s availability in black markets and the racially disproportionate enforcement of laws, reconsideration of the ban became a state focus.³⁷ States

³³ Garvey, *supra* note 30 at 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Chemerinsky, *supra* note 22 at 84 (discussing after passing CSA, states began to implementing law prohibited marijuana prompted state law as the basis for marijuana arrests).

³⁷ *Id.* at 84-85; *see also* AMERICAN CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 8 (2013), <https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report> (reporting a “Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates.” These racial disparities still exist in today and in most regions of the United States).

began to embrace popular advocacy for not only the disparate criminalization between minorities and whites, but also commenced reexamining cannabis use with respect to the potential medicinal benefits.³⁸

B. THE CANADIAN WAY

1. EARLY DEVELOPMENT THANKS TO OPIATES

Cannabis in Canada endured a similar fate of inconsistent methodologies to combat cannabis use as it had in the United States. Just like its southern neighbor, initial cultivation of cannabis in Canada predominately served the hemp industry, and its use was for medicinal treatment.³⁹ Likewise, Canada's history is equally plagued with discriminatory and nationalistic ideologies in an effort to combat the war on drugs.⁴⁰ The use of Chinese migrant workers for railroad construction and gold mining was as

³⁸ Schwartz, *supra* note 32 at 577.

³⁹ Goodwin, *supra* note 1 at 204.

⁴⁰ *Id.*

prevalent in Canada as it was in the United States, and both countries dealt with the opiate addiction allegedly to be brought by the Chinese.⁴¹ Completion of many of these projects by Canadian companies lead to the unnecessary need for Chinese labor, resulting in thousands of these workers being left homeless and thereby creating a serious immigration crisis.⁴² In its attempt to control the crisis, the Canadian government enacted the Opium Narcotic Act of 1908,⁴³ prohibiting the import, manufacture and sale of non-medicinal opiates.⁴⁴

Although the Act was designed by the Canadian government to “eliminate an undesired element of the labor pool,” the Chinese, the Act became the basis for all governmental dealings with illicit drugs.⁴⁵ However, issues of enforcement emerged and the development of Chinese opium smuggling networks prompted the government to

⁴¹ See generally THE COMPLETE HISTORY OF CANNABIS IN CANADA, HACK CANADA (Jan. 26, 1999), <http://www.hackcanada.com/canadian/freedom/hempinfodoc2.html>; see also Kyle Grayson, CHASING DRAGONS: SECURITY, IDENTITY, AND ILLICIT DRUGS IN CANADA, 132-133 (2008).

⁴² *Id.*

⁴³ The Opium and Narcotic Drug Act, S.C. 1923, c. 22 (Can.).

⁴⁴ *Id.*

⁴⁵ *Id.*; Goodwin, *supra* note 1 at 205.

revitalize the Act of 1908 into the Opium and Drug Act, which was promulgated in 1911. Not only did this new Act cover opiates, but it also caused the government to extend the list to other prohibited drugs.⁴⁶ Furthermore, an amplification of minority criminalization for drug possession and use in the states prompted comparable approaches in Canada, further supported by MacLean's Magazine, which published a series of articles regarding illicit drugs in Canada.⁴⁷ Analogous to the American demonization of cannabis use in association with minority groups and crime, these articles written by Judge Emily Murphy professed a white only Canada by claiming:

“Addicts to this drug, while under its influence, are immune to pain, and could be severely injured without having any realization of their condition. While in this condition they become raving maniacs, and are liable to kill or indulge in any form of violence to other persons, using the most savage methods of cruelty without ... any sense of moral responsibility. When coming from under the influence of this narcotic, these victims present the most horrible condition imaginable. They are dispossessed of their natural and normal will power, and their

⁴⁶ *Id.*

⁴⁷ *Id.*; Hack, *supra* note 42.

mentality is that of idiots. If this drug is indulged to any great extent, it ends in the untimely death of its addict."⁴⁸

Murphy's stance on cannabis prohibition derives from discriminatory sentiments akin to those made by Harry J. Anslinger, claiming cannabis as a "menace to society," causing minorities to act violently and insanely, particularly Mexicans.⁴⁹ These articles, later compiled into a book entitled "The Black Candle," were used by prohibitionists "for the express purpose of arousing public demand for stricter drug legislation."⁵⁰ Murphy's contentions potentially incited the Canadian government to extend the Opium and Drug Act to include cannabis as a prohibited drug in 1923.⁵¹

2. CONTEMPORARY PROHIBITION

Canadian use of cannabis escalated in the 1960s and 1970s, inciting an increase in drug convictions and arrests

⁴⁸ EMILY F. MURPHY, *THE BLACK CANDLE* 332-33 (1922); Grayson, *supra* note 42 at 148.

⁴⁹ MURPHY, *supra* note 49 at 333.

⁵⁰ Hack, *supra* note 42.

⁵¹ *Id.*

throughout the country.⁵² In 1972, talks of a liberalization of Canadian drug policy, notwithstanding the persistent negative stigma of cannabis, prompted the creation of the Commission of Inquiry into the Non-Medical Use of Drugs, also referred to as the Le Dain Commission.⁵³ The Commission recommended a repeal of the cannabis ban based on extensive research findings that "the social cost . . . did not justify the nation's current drug policies."⁵⁴ However, like the AMA's recommendations to Congress, negative perceptions of cannabis use encouraged the government to discount the assertions to reclassify cannabis

⁵² R. Solomon et al., *Legal Considerations in Canadian Cannabis Policy*, 4 CAN. PUB. POL'Y 419, 421 (1983).

⁵³ Hack, *supra* note 42.

⁵⁴ See generally Canadian Government Commission of Inquiry into the Non-Medical Use of Drugs. "Conclusions and Recommendations of Gerald Le Dain, Heinz Lehmann, J. Peter Stein" (Recommending outright legalization or fines for marijuana use)

under the Narcotic Control Act.⁵⁵ Aside from an amendment to the Act allowing prosecutors to proceed with cases under lesser offenses, the Le Dain Commission provoked the formation of the Non-Medical Use of Drugs Directorate (NMUDD).⁵⁶ This pivoted the focus to health policy considerations rather than criminal sanctions.⁵⁷

Pressures from the Reagan Administration on global drug policy caused the enactment of Canada's Drug Strategy in 1987 in order to enforce, treat, and prevent drug use.⁵⁸ However, the program failed once funding ended, and, in 1997, the government enacted the Controlled Drugs and

⁵⁵See generally Canadian Government Commission of Inquiry into the Non-Medical Use of Drugs. "Conclusions and Recommendations of Marie-Andree Bertrand ("The federal government should remove cannabis from the Narcotic Control Act, as the Commission recommended in its Interim Report. The federal government should immediately initiate discussions with the provincial governments to have the sale and use of cannabis placed under controls similar to those governing the sale and use of alcohol, including legal prohibition of unauthorized distribution and analogous age restrictions. Furthermore, this government-distributed cannabis should be marketed at a quality and price that would make the 'black market' sale of the drug an impractical enterprise").

⁵⁶ Goodwin, *supra* note 1 at 207.

⁵⁷ *Id.*

⁵⁸ *Id.*

Substance Act ("CSDA"), replacing the Narcotic Control Act.⁵⁹ Cannabis escaped classification as a Schedule I drug, like cocaine and heroin, and instead was classified as a Schedule II drug, where penalties for possession, distribution, and production were lessened; particularly for personal use. Defining any substances "that can alter consciousness as a controlled substance," the CSDA brought to Canada the American-driven strategies towards the "war on drugs," which were later found to be as unworkable as in the states, and ultimately calling for provincial and federal government intrusion.⁶⁰ Despite active regulation and enforcement, cannabis use and distribution increased significantly, and the Royal Canadian Mounted Police (RCMP) reported that "marijuana production activities will continue to increase" because of the popular use among individuals and prevalence of black markets making cannabis available.⁶¹

While the government continued to assert the dangers of cannabis use, advocates against the ban pushed for reform of cannabis policy, arguing that the basis of the draconian law

⁵⁹ Controlled Drugs and Substances Act, S.C. 1996, c. 19 (Can.) (creating a focus in drug legislation back into the criminal system and changing drug scheduling used by the Canadian government).

⁶⁰ Goodwin, *supra* note 1 at 207.

⁶¹ See generally Drug Situation in Canada, ROYAL CANADIAN MOUNTED POLICE CRIM. INTEL. PROGRAM. (April 2002), http://www.rcmp-grc.gc.ca/crimint/drugs_2001e.htm.

was “idiotic, unfounded, and inaccurate.”⁶² Advocates claimed the government maintained the prohibition of cannabis by the dissemination of propaganda and the use of medical studies that were outdated and discredited by the scientific community.”⁶³ Particularly, these advocates denounced the American influence on the war on drugs in Canada, calling for Canadian independence on the matter, hopeful that eventual cannabis reform in Canada “would put tremendous pressure on U.S. lawmakers to do the same.”⁶⁴ Realizing these conflicting methodologies continued to be undermined by black market and popular opinion regarding legalization, Canada moved to significantly alter laws regarding medical marijuana access. Presently, the government is considering full legalization of recreational marijuana to alleviate these persistent problems.

⁶² See Isabel Vincent, *Canada: Enforcers Challenge Cannabis Liberation Movement*, GLOBE & MAIL, (Apr 6, 1998), <http://www.mapinc.org/drugnews/v98.n255.a08.html/all>.

⁶³ *Id.*

⁶⁴ *Id.* (Proponents of decriminalization say that Canadian legislators are loath to reform cannabis policy because of pressure from the United States . . . "We can't seem to get beyond the repressive American policy on drugs," . . . strong influence of the U.S. government's so-called war on drugs, which came to a head under the Republican administrations of Ronald Reagan and George Bush in the 1970s and 1980s . . . So, we maintain this cowardly insistence of being little foot soldiers to the American war on drugs.")

III. EFFECTS OF PROHIBITION AND THE ROAD TO LEGALIZATION: A STORY OF DIFFERENT APPROACHES

Since the passing of controlled substances acts, Canada and the United States have instituted conflicting views in the management of cannabis policy. What can be attributed to these opposing approaches is the rise in progressive movements in Canada at the start of the millennium, while a rise of conservative inclinations prompted more enforcement and control in the United States.⁶⁵ Furthermore, the Canadian government's progression of legalization focuses on a balance between crime prevention and an individual's right to use cannabis for medicinal treatment, while the American approach is silent on individual rights: crime and drug prevention are at the forefront of federal policy.⁶⁶ This next section will outline the legalization process in each country, as well as discuss the effects of the cannabis ban throughout the process.

A. STATE DISOBEDIENCE AND MARIJUANA POLICY'S PUZZLING FUTURE IN THE UNITED STATES

⁶⁵ Jeet Heer, *Canadian Rhapsody, The Great White North's Unlikely Progressivism*, BOSTON GLOBE, (July 13, 2003.)

⁶⁶ Goodwin, *supra* note 1at 214-5.

Notwithstanding the federal ban, since 1996 States have implemented legislation allowing for the use, production, and distribution of medical cannabis under the view of the potential health and economic benefits. Ironically, California, one of the first states to criminalize cannabis, became the first state to legalize medical cannabis, basing this decision on the political and popular support of cannabis use for terminally-ill patients.⁶⁷ California's Proposition 215 became the longstanding model for reform at the state level, with the condition that legal use of medical cannabis is possible when recommended and prescribed by a medical physician for treating a medical condition.⁶⁸ Presently, either through ballot initiative or state legislative process, twenty-nine states and the District of Columbia have enacted laws modeled after the California initiative of medical cannabis; eight states have legalized cannabis for adult use.⁶⁹

Moreover, certain provisions in state medical and recreational cannabis laws are designed to shield individuals, doctors, and others in the industry from state

⁶⁷ Chemerinsky, *supra* note 22 at 85.

⁶⁸ Garvey, *supra* note 30 at 4.

⁶⁹ Melia Robinson, *the legal weed market is growing as fast as broadband internet in the 2000s*, BUSINESS INSIDER, (Jan. 3, 2017), <http://www.businessinsider.com/arcview-north-america-marijuana-industry-revenue-2016-2017-1>.

criminal prosecution.⁷⁰ States where recreational marijuana is permitted “impose state controls akin to the more restrictive state laws regulating the sale of alcoholic beverages.”⁷¹ However, while State legalization of both medical and recreational cannabis are in force, this violates the Federal CSA ban on marijuana.⁷² With other states following suit⁷³, constitutional questions linger regarding the constraints on the relationship of federal and state law, and whether the conflict will foster instability and ambiguity in “states that are pioneering new approaches to marijuana control.”⁷⁴ The cannabis markets in the United States and Canada are growing at an extraordinary rate; it is purported that the market will surpass the gains of the dot-com era by

⁷⁰ Schwartz, *supra* note 32 at 575.

⁷¹ *Id.*

⁷² 21 U.S.C. § 812(c) (2012).

⁷³ Seerat Chabba, *Marijuana Legalization 2017: Which States Will Consider Cannabis This Year?*, INT'L BUSINESS TIMES, (Dec. 31, 2016) <http://www.ibtimes.com/marijuana-legalization-2017-which-states-will-consider-cannabis-year-2467970> (discussing state legalization in 2017, with Delaware, Rhode Island, Vermont and New Mexico moving to recreational use of marijuana, and other states such as New Jersey, Texas, Virginia, Kentucky, and Missouri).

⁷⁴ See Chemerinsky, *supra* note 22 at 77.

a projected growth of 25% per year.⁷⁵ This exploding market calls for federal reassessment of potential initiatives to establish a legitimate market in the U.S.

1. FEDERAL INDECISION BECOMES AN ON/OFF SWITCH

As states move for legalization of cannabis, either for medical or recreational use, discrepancies in federal and state law places the use, production, and distribution of marijuana in a dual state of compliance and violation.⁷⁶ Marijuana policy in the United States witnessed an acute progression under President Barack Obama, chartering an end to the Bush administration's frequent raids of medical marijuana distributors and the inconsistent application of

⁷⁵ Robinson, *supra* note 69; See also Debra Borchardt, *Marijuana Sales Total \$6.7 Billion in 2016*, FORBES, (Jan 1, 2017) ("To put this in perspective, this industry growth is larger and faster than even the dot-com era. During that time, GDP grew at a blistering pace of 22%. Thirty percent is an astounding number especially when you consider that the industry is in early stages. ArcView's new editor-in-chief Tom Adams said, "The only consumer industry categories I've seen reach \$5 billion in annual spending and then post anything like 25% compound annual growth in the next five years are cable television (19%) in the 1990's and the broadband internet (29%) in the 2000's") <http://www.forbes.com/sites/debraborchardt/2017/01/03/marijuana-sales-totaled-6-7-billion-in-2016/#1c0352e18716>.

⁷⁶ 21 U.S.C. § 812(c) (2012).

federal and state law.⁷⁷ In an informal policy, President Obama announced that the federal government has “bigger fishes to fry,” and the focus on drug enforcement should be geared towards the black market and not the legitimate state market.⁷⁸ Likewise, Deputy Attorney General David Ogden in 2009 issued a memorandum providing guidance and clarification regarding federal prosecution in states that have legalized medical marijuana.⁷⁹ The memorandum

⁷⁷ See David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, N.Y. TIMES, (Mar 18, 2009), <http://www.nytimes.com/2009/03/19/us/19holder.html>; see also Stu Woo & Justin Scheck, *California Marijuana Dispensaries Cheer U.S. Shift on Raids*, WALL ST. J., (Mar. 9, 2009) <http://online.wsj.com/news/articles/SB123656023550966719>.

⁷⁸ See Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go into Effect*, HUFFINGTON POST, (Aug. 29, 2013), <http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj-n-3837034.html>.

⁷⁹ See generally Memorandum from David W. Ogden, U.S. Deputy Att’y Gen., to U.S. Att’y’s (2009) (“does not “legalize” marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act”) <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

specifically declares the “pursuit of [federal] priorities should not focus federal resources in [. . .] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” The memorandum, although useful for some clarification on compliance, nevertheless, leaves states in limbo because there is nothing precluding a federal “investigation or prosecution even where there is clear and unambiguous compliance with existing state law . . . where investigation or prosecution otherwise serves important federal interest.”⁸⁰ Even with such cautionary language, the post-memorandum effect demonstrated an optimistic future for a “hands-off policy to enforcing federal marijuana laws in states authorizing marijuana under state law.”⁸¹

However, an upsurge in the “commercial cultivation, sale distribution, and use of marijuana for purported medical purpose” provoked a Department Of Justice (“DOJ”) response in a 2009 memorandum by Deputy Attorney General James M. Cole.⁸² Responding to state

⁸⁰ *Id.* at 3.

⁸¹ See Chemerinsky, *supra* note 22 at 87.

⁸² See generally Memorandum from James M. Cole, U.S. Deputy Att’y Gen., to U.S. Att’ys (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

authorization “of large-scale, privately operated industrial marijuana cultivations centers,” the Cole Memorandum clarified the scope of the Ogden memorandum, declaring the government “never intended to shield such actives from federal enforcement action and prosecution, even where those activities purport to comply with state law.”⁸³ Therefore, those “who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA] regardless of state law.”⁸⁴ Since the issuing of the memorandum, state and federal prosecution of those involved in the marijuana industry skyrocketed, causing many states to hold off on legislation expanding their

⁸³ *Id.*

⁸⁴ See Sarah Kliff, *Justice Dept. Won't Stop States from Legalizing Pot. Here 's What That Means*, WASH. POST, (Aug. 29, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/29/justice-dept-wont-stop-states-from-legalizing-pot-heres-what-that-means/>.

medical marijuana programs or programs for recreational use.⁸⁵

Deputy Attorney Cole provided a subsequent memorandum responding to the passing of recreational marijuana laws by Colorado and Washington, announcing a waiver on legal challenges to recreational laws, but reserving the right to interfere with criminal prosecution actions [i]f state enforcement efforts are not sufficiently robust.”⁸⁶ Interference from the federal government would ensue should the states fail to comply with eight outlined

⁸⁵ See *Medical Marijuana: Federal Crackdown, Similar to That in California, Begins in Colorado*, HUFFPOST DENVER (Jan. 12, 2012, 4:28 PM), http://www.huffingtonpost.com/2012/01/12/medical-marijuana-federal_n_1202725.html; See also Bob Ponting, *Feds Raid Medical Marijuana Facilities*, FOX 5 SAN DIEGO (Apr. 23, 2013, 9:28 PM) <http://fox5sandiego.com/2013/04/23/feds-raid-medical-marijuana-facilities/#axzz2YkLqhqUS>; Colleen Slevin & Kristen Wyatt, *Denver Pot Businesses Raided Ahead of Legal Sales*, YAHOO (Nov. 21, 2013, 6:21 PM), <http://news.yahoo.com/denver-pot-businesses-raided-ahead-legal-sales-232109833.html> (discussing November 2013 raids of Colorado marijuana dispensaries).

⁸⁶ See Memorandum from James M. Cole, U.S. Deputy Att’y Gen., to all U.S. Att’ys (Aug. 29, 2013) <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

priorities,⁸⁷ or if state laws were implemented that would otherwise “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸⁸ These communications by the federal government provide minimal guidance regarding state law compliance, leaving undefined road towards the solution of marijuana’s dual status in this federalism conflict. Recently, the federal government refused to reschedule marijuana under the CSA in 2016 with the perception that marijuana contains no

⁸⁷ *Id.* at 1-2 (Preventing 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 product on public lands; and Preventing marijuana possession or use on federal property).

⁸⁸ *See County of San Diego v. San Diego Norml*, 165 Cal. App. 4th 798 (2008) (holding state law conflicts with the CSA only when it is impossible to comply with both state and federal law).

medicinal value.⁸⁹ Aside from a few recent clarifications, the federal government remains mute in the reclassification of cannabis, the conceivable medical benefits of cannabis, and the potential of outright legalization.⁹⁰ In a sense, the government has failed in mitigating prevailing issues that are a by-product of the cannabis ban.

2. FEDERALISM EFFECTS

The federalism anomaly poses a variety of constitutional questions, which have received little to no

⁸⁹ See DEA PUB. AFF., *DEA Announces Actions Related to Marijuana and Industrial Hemp*, DEA.GOV (Aug. 11, 2016), <https://www.dea.gov/divisions/hq/2016/hq081116.shtml> (DEA has denied two petitions to reschedule marijuana under the Controlled Substances Act (CSA). In response to the petitions, DEA requested a scientific and medical evaluation and scheduling recommendation from the Department of Health and Human Services (HHS), which was conducted by the U.S. Food and Drug Administration (FDA) in consultation with the National Institute on Drug Abuse (NIDA). Based on the legal standards in the CSA, marijuana remains a schedule I controlled substance because it does not meet the criteria for currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse).

⁹⁰ *Id.*

answers regarding the marijuana state experiment. However, in *Gonzales v. Raich*, the Supreme Court established the cultivation and production of medical cannabis is well within Congressional Commerce authority.⁹¹ Notably, the Court's opinion in *Raich* dealt solely with the question of Congress' Commerce power to regulate and prohibit "intrastate possession and use of marijuana;" it did not comment on the question of whether state law permitting the use of marijuana for medical purposes is preempted by CSA.⁹² The Court's holding results in incongruent state and federal laws, which furthers indecision under the doctrines of preemption and anti-commandeering.⁹³

The Constitution's Supremacy Clause establishes the preemption doctrine by declaring federal law "the supreme law of the land" and that the "fundamental principle of the Constitution is that congress has the power to preempt state law."⁹⁴ This bears the constitutional question whether state

⁹¹ *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (Relying on the 1942 decision of *Wickard v. Filburn*, the Court held prior precedent "firmly establish[es] Congress'[s] power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce").

⁹² Garvey, *supra* note 30 at 6.

⁹³ See Chemerinsky, *supra* note 22 at 102.

⁹⁴ *Id.* at 102; see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

law legalizing marijuana is preempted due to its direct conflict with the CSA.⁹⁵ Nonetheless, while a conflict exists, the CSA does not entirely preempt state marijuana laws due to the Tenth Amendment's anti-commandeering doctrine, and a CSA provision clarifying that "Congress did not intend to entirely occupy the regulatory field concerning controlled substances or wholly supplant traditional state authority in the area."⁹⁶ The anti-commandeering doctrine institutes a federal restriction forcing state enforcement, development, or maintenance of federal law.⁹⁷ Thus, the federal government is precluded from commandeering states to enact legislation on intrastate regulation regarding an activity commonly regulated by the federal government.⁹⁸ Likewise, it is impermissible for state executive officials to be commandeered by the federal government for the purpose of carrying out federal law.⁹⁹ Furthermore, the preemptive

⁹⁵ Chemerinsky, *supra* note 22 at 102.

⁹⁶ Garvey, *supra* note 30 at 9.

⁹⁷ *Id.*

⁹⁸ See *New York v. United States*, 505 U.S. 144 (1992) (holding congress cannot commandeer the legislative process of the states no matter how important federal interest is).

⁹⁹ See *Printz v. United States*, 521 U.S. 898, 933, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997) (holding unconstitutional "commandeering" of state officers is similar to a commandeering of legislature, which is outside of congressional authority and violates the Tenth Amendment).

power of the federal government is expressly limited in the CSA unless “a positive conflict between” state and federal laws makes it either “physically impossible” to comply with both laws, or the state law “stands as an obstacle to the accomplishment and execution” of congressional objectives.¹⁰⁰

Although there are some consistencies in preemption and anti-commandeering, scholars affirm remaining ambiguities in the law that leave an opportunity for preemption of the CSA, which may prevent state protection of citizens complying with state law.¹⁰¹ Even more straining is the uncertain future of the federal stance on marijuana after the election of a Republican-controlled government and the appointment of Jeff Sessions as Attorney General, who

¹⁰⁰ See 21 U.S.C. § 903 (2012) (“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”).

¹⁰¹ Chemerinsky, *supra* note 22 at 102-13.

has spent decades opposing legalization.¹⁰² As more states endorse legalization, the issue of preemption remains undefined, and, until the Supreme Court or federal government opines on the subject, states may experience federal intervention, which may overrule state marijuana initiatives.

The federalism conflict makes compliance with the law uncertain. The CSA's ban on marijuana makes it so those involved in the marijuana industry cannot deposit legitimate profits in banks and are finding themselves at risk of theft by storing physical cash.¹⁰³ Pressure from the

¹⁰² See Jezreel Smith, *Donald Trump and Republicans On the Legalization of Marijuana; Is There A Possibility to Stop What Obama Started* ("Democrats' votes legalizing marijuana over having it illegal is 66% vs. 33% whereas for republicans almost 55% oppose marijuana legalization while 41% favoring it); see also Patrick McGreevy, *Weed's Legal in California, But Activist Fear a Battle Ahead with Jeff Sessions, Trump's Pick For Attorney General*, ("Sessions said at a legislative hearing in April that 'good people don't smoke marijuana'... He went on to say, "We need grown-ups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized").

¹⁰³ Jacob Sullum, *Eric Holder Promises to Reassure Banks About Taking Marijuana Money 'Very Soon,'* FORBES (Jan. 24, 2014, 1:02 PM), <http://www.forbes.com/sites/jacobsullum/2014/01/24/eric-holder-promises-to-reassure-banks-about-taking-marijuana-money-very-soon> ("Huge amounts of cash, substantial amounts of cash just kind of lying around with no place for it to be appropriately deposited, is something that would worry me").

government results in banks shunning marijuana producers out of fear of federal prosecution for money laundering.¹⁰⁴ Lack of uniformity, or even federal guidance, makes it impossible for the marijuana businesses operating through cash only to be regulated or taxed, particularly

¹⁰⁴ Memorandum from James M. Cole, U.S. Deputy Att’y Gen., to all U.S. Att’ys, (Feb. 14, 2014), <http://www.justice.gov/usao/co/news/2014/feb/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014.pdf> (“Financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money laundering statutes (18 U.S.C. §§ 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. § 1960), and the BSA. Sections 1956 and 1957 of Title 18 make it a criminal offense to engage in certain financial and monetary transactions with the proceeds of a “specified unlawful activity,” including proceeds from marijuana-related violations of the CSA. Transactions by or through a money transmitting business involving funds “derived from” marijuana-related conduct can also serve as a predicate for prosecution under 18 U.S.C. § 1960. Additionally, financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability under the BSA for ... failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA. See, e.g., 31 U.S.C. § 5318(g)”; Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, (Jan. 11, 2014), <http://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html>.

in states that have legalized recreational use of marijuana.¹⁰⁵ Until there is a federal prescription guiding states with these issues, the federal ban on marijuana will remain defamatory to the current legal industry, making it impossible for banks and others engaged in commercial practices to perceive marijuana as a legitimate industry.¹⁰⁶ Additionally, business in the legal marijuana industry or people simply seeking legal advice are encountering inconsistent state regulations in accessing attorneys. The federal ban, coupled with the most recent DOJ memorandum, marks participation or knowledge of legal marijuana commerce as a breach of the CSA; therefore, attorneys providing such services may find themselves conceivably violating ethical codes of the state bar and Model Rules of Professional Responsibility.¹⁰⁷ States like

¹⁰⁵ Govs. Hickenlooper, Inslee Call for Flexibility in Federal Banking Regulations for Marijuana Businesses, COLORADO: THE OFFICIAL STATE WEB PORTAL (Oct. 2, 2013), http://www.colorado.gov/cs/Satellite?c=Page&childpagename=GovHickenlooper%2FCBONLayout&cid=12_51646488031&pagename=CBONWrapper; see also Chemerinsky, *supra* note 22 at 92.

¹⁰⁶ Chemerinsky, *supra* note 22 at 93.

¹⁰⁷ MODEL RULES OF PROF'L CONDUCT R. 1.2 (d) (2015) ("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 a proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law").

Arizona, Colorado, and Washington have a relaxed by cautionary approach, expressing a need for attorneys to keep in mind of the federal prohibition when advising clients as well as stating no intention of attorney discipline by the bar for those “who in good faith advice or assist clients . . . in strict compliance with the state and its implementing regulation[s].”¹⁰⁸ Maine and Connecticut have ambiguous approaches, stating “the Rule governing attorney conduct, does not make a distinction between crimes that are enforced and those that are nonetheless a federal crime.”¹⁰⁹ Complications presented by federalism and government inaction, especially to the access of attorneys and banking, are added exacerbations to the uncertainty of the future of the legal marijuana industry.

¹⁰⁸ COLO. RULES OF PROF'L CONDUCT, RULE 1.2 OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER, Amended and Adopted by the Court, En Banc (March 24, 2014) https://www.courts.state.co.us/userfiles/file/court_Probation/Supreme_Court/Rule_Changes/2014/2014%20redlined.pdf; WASH. RULES OF PROF'L CONDUCT, RULE 1.2 OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER.

¹⁰⁹ Opinion #199. Advising Clients Concerning Maine's Medical Marijuana Act (July 7, 2010) http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134; Informal Opinion 2013-02: *Providing Legal Services to Clients Seeking Licenses Under the Connecticut Medical Marijuana Law*, (Jan. 16, 2013), http://c.ymcdn.com/sites/ctbar.siteym.com/resource/resmgr/Ethics_Opinions/Informal_Opinion_2013-02.pdf.

B. CANADA'S LEGALIZATION OF MEDICAL MARIJUANA AND THE FUTURE OF RECREATIONAL USE

The legalization initiative in Canada is principally a federal government response to disproportionate criminalization of those who need marijuana for medical treatment and the security of individual rights. Canada's progression toward medical marijuana legalization, and now recreational legalization, focuses primarily on a government promotion of health issues, individual rights, and the control of organized crime groups.¹¹⁰ Contrary to the American legalization process, which focuses on regulation and enforcement of drugs based on criminal prosecution, the Canadian government continues to experiment with marijuana legalization. This section will outline the basis for change in Canada under section 7 of the Charter of Rights and Freedoms¹¹¹ and the government response to increasing barriers for individuals to obtain medical marijuana. The section will conclude with the future of marijuana legalization in Canada proposed to be due by the Canadian Task Force in 2018.

¹¹⁰ United States-Canada Border Drug Threat Assessment - Response to the Situation, NAT'L DRUG INTELLIGENCE CENTER (Dec. 2001), <http://www.usdoj.gov/ndic/pubs07/794/794p.pdf> at 31.

¹¹¹ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

1. SUPREMACY OF SECTION 7 OF THE CHARTER:
THE BASIS FOR CHANGE

Revisions to legalization in Canada stem from Section 7 of the Canadian *Charter of Rights and Freedom*, the supreme law of Canada that declares any law contrary to the charter void.¹¹² Under the Charter, “[e]very person has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹¹³ These independent but intersecting rights under Section 7 apply to all natural citizens of Canada and can be asserted in the presence of government intrusion into these rights.¹¹⁴ During the 1990s and early 2000s, the government initiated considerations of access where guaranteed rights became the basis for reconsideration of medical marijuana access. In 1999, the “Research Plan for Marijuana for Medicinal Purposes” announced by Health Canada stipulated a research plan to understand medicinal marijuana’s viability, and thereafter established the Marihuana Medical Access Program (MMAP).¹¹⁵ The MMAP amended section 56 of CDSA to allow access to marijuana

¹¹² The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, Part I § 7; see also The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 Part IV § 52 (

¹¹³ *Id.*

¹¹⁴ Conron, *supra* note 5 267.

¹¹⁵ *Id.*

for medical purposes but required the issuance of an exemption under the CDSA.¹¹⁶ Because of the negative stigma of marijuana, many doctors were reluctant to prescribe marijuana, and people found it nearly impossible to obtain the medical exemption, causing them to turn to the black market and risking criminal prosecution.¹¹⁷

Moreover, increasing criminal prosecution inaugurated legal challenges to the CDSA, where courts began to consider the proportionality of criminal prosecution for possession and cultivation of medical marijuana alongside the individual's right to security.¹¹⁸ In 2000, the Ontario Court of Appeal issued an opinion to Section 56 of the CDSA in *R. v. Parker*, where defendant Parker, growing his own supply of marijuana to avoid the black market was arrested for possession and cultivation of cannabis.¹¹⁹ The Ontario Court found "[t]he government's failure to provide reasonable access for medical purposes violated Mr. Parker's rights under Section 7 of the *Charter*, as

¹¹⁶ See *Marihuana for Medical Purpose Regulations, Regulatory Impact Analysis Statement*, CAN. GAZETTE, (Dec. 15, 2012), <http://gazette.gc.ca/rp-pr/p1/2012/2012-12-15/html/reg4-eng.html> [hereinafter Analysis Statement].

¹¹⁷ Conron, *supra* note 5 at 276.

¹¹⁸ *Id.*; see also *R. v. Parker*, [2000] 49 O.R. 3d 481, 5 (Can. Ont. C.A.).

¹¹⁹ *Parker*, [2000] 39 O.R. 3d at ¶ 13.

he had not only been charged with a criminal offense but was forced to choose between his 'liberty' and his 'health.'"¹²⁰ The Court concluded the objectives of the CDSA were to protect the health of citizens, but, by preventing access to cannabis, the objectives were running counter to the legislative effect; the court therefore concluded the CDSA arbitrarily denied "a generally safe medical treatment that might be of clear benefit" as inconsistent with guarantees of the charter and fundamental justice.¹²¹ Citing the holding of *R. v. Morgentaler*, the court affirmed the "[s]ecurity of the person' within the meaning of Section 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction."¹²² The Court held a blanket prohibition on cannabis possession in the CDSA, with no legal source to supply medical marijuana, deprives

¹²⁰ The Canadian Bar Association, *Bill C-2, Respect for Communities Act*, NAT'L CRIM. JUSTICE SECTION, 1, 3 (2014) <https://www.cba.org/CMSPages/GetFile.aspx?guid=97319f43-237d-4ff4-9fe6-a0a7341ec0e0>.

¹²¹ *Id.*; *Parker*, [2000] 39 O.R. 3d at ¶ 109, 139, 192 ("[T]he common-law treatment of informed consent, the sanctity of life and commonly held societal beliefs about medical treatment suggest that a broad criminal prohibition that prevents access to necessary medicine is not consistent with fundamental justice").

¹²² *Parker*, [2000] 39 O.R. 3d at ¶ 93 ("state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person").

individuals of the “right to security of the person and right to liberty,” and is therefore unconstitutional under Section 7 of the *Charter*.¹²³ The Court’s holding inspired current changes in marijuana policy by the government, and serves as a blueprint for other courts in determining when principles of fundamental justice interfere with criminal law and disproportionately impede on the individual rights guaranteed by the charter.¹²⁴

¹²³ *Id.* at ¶ 153.

¹²⁴ Parker, [2000] 39 O.R. 3d at ¶ 117 (The principles of fundamental justice are breached where the deprivation of the right in question does little or nothing to enhance the state's interest[;] (ii) A blanket prohibition will be considered arbitrary or unfair and thus in breach of the principles of fundamental justice if it is unrelated to the state's interest in enacting the prohibition, and if it lacks a foundation in the legal tradition and societal beliefs that are said to be represented by the prohibition[;] (iii) The absence of a clear legal standard may contribute to a violation of fundamental justice[;] (iv) If a statutory defense contains so many potential barriers to its own operation that the defense it creates will in many circumstances be practically unavailable to persons who would prima facie qualify for the defense, it will be found to violate the principles of fundamental justice[; and] (v) An administrative structure made up of unnecessary rules, which result in an additional risk to the health of the person, is manifestly unfair and does not conform to the principles of fundamental justice.); *see also* Canadian Bar, *supra* note 121 at 3-4.

Subsequently, the Court's holding prompted governmental response to consistencies of the objectives and effects of the CDSA. In 2001, the Canadian government amended the CDSA to allow personal possession and purchase of marijuana for legitimate medical needs and it enacted the Marihuana Medical Access Regulations (MMAR).¹²⁵ The Regulation "establish[ed] a framework to allow access to marihuana by individuals suffering from grave or debilitating illnesses;" those seeking medical access must be authorized under one of the three categories of symptoms and disease¹²⁶ and supported by medical practitioners.¹²⁷ While this attempt by Health Canada

¹²⁵ Marihuana Medical Access Regulations, SOR12001-227 § 1 (Can.) [hereinafter MMAR].

¹²⁶ MMAR, *supra* note 126 at §1(1) ("category 1 symptom" means a symptom that is associated with a terminal illness or its medical treatment. "category 2 symptom" means a symptom, other than a category 1 symptom, that is set out in column 2 of the schedule and that is associated with a medical condition set out in column 1 or its medical treatment. "category 3 symptom" means a symptom, other than a category 1 or 2 symptom, that is associated with a medical condition or its medical treatment).

¹²⁷ *Id.* at § 4(1) (2) ("(1) A person seeking an authorization to possess dried marihuana for a medical purpose shall submit an application to the Minister. (2) An application under subsection (1) shall contain (a) a declaration of the applicant; (b) a medical declaration that is made (i) in the case of an application based on a category 1 symptom, by the medical practitioner of the applicant, or (ii) in the case of an application based on a category 2 or 3 symptom, by a specialist").

offered access to medical marijuana to more individuals without the fear of criminal sanction, the requirements in the MMAR were deemed impossible for many to satisfy, and led to inevitable debates in the Canadian courts.¹²⁸

2. SERIES OF COURT DECISION AND GOVERNMENT RESPONSE

Since the *Parker* holding, medical marijuana reform in Canada has endured incremental modification from both government response and *Charter* challenges to the effects of government regulation that is contrary to the guarantees of Section 7.¹²⁹ A series of cases continue to reshape marijuana reform, and have prompted response from the current federal government to legalize adult use of cannabis in order to ease the effects of government regulation. Much of the MMAR has been long debated for its ambiguity and silence on pertinent implications of government regulation on individual access and rights concerning the use medical marijuana. A major challenges to the first MMAR was the regulation's burden in accessing legal supply to medical marijuana, which demonstrated that even when one was able to obtain a medical exemption, individuals were

¹²⁸ Analysis Statement, *supra* note 117.

¹²⁹ Conron, *supra* note 5 at 282.

turning to illegal purchases for medical marijuana.¹³⁰ In 2003, the Ontario Court of Appeals in *Hitzig v. Canada*, considered a MMAR challenge to the legal supply and access of medical marijuana and determined legislative restriction created a serious impediment for individual access to a legal supply.¹³¹ The claimants attempted the near impossible task of finding medical professionals that would authorize their medical exemption.¹³² Reviewing the evidence, the Court held the MMAR directly violated rights of liberty and security set by Section 7 of the *Charter*.¹³³ The Court's holding reaffirms government implementation of processes preventing authorized users to medical marijuana as counter to the principles of fundamental justice because, by removing legal access to supply, the government is

¹³⁰ *Id.*; *R. v. Krieger*, [2000] 307 A.R. 349, ¶ 36 (Can.) (Concluding lack of legal supply was unconstitutional because of the government's removal of legal access that forced individuals to seek black market purchases of marijuana).

¹³¹ *See Hitzig v. Canada*, [2003] O.J. No. 3873, ¶ 145.

¹³² *Hitzig*, [2003] O.J. No. 3873 at ¶ 15- 22.

¹³³ *Id.* at ¶ 104-5 ("To take the medication they require they must apply for an ATP, comply with the detailed requirements of that process, and then attempt to acquire their medication in the very limited ways contemplated by the MMAR. These constraints are imposed by the state as part of the justice system's control of access to marihuana. As such, they are state actions sufficient to constitute a deprivation of the security of the person of those who must take marihuana for medical purposes").

essentially granting individuals leave to purchase from illegal markets.¹³⁴ While the Court did not view the task to obtain medical authorization as an impossible or unduly burdensome task, it did note that, “if in the future physician co-operation drops to the point that the medical exemption scheme becomes ineffective, this conclusion might have to be revisited.”¹³⁵ Following this decision, the MMAR was amended to permit authorized users to obtain marijuana from Health Canada and the authorization process to obtain marijuana was further simplified, relaxing the specialist approval process.¹³⁶

Indeed, Canada saw an incredible increase in the number of individuals who were authorized to possess and produce large amounts of cannabis. The regulation of the MMAR with respect to the limitations in obtaining licenses for production as well as the limited amount of cannabis supply available demonstrated a necessity for modification.¹³⁷ Additionally, the amount of production licenses amplified dramatically, but the issue became a lack of government foresight because the “MMAR did not intend to permit such widespread, large-scale marijuana

¹³⁴ *Id.* at ¶ 118.

¹³⁵ *Id.* at ¶ 139.

¹³⁶ *R. v. Mernagh*, [2011] O.J. No. 1669, ¶ 21 (Can. Ont. Super. Ct.).

¹³⁷ *Id.* at ¶ 29.

production;" the government quickly recognized "the MMAR did not adequately address the public health, safety, and security concerns that accompanied personal production."¹³⁸ Numerous local and federal complaints expressed the negative impacts of personal production in-house grow operations: various "fire safety risks, building code violations, electrical violations, diversion, theft, and children's safety."¹³⁹ Such worries brought about careful consideration of amendments, that would address and improve these issues. The problems with the MMAR were far from over, and in 2013 Health Canada instituted the Marihuana for Medical Purposes Regulation (MMPR), which effectively made medical marijuana legal throughout Canada,¹⁴⁰ thereby replacing the MMAR.¹⁴¹ Aside from legalizing medical marijuana to all, the MMPR eliminated personal production licenses and allowed for-profit productions facilities.¹⁴² This new regime is responsible for the current explosion of the marijuana industry in Canada,

¹³⁸ *Id.* at ¶ 31.

¹³⁹ *Id.*

¹⁴⁰ See generally Brian Hutchinson, *Medical Marijuana Production in Canada Set for Dramatic Change*, NAT'L POST, (Jan 17, 2014), <http://news.nationalpost.com/news/canada/medical-marijuana-production-in-canada-set-for-dramatic-change>.

¹⁴¹ *R. v. Mernagh*, [2011] O.J. No. 1669, ¶ 31-33 (Can. Ont. Super. Ct.).

¹⁴² *Id.*

which, in 2014, was estimated to reach an annual industry accumulation of \$1.3 billion by 2024.¹⁴³ The MMPR was short-lived due to several inconsistencies with previous policies in the MMAR and individual rights under the *Charter*. The biggest contention was that the MMPR did not allow for personal growth of medical cannabis and there were restrictions for obtaining dry cannabis only.¹⁴⁴

3. ACMPR: A JOINT APPROACH BETWEEN MMAR & MMPR

The expansion of medical marijuana experienced a significant rise after promulgation of the MMRP, and this prompted legitimate discussions by parliament on the issue of recreational legalization. Some even suggest recreational dialogue is now possible by the Conservative government's

¹⁴³ *Id.*; see Gecko Research, *Why the Canadian Marijuana Sector is the Next Big Thing and Why Emblem is Our Top Pick*, Streetwise Reports, (Dec. 8, 2016), <https://www.streetwisereports.com/pub/na/why-the-canadian-marijuana-sector-is-the-next-big-thing-and-why-emblem-is-our-top-pick>.

¹⁴⁴ See *R. v. Smith*, [2015] 2 S.C.R. 602, ¶ 34; see also *Allard et al. v. Regina*, [2016] F.C. 236 ¶ 254 -7; see Jack Locke & Sam Dabner, *Legal Update: Marihuana for Medical Purpose*, FULTON & CO. (Aug 13, 2013), <http://www.fultonco.com/wp-content/uploads/2015/12/Case-Law-Update-Marihuana-for-Medical-Purposes-1.pdf>.

inadvertent expansion of the industry in 2013.¹⁴⁵ However, criticism of the MMRP's deficiencies positioned another government stalemate, and pressures from the High Courts and popular demands suggested a need for a policy improvement that would incorporate the missing pieces. With the MMAR and MMRP working concurrently,¹⁴⁶ the Court in *Allard et al. v. Regina* concluded both regulations regarding access, production, and possession of medical marijuana in conflict with the standards proposed in Section 7.¹⁴⁷ The Federal Court of Canada held that the MMRP's limited access for medical marijuana to licensed producers

¹⁴⁵ See Jared Lindzon, *With Legalization on the Horizon, Pot Entrepreneurs are Keen to Turn Canada into a Marijuana Leader*, *Globe & Mail*, (Oct 20, 15) ("By transitioning from small mom-and-pop operations to the mega facilities we see today, it is likely that [the Conservative government] inadvertently created the infrastructure that would greatly benefit from legalization"), <http://www.theglobeandmail.com/report-on-business/small-business/startups/with-legalization-on-the-horizon-pot-entrepreneurs-are-keen-to-turn-canada-into-a-marijuana-leader/article26890992/>.

¹⁴⁶ Conron, *supra* note 5 at 288 ("The MMRP will run concurrently with the MMAR from the time the new regulations come into force, until March 31, 2014").

¹⁴⁷ *Allard et al. v. Regina*, [2016] F.C. 236 ¶ 254-5; see also Andrea Hill, *Allard decision Sets the Stage for the Future of Legal Marijuana*, *GLOBE & MAIL*, (Feb 25, 2016) <http://www.theglobeandmail.com/opinion/allard-decision-sets-the-stage-for-the-future-of-legal-marijuana/article28902163/>.

only and denying individuals the ability to grow on their own, infringes individual liberty and security rights.¹⁴⁸ Most concerning to the court was that “under the current legislation ... medical marijuana was not appropriately affordable and accessible to Canadians.¹⁴⁹ Consequently, the Court’s decision pressured government amendments to the MMPR and MMAR, and in response the government announced the enactment of the Access to Cannabis for Medical Purposes Regulations (“ACMPR”) in 2016.¹⁵⁰ Divided into four parts, the ACMPR permits personal growth of medical marijuana or to designate a grower, while having the option to purchase cannabis from licensed producers.¹⁵¹ Essentially, the ACMPR, by replacing the MMAR and MMPR, consolidates the previous regulations into all four parts. The framework envisioned in the ACMPR may serve as a guide for the future of recreational marijuana regulation in Canada, and, while the proposal of adult use

¹⁴⁸ *Allard et al*, [2016] F.C. 236 ¶ 289.

¹⁴⁹ Susan Lunn, *Philpott won’t Appeal Allard Ruling on Right to Grow Medical Marijuana*, CBC NEWS, (Mar. 24, 2016) <http://www.cbc.ca/news/politics/medical-marijuana-grow-allard-philpott-no-appeal-1.3506015>.

¹⁵⁰ *Statement from Health Canada Concerning Access to Cannabis for Medical Purposes*, HEALTH CANADA, (Aug 11, 2016), <http://news.gc.ca/web/article-en.do?nid=1110389>.

¹⁵¹ *Statement*, *supra* note 151.

was long-before discussed, the ACMRP and the *Allard* decision demonstrate the noteworthy push towards legalization.¹⁵²

4. THE TIMES THEY ARE A-CHANGIN: CANADA MAY GO GREEN

The Canadian election of 2015 demonstrated a monumental transformation in the government's focus on marijuana legalization for adult use.¹⁵³ Liberal Party Leader and elected Prime Minister Justin Trudeau vowed before and after the election for a Parliament push towards recreational legalization.¹⁵⁴ More than half the population supporting legalization of marijuana in some form.¹⁵⁵ With an immense

¹⁵² Lunn, *supra* note 150.

¹⁵³ Jessica Murphy, *Justin Trudeau Elected New Canadian Prime Minister as Liberals Return to Power*, GUARDIAN, (Oct 20, 2015), <https://www.theguardian.com/world/2015/oct/20/justin-trudeau-set-to-become-pm-as-liberals-sweep-board-in-canada-election>.

¹⁵⁴ *Id.*

¹⁵⁵ CBC NEWS, *Vote Compass: Majority of Canadians Support Softer Marijuana Laws*, CBC NEWS, (Sep 29, 2015), <http://www.cbc.ca/news/politics/canada-election-2015-marijuana-1.3248969>.

increase in personal prescription to buy marijuana,¹⁵⁶ Prime Minister Trudeau and a panel of appointed officials are planning to legitimize the cannabis market and to remove from the criminal code the possession and consumption of marijuana.¹⁵⁷ The plan, formalized by the creation of the Task Force on Marijuana Legalization and Regulation, is led by Anne McLellan, former deputy Prime Minister, to ensure a system that will legalize, regulate, and restrict marijuana access to minors.¹⁵⁸ After careful research and investigation of legal markets in various countries and states in the U.S., the Task Force announced at the end of 2016 a 112-page report outlining Canada's legal marijuana market, laws, and

¹⁵⁶ Susana Mas, *Marijuana Task Force to be Led by Former Deputy PM Anne McLellan*, CBC NEWS, (Jun 30, 2016), <http://www.cbc.ca/news/politics/liberals-marijuana-task-force-1.3659509>; Jacquie Miller, *Numbers of Canadians Buying Legal Medical Marijuana Triples in Just One Year*, OTTAWA CITIZEN, (Dec 12, 2016), <http://ottawacitizen.com/news/local-news/number-of-canadians-buying-legal-medical-marijuana-triples-in-just-one-year>.

¹⁵⁷ Adam Goldenberg, *Is Trudeau's Plan Constitutional?*, POL'Y OPTIONS, (Nov 18, 2015), <http://policyoptions.irpp.org/2015/11/18/trudeau-pot-constitution/>.

¹⁵⁸ Susana Mas, *Marijuana Task Force to be Led by Former Deputy PM Anne McLellan*, CBC NEWS, (Jun 30, 2016), available at <http://www.cbc.ca/news/politics/liberals-marijuana-task-force-1.3659509>.

regulations.¹⁵⁹ In the report, the task force clarifies that marijuana will receive more control than government regulation on tobacco and alcohol in order to prevent access to minors or to criminal organizations.¹⁶⁰ Moreover, the task force addresses recommendations for minimum age use; it also provides public safety guidance—especially on impaired driving—and tighter enforcement in avoiding an overflow of the legal market into the black market.

While this has allowed for somewhat of a relaxation of marijuana policy, the government plans on continuing criminalization on those who access the market without proper authorization.¹⁶¹ Prime Minister Trudeau has urged law enforcement to continue seeking those who are getting ahead of legalization.¹⁶² Trudeau's promise is official, but there remains substantial debate on the move towards

¹⁵⁹ Shannon Proudfoot, *What Canada Learned About Marijuana*, MACLEAN'S, (Dec 13, 2016), <http://www.macleans.ca/news/canada/what-canada-learned-about-marijuana/>.

¹⁶⁰ *Id.*

¹⁶¹ Jaime Watt, *Justin Trudeau Risks Alienating Both Right and Left*, The Star, (Dec 12, 2016), <https://www.thestar.com/opinion/commentary/2016/12/12/justin-trudeau-risks-alienating-both-right-and-left-watt.html>.

¹⁶² *Id.*

outright legalization.¹⁶³ Only time will tell what the outcome of Canada's legal market will be, but, given the government's history on legalization and regulation of medical marijuana, Canada may have reached the point of no return. Perhaps the same can be said about the process in the U.S.

IV. PENDING HIGH ISSUES AND BLUNT SOLUTIONS

Currently, cannabis prohibition experiences an undoubted paradigm shift in the move towards legalization, regardless of the type of use. Each year, the reception of the medical or recreational use of cannabis and its decriminalization in both countries, has seen a growth in more than half of the population.¹⁶⁴In 2016, ArcView Market Research, including Canada for the first time in the report, noted the North American "marijuana market posted sales

¹⁶³ John Paul Tasker, *Pot task force recommends legal cannabis sales be limited to users 18 and over*, CBC NEWS, (Dec 13, 2016), <http://www.cbc.ca/news/politics/marijuana-legalization-pot-task-force-1.3893876>; see also Rob Gillies, *Justin Trudeau Introduces Bill to Legalize Marijuana in Canada*, TIME, (Apr. 13, 2017), <http://time.com/4739145/justin-trudeau-canada-legalize-marijuana-pot-2018/>.

¹⁶⁴ See David Dinenberg, *The US is Falling Behind Other Countries – like Canada – on Marijuana*, CNBC, (Apr. 20, 2017), <http://www.cnbc.com/2017/04/20/the-us-falling-behind-other-countries-like-canada-on-marijuana-commentary.html>.

totaling \$6.7 billion—a 34% increase from 2015—and projected the market to increase to \$20.2 billion by the year 2021.¹⁶⁵ The numbers alone should be an incentive for the U.S. government to reconsider the ban vis-à-vis the potential economic benefits.¹⁶⁶ Further, the means of these nations towards cannabis reform, though differently managed, create the prospect of elevating the industry from a national level toward a global industry. However, though a legalized global economy of cannabis is unlikely to happen anytime soon, it is imperative that the two nations brace themselves for the inevitable, and begin cross-border reform to uniformly address potential future impacts.¹⁶⁷

¹⁶⁵ See Debra Borchartd, *Marijuana Sales Total \$6.7 Billion in 2016*, FORBES, (Jan 1, 2017) (“To put this in perspective, this industry growth is larger and faster than even the dot-com era. During that time, GDP grew at a blistering pace of 22%. Thirty percent is an astounding number especially when you consider that the industry is in early stages. ArcView’s new editor-in-chief Tom Adams said, “The only consumer industry categories I’ve seen reach \$5 billion in annual spending and then post anything like 25% compound annual growth in the next five years are cable television (19%) in the 1990’s and the broadband internet (29%) in the 2000’s”), <http://www.forbes.com/sites/debraborchartd/2017/01/03/marijuana-sales-totaled-6-7-billion-in-2016/#1c0352e18716>.

¹⁶⁶ *Id.*

¹⁶⁷ Yakowicz, *supra* note 9 (discussing how the United States and Canada are not the models for legalization as other countries have commence initiatives towards some-type of legalization, as well as commenting on

A. GREEN AS FAR AS THE EYE CAN SEE

Presently, the legal cannabis market in America continues to receive a wave of incredible growth, where sales alone demonstrate a need for the government to reevaluate their dismissive position. Colorado's legal market broke a billion dollars by generating \$1.3 billion dollars in sales in 2016, and within that number \$200 million was generated in tax and licensing alone.¹⁶⁸ The first \$40 million of the tax generated from cannabis sales is dedicated to education and school infrastructure, under an amendment to the Colorado State Constitution.¹⁶⁹ The remaining funds from the tax are distributed to programs ranging from drug prevention to student retention in schools.¹⁷⁰ Colorado is one

how other countries have implemented regulation and enforcement efforts that far surpass the United States model).

¹⁶⁸ See Sean Williams, *Canada Aims to Become the First Developed Country to Legalize Marijuana*, Motley Fool, (Apr. 8, 2017), <https://www.fool.com/investing/2017/04/08/canada-aims-to-become-the-first-developed-country.aspx>.

¹⁶⁹ See Choice Organics, *Cannabis Revenue Supports Colorado Health, Education Programs*, COLORADOAN, (Apr. 6, 2017), <http://www.coloradoan.com/story/sponsor-story/choice-organics/2017/04/06/cannabis-revenue-supports-colorado-health-education-programs/100122378/>.

¹⁷⁰ *Id.*

of many states allocating cannabis funds to the above-mentioned programs. Thus, any action from the federal government to curb state legalization or offer the implementation of policies that would effectively make the market unserviceable, will have considerable impact in state economies and the lives of their citizens.

As an illustrative point, approximately 123,000 Americans are employed in the cannabis industry, and campaign promises from the current administration regarding job expansion, would be broken if this job pool were suddenly lost.¹⁷¹ These are the reported number of jobs in the current state of the legal market, one could only imagine the amount of jobs that would sprout as a result of federal harmonization of laws throughout the country. With the industry continuing its growth, it is reported the jobs available would be expected to surpass the growth of manufacturing jobs by 2020,¹⁷² and most importantly

¹⁷¹ Alex Halperin, *Trump Probably Won't Crush the Legal Weed Industry*, SLATE, (Mar. 16, 2017), http://www.slate.com/articles/business/moneybox/2017/03/trump_probably_won_t_crush_legal_weed.html; see also Debra Borchartd, *Marijuana Industry Projected to Create More Jobs Than Manufacturing 2020*, FORBES, (Feb. 22, 2017), <https://www.forbes.com/sites/debraborchartd/2017/02/22/marijuana-industry-projected-to-create-more-jobs-than-manufacturing-by-2020/#74edb89d3fa9>.

¹⁷² Borchartd, *supra* note 173; Joe Burgett, *New Jobs in Marijuana Industry to Eclipse New Manufacturing Jobs by 2020*, INQUISITOR, (Mar. 13, 2017),

because cannabis is illegal in most places in the world, these jobs may be “immune from outsourcing.”¹⁷³ However, the industry is in a perpetual state of indecision with conflicting views within the Trump Administration, while President Trump is expressly silent on the matter, Attorney General Sessions unambiguously advocates for tougher reform on the state experiment and a reawakening to the “Just Say No” policies against the war on drugs.¹⁷⁴ Yet, A.G. Sessions will have to rethink his focus on state legal cannabis because as time goes on his fellow Alabamians are reconsidering the their view on cannabis, where a state poll shows that about 80% of the population believes cannabis should be legalized.¹⁷⁵

<http://www.inquisitr.com/opinion/4056246/new-jobs-in-marijuana-industry-to-eclipse-new-manufacturing-jobs-by-2020/>.

¹⁷³ Halperin, *supra* note 173.

¹⁷⁴ Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, WASH. POST, (Apr. 8, 2017), https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.c9af896c8b73

¹⁷⁵ Dispensary.com, *Most People in Attorney General Jeff Session’s Home State Want to Legalize Marijuana*, Entrepreneur, (Apr. 11, 2017), <https://www.entrepreneur.com/article/292657>.

There's a simple solution here—harmonization—and it requires bipartisan support that is already in effect.¹⁷⁶ Particularly, a candid discussion about the security of the industry and the people implicated by it is necessary for the United States to move forward. The persistent stigmatization of cannabis ends once government officials beginning tackling reasonable policies regarding cannabis regulation and acknowledge the need for this industry to flourish just as any other legal enterprise. With such haze in the air, many states are moving to implement policies that would allow the industry and the citizenry to continue to reap from the benefits of legal cannabis. Colorado, for example, is implementing legislation that would allow recreational cannabis to be reclassified as medical cannabis in case significant stringent policies are instituted by the federal government to tackle legal recreational cannabis.¹⁷⁷ However, there would be great financial undercutting if that

¹⁷⁶ Christopher Ingraham, *Meet the Senators and Congressmen Who Support Marijuana Legalization*, Wash. Post, (Sept. 29, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/09/29/meet-the-senators-and-congressmen-who-support-marijuana-legalization/?utm_term=.be7e24cf9f2f; Sarah Jacoby, *Where Marijuana Laws Stand in the U.S.*, Refinery 29, (Apr. 20, 2017), <http://www.refinery29.com/2017/04/149507/marijuana-weed-legalization-trump-sessions>.

¹⁷⁷ Kristen Wyatt, *Colorado Weighs Strategy for Guarding Against Pot Crackdown*, AP NEWS, (Mar. 25, 2017), https://apnews.com/b5e55ca0d5154397a3a232173c5d7466?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP.

were to happen, because in Colorado medical cannabis tax is lower than recreational cannabis tax, which would cut current funding for education and drug prevention programs.¹⁷⁸ But, this type of state legislative process can be of great benefit for other similarly situated state to consider implementing. Such a state reclassification of recreational cannabis to medical would allow this industry to stay in business in some form.¹⁷⁹ Nevertheless, constantly changing cannabis policy may become unstable if the federal government does not adequately address the issue now.

The significance of this section of the discussion is to illustrate the steps forward states are taking to ensure the life of the industry, while the federal government preserve on keeping the conversation in limbo. The effects of such a state-federal clash will spill over once Canada becomes the first G7 nation to legalize cannabis. Canada will be the initial piece to a global domino effect providing real solutions by withdrawing focus on cannabis' criminalization to profiting on legitimate market for the purposes of "eliminating the costs . . . of jailing people for selling and possessing pot; driving out the black market through competition; and giving people transparency about what they're buying."¹⁸⁰

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Katy Steinmetz, *What Marijuana Legalization in Canada Could Mean for the United States*, *Time*, (Apr. 6, 2017),

The effect created between these two nations would bring about questions to a potential cross-national cannabis market, where the commodity is legal in one country, but only legal in selected locations of the other.

Another noteworthy point is Canada's willingness to consult with states like Colorado and Washington to prepare for legalization; so, it's time for the U.S. federal government to discuss with Canada's Task Force to implement legislation that would reconcile the industry throughout the country.¹⁸¹ If not, then the U.S. runs the risk of missing out on promising market by allowing another country to profit off American citizens without implementing internal regulations to deal with that market.¹⁸² A dialogue between Canada and U.S. States, resurrects concerns that resulted in the failure of the Articles of Confederation, where states were independent sovereigns able to deal foreign nations.¹⁸³ Allowing states to conduct dialogue about drug policy with other nations without federal involvement, decentralizes the supremacy of the Federal government to regulate such

<http://time.com/4728091/canada-legalizing-marijuana-united-states-weed-pot/>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Off. Of the Historian, *Articles of Confederation, 1778-1781*, <https://history.state.gov/milestones/1776-1783/articles> (last visited Apr. 23, 2017).

matters and raises deeper federalism question regarding state autonomy. Thus, instead of playing with a fail system of governance, the federal government needs to step up and lead the conversation of cross-border relations dealing with cannabis policy.

B. INTERNAL CONSTRAINTS CAUSING CROSS-BORDER EFFECTS

There are merits in the manner to which the United States and Canada have moved toward a lawful cannabis industry, which is inspired by societal concerns regarding health and crime. Nevertheless, Canada's move towards full legalization will conceivably obfuscate its relationship with the United States, especially when the Trump administration poses deviating views from the Obama administration toward cannabis reform.¹⁸⁴ For many, Donald Trump's

¹⁸⁴ Ingraham, *supra* note 13; Sharon LaFraniere & Matt Apuzzo, *Jeff Sessions, a Lifelong Outsider, Finds the Inside Track*, N.Y. TIMES, (Jan 8, 2016) (After one of the most liberal periods in Justice Department history, Mr. Sessions is expected to execute an about-face on the Obama administration's policies of immigration, criminal justice and — many critics fear — civil rights), http://mobile.nytimes.com/2017/01/08/us/politics/jeff-sessions-attorney-general.html?WT.nav=top-news&action=click&_amp=&_amp=&_amp=&_amp=&_amp=&clickSource=story-heading&emc=edit_nn_20170109&hp=&module=first-column-region&nl=morning-

campaign and election was unexpected, and advocates of cannabis reform raise similar concerns about the trajectory of the cannabis industry in the United States.¹⁸⁵ The appointment of Senator Jeff Sessions and several other cabinet members leaves the accomplishments of the outgoing liberal government in a state of possible regress.¹⁸⁶ As unlikely as it may be for Senator Sessions and the Trump administration to dismantle existing state laws on both medical and recreational use, as the aforementioned DOJ memorandums illustrate, there is wide latitude for the government to commence more rigid enforcement and regulatory policies.¹⁸⁷ Any prospect of cannabis reform in either acknowledging individual rights, as charted in Canada, and the federalism conflict, seem grim with a republican majority government. Though state literature

briefing&nlid=72254056&pgtype=Homepage®ion=top-news&te=1&referer=.

¹⁸⁵ Dan Roberts, et al., *Donald Trump's win Presidential election, plunging US into Uncertain Future*, GUARDIAN, (Nov 9, 2016) <https://www.theguardian.com/us-news/2016/nov/09/donald-trump-wins-us-election-news>; McGreevy, *supra* note 102.

¹⁸⁶ *Id.*

¹⁸⁷ Times Editorial Board, *The Voters Have Spoken on Marijuana. Trump Ought to Listen*, LA TIMES, (Dec 28, 2016), <http://www.latimes.com/opinion/editorials/la-ed-marijuana-trump-20161228-story.html>.

acknowledges a right to access for medical cannabis, developing such a right has yet to be undertaken by the federal government, and perhaps will not be a consideration of the Trump administration.¹⁸⁸

But what does this mean for the American-Canadian relationship? Well, for starters, with such a vehement view of cannabis reform, as noted by most in the Trump administration, there may be a wave to promote draconian regulations regarding border patrol and immigration. However, a few countries are commencing some type of internal drug policy and are examining how to deal with major international treaties—initiated by the American effort against the war on drugs.¹⁸⁹ Canada may receive immense support from nations, such as Great Britain, Germany, and Israel, to ameliorate global drug policy, which may cause the

¹⁸⁸ *Gonzales v. Raich*, 545 U.S. 1, 9 (2005). (“For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected. Until that day arrives, federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering”).

¹⁸⁹ Rachel Browne, *Canada Really Wants to Legalize Weed – But First It Needs to Deal with The UN*, VICE NEWS, (Feb 10, 2016), <https://news.vice.com/article/canada-really-wants-to-legalize-weed-but-first-it-needs-to-deal-with-the-un>.

United States to align with countries that have taken extreme measures to combat the war on drugs.¹⁹⁰ Both countries are the key players of the Western hemisphere, and are responsible for creating decisive solutions to current global issues. Thus, it is not conducive to continue this cat-fight against legalization. An unsettling approach may ruin the prospect of regulating a legitimate market, and perhaps providing further aliments for people to resort to illicit channels.

The extensive border between the United States and Canada includes states that have legalized marijuana either for adult or medical use, but other states may not move for legalization at all. Cross-border inconsistencies on the legality of cannabis present immediate problems to Canada's plan to legalize because the Trump administration commented that the government firmly intends to keep cannabis illegal at the federal level.¹⁹¹ Leaving the states to vet for themselves in dealing with border patrol issues may force states that have legalized cannabis to consider heavier restrictions along the border.¹⁹² Presently, the United States' border policies result in travel bans to immigrants admitting to using marijuana, which is an issue Canada has pleaded with the American government to fix because of the ban's

¹⁹⁰ *Id.*

¹⁹¹ Editorial Board, *supra* note 190.

¹⁹² *Id.*

effect on Canadians.¹⁹³ Because the border patrol is under the exclusive jurisdiction of the federal government, cannabis at the border is illegal on the side of the free nation and policy can change at any moment.¹⁹⁴

The above presents a concern in acquiring American legal representation for Canadians and Americans who have been criminalized for possession. Because some state rules of professional responsibility strictly adhere to federal laws, such as the CSA, this may create an opportunity of ethical infractions for attorneys.¹⁹⁵ Limitations of legal access in

¹⁹³ Andrew Blake, *Canada to urge U.S. for Changes to Border Law that Bans Marijuana Smokers from Entry*, WASH. TIMES, (Sep 10, 2016), <https://news.vice.com/article/canada-really-wants-to-legalize-weed-but-first-it-needs-to-deal-with-the-un>.

¹⁹⁴ Laura Kane, *How Legalizing Marijuana Could Change Canada-U.S. Relations*, Globe & Mail, (Dec. 21, 2016), <https://news.vice.com/article/canada-really-wants-to-legalize-weed-but-first-it-needs-to-deal-with-the-un>; see also Chris Roberts, *The Green Border: How Canada's Move to Legalize Pot Will Affect the U.S.*, HIGH TIMES, (Dec 21, 2016), <http://hightimes.com/news/the-green-border-how-canadas-move-to-legalize-pot-will-affect-the-u-s/>.

¹⁹⁵ MODEL RULES, *supra* note 107 at 1.2(d) (“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 a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.”).

Canada are not at all prevalent; instead Canada witnesses a surge of individuals in need of legal assistance when admitting to their use of marijuana to American border patrol agents.¹⁹⁶ This results in impossible immigration battles between the two nations, and requires keen dialogue to solve the issue. There is great uncertainty as to how the Trump Administration will decide to deal with this, but, for now, it calls for such individuals to keep an open mind towards co-operative management between the two nations. Moreover, Canadian prospects of legalization commenced a new wave of American citizens making their way to the greater north, which potentially calls for “building a wall in order to keep Americans in” the U.S.¹⁹⁷ Many Americans are seeking work permits for various occupations in Canada because the booming industry has amplified job creation and, at the rate Canada is heading, Americans will continue to seek jobs in Canada that are not available throughout the U.S.¹⁹⁸

C. DISREGARD FOR THE JUDICIARY? — F.A.A.
KEEPING CANNABIS CONTRACTS ALIVE

Businesses in states where cannabis is legal in some form, are facing an additional concern: can cannabis related contracts be enforceable? The unclean hands doctrine

¹⁹⁶ Blake, *supra* note 196.

¹⁹⁷ Roberts, *supra* note 197.

¹⁹⁸ *Id.*

provides a route to find a contract unenforceable because of an illegality embedded in the agreement.¹⁹⁹ This is a path many courts are taking when dealing with cannabis related disputes, thereby leaving parties without a remedy.²⁰⁰ As a result, the Cannabis Dispute Resolution Institute acknowledging this unfairness, is providing a forum for cannabis related disputes so that cannabis businesses can seek redress when necessary.²⁰¹ However, this process, while providing a service to these disputes, incentivizes a disservice by disregarding policies the judiciary are bound to and opening a back-door approach to have cannabis contracts enforced. For years, arbitration is regarded as an efficient manner to solve disputes privately and decided by experts in the field to make parties more comfortable with

¹⁹⁹ See Restatement (Second) of Contracts § 178(1) (Am. Law Inst. 1981); see also, Steven Mare, *He Who Comes into Court Must Not Come with Green Hands: The Marijuana Industry's Ongoing Struggle with the Illegality and Unclean Hands Doctrines*, 44 HOFSTRA L. REV. 1351, 1359 (2016).

²⁰⁰ Mare, *supra* note 202 at 1360 (citing *Haeberle v. Lowden*, No. 2011CV709, 2012 WL 7149098, at 8. (Colo. Dist. Ct. Aug. 8, 2012) (finding contract for sale of medical cannabis as void and unenforceable)

²⁰¹ Joel Warner, *The World's First Cannabis Arbitration Institute Wants to Take the Legal Uncertainty Out of the Pot Business*, Int'l Bus. Times (Dec. 11, 2015) <http://www.ibtimes.com/worlds-first-cannabis-arbitration-institute-wants-take-legal-uncertainty-out-pot-2220935>; see also CANNABIS DISP. RESOL. INST., <http://www.candri.org/why-arbitration/> (last visited Apr. 23, 2017).

the award rendered.²⁰² While there is no question to the enforceability and constitutionality of arbitral awards, as decided by the Supreme Court, allowing for cannabis contract disputes to be decided in this manner will leave a void in case-law for the future.²⁰³ Giving leave to arbitration tribunals to decide such disputes, and having the awards enforceable under the Federal Arbitration Act ²⁰⁴ , circumvents the decisions made by the judiciary when applying the unclean hands doctrine to illegal contracts.

Encouraging cannabis business to implement arbitration clauses in their agreements offers some-what of a disregard for the judicial system. Nevertheless, these tribunals should be used as a supplement or in conjunction with the traditional judicial process, but the tribunals should not be the only way to seek enforcement. More inconsistencies in law regarding cannabis business would arise following the above, as a result, it should be a government priority to balance these approaches by considering uniform cannabis policy through the U.S. or rescheduling cannabis under the CSA. With the emerging legal market in Cannabis it may be foreseeable that Canadian marijuana enterprises utilize arbitration agreements with American companies to have their contracts enforced. Such a novel situation would give rise to

²⁰² Mare, *supra* note 202 at 1377.

²⁰³ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)

²⁰⁴ 9 U.S.C. § 2 (2012).

new questions about the enforceability and recognition of awards under the New York Convention, which is beyond the scope of this Note.²⁰⁵

D. TREATIES

American's uncertain future on cannabis reform may pose significant barriers to Canadian efforts on full legalization. Because both countries are signatories to three major UN treaties regarding global drug policy, there may be pressures from the Trump Administration to sanction or hold Canada liable for treaty violations.²⁰⁶ This would not be the first time the United States would make an attempt at this.²⁰⁷ During the Bush Administration, the known "drug czar" John Walters denounced Canadian efforts to decriminalize cannabis and the liberalization of drug policies.²⁰⁸ Believing that "poison" would flow south of the Canadian border, Walters threatened the Canadian government with stricter border patrol and moving to hold

²⁰⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

²⁰⁶ Browne, *supra* note 192.

²⁰⁷ Tim Harper, *US: Pot Plan Puts U.S. Noses Out of Joint*, TORONTO STAR (May 3, 2003), <http://www.mapinc.org/drugnews/v03/n640/a07.html?255171>.

²⁰⁸ *Id.*

Canada liable for treaty violations.²⁰⁹ This pressure ended up being effective, causing the Canadian government to back off from cannabis reform for nearly a decade.²¹⁰ A similar situation may present itself in the near future, given that the two nations are in a similar political states similar to those during the time of the Bush and Chrétien governments.²¹¹ Either country may face serious backlash depending on how the global community reacts to Canada's cannabis policy reform. Thus, for Canada to avoid this backlash, the government must denounce the above treaties and then must attempt to reapply to the treaties with expressed reservations.²¹² Though this approach will take time, this may be a remedial way to avoid conflict between the two nations.

V. CONCLUSION

Though the popularity of cannabis is nothing recent, its progression towards a legitimate market demonstrates a colossal transformation in the perception on the war on drugs. The potential legalization of cannabis in Canada puts the country ahead of other developed nations in tackling drug policy. The drug ban has only led to immense political,

²⁰⁹ *Id.*

²¹⁰ Roberts, *supra* note 197.

²¹¹ *Id.*

²¹² Browne, *supra* note 192.

social, and economic issues, which require frank discussions between adult leaders. One of the many lessons the United States can learn from its neighbor, is Canada's concern for individual security rights under federal law. Drug reform should not be about the criminalization and alienation of people, as the history of cannabis has indicated. Instead, comprehensive reform comes through sincere approaches solving pervasive issues regarding citizen quotidian matters. When there is no government acknowledgment of the basic rights that the laws afford, then there will be a heightened focus on government prerogatives to regulate and criminalize, rather than reconsiderations of how governance interferes with basic citizen livelihood. The purpose of this note is to demonstrate how swiftly it is for federal inaction and reaction to create national filibusters that do not allow for fruitful measures that would fix problems affecting the overall functionality of the government. This Note intends to create spaces for discussion on matters that we have consistently ignored. While this Note does not discuss the racial and discriminatory consequences of existing drug policies, it does implore the reader to acknowledge and evaluate these issues tainting the innocent lives of many. The successes of the legalization experiment in both Canada and some U.S. states, should be evidence to the American government of the need to harmonize the application of laws regarding legal cannabis, in order to avoid unknown consequences in the future.