2009

Legalizing Marijuana: California’s Pot of Gold?

Michael Vitiello
Pacific McGeorge School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/facultyarticles

Part of the Criminal Law Commons

Recommended Citation
In early 2009, a member of the California Assembly introduced a bill that would have legalized marijuana in an effort to raise tax revenue and reduce prison costs. While the bill’s proponent withdrew the bill, he vowed to renew his efforts in the next term. Other prominent California officials, including Governor Schwarzenegger, have indicated their willingness to study legalization in light of California’s budget shortfall. For the first time in over thirty years, politicians are giving serious consideration to a proposal to legalize marijuana. But already, the public debate has degenerated into traditional passionate advocacy, with ardent prohibitionists raising the specter of doom, and marijuana advocates promising billions of dollars in tax revenues and reduced prison costs. Rather than rehashing the old debate about legalizing marijuana, this Essay offers a balanced view of the proposal to legalize marijuana, specifically as a measure to raise revenue and to reduce prison costs. It raises some of the central problems with proponents’ arguments, including how their goal of reducing prison costs effectively undercuts their goal of raising revenue. Additionally, it challenges extravagant claims of the prohibitionists that legalizing marijuana will lead to significant increases in marijuana use and attendant social harm. In the end, the author offers a mild endorsement for legalization.
INTRODUCTION

In early 2009, California Assembly member Tom Ammiano authored A.B. 390, which proposes legalizing marijuana production and taxing its sales.\(^1\) Newly appointed Attorney General Eric Holder has signaled that the federal approach towards medical marijuana will be softer than that of his predecessor.\(^2\) Ammiano cited such statements as evidence that the Obama administration may give California room to legalize marijuana.\(^3\) Given the ongoing budget crisis in California, Ammiano no doubt sought to build support among legislators and members of the public desperate to find a needed source of revenue and those troubled by California’s burgeoning prison population, along with the long-standing opponents of marijuana laws.

Not surprisingly, Ammiano’s bill has produced a heated debate. Supporters of legalizing marijuana marshal powerful arguments for its legalization, including projected revenues of over a billion dollars, with savings of another billion dollars in reduced prison costs.\(^4\) Opponents predict widespread marijuana use, including a dramatic increase in use by California’s youth, with no significant reduction in prison costs or significant increases in revenue.\(^5\) As is typical of debates about important policy questions today, the debate surrounding A.B. 390 has

---

1. A.B. 390, 2009 Leg., 2009–10 Sess. (Cal.).
5. See infra Part III.A.3.
generated much heat and little light. Issues surrounding A.B. 390 need more rational debate. That is the subject of this Essay.

Part I briefly lays out the policy supporting marijuana legalization and the provisions of A.B. 390.\footnote{Part II focuses primarily on arguments in support of A.B. 390. That is, it develops arguments favoring taxing and regulating marijuana production. It does not review the existing literature that advocates legalizing marijuana use per se. This literature is ample and dates back decades. See, e.g., JOHN KAPLAN, MARIJUANA: THE NEW PROHIBITION (1970). For more recent literature, see JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS (2001). Despite the arguments advanced for legalization, proponents have failed to convince legislators. The current arguments are more persuasive because of the potential to tax a lucrative cash crop.} Part II discusses the threshold problem before anyone should seriously consider becoming a registered marijuana grower even if A.B. 390 were to become law: Can anyone realistically hope that the federal government will abstain from its efforts to enforce marijuana laws? Part III then reviews the debate surrounding A.B. 390, including an assessment of extravagant claims by both sides about the results of legalizing marijuana. Sorting through charges and countercharges, I point out some of the inconsistencies within proponents' and opponents' own arguments. Further, legalizing marijuana will entail many unanticipated consequences. Whether proponents can deliver on their promises will depend on whether the legislature thinks through issues that proponents and opponents are not likely to focus on in their passionate advocacy. Finally, in Part IV, I tepidly favor legalizing marijuana.

I. A.B. 390

study reports that over 40 percent of Americans have tried it.\textsuperscript{10} Proponents of legalizing marijuana can point to the current hypocrisy among politicians: possibly three Presidents, a Supreme Court Justice, California’s Governor, and numerous prominent—and often conservative—members of Congress have admitted using marijuana.\textsuperscript{11} Despite that, few are willing to advocate for its legalization.

Proponents of legalizing marijuana can also point to the selective enforcement of drug laws. Despite survey data suggesting that the same proportion of whites, Hispanics, and African Americans use illegal drugs, enforcement falls far more heavily on minority communities.\textsuperscript{12} Saddled with criminal records, young minority adults bear yet another disability when they attempt to enter the mainstream of American society.

Further, proponents have long argued that, unlike alcohol, marijuana use is not associated with violent crime.\textsuperscript{13} And while smoking marijuana involves similar risks to those involved in the use of tobacco,

\begin{itemize}
  \item[12.] One recent study suggests that this disparity has decreased in recent years. \textit{See Marc Mauer, The Sentencing Project: The Changing Racial Dynamics of the War on Drugs} (2009), available at http://www.sentencingproject.org/doc/1dp_raceanddrugs.pdf.
\end{itemize}
marijuana users are not likely to smoke as much as cigarette users.\textsuperscript{14} And while both tobacco and alcohol are listed among the ten most dangerous substances, marijuana does not make that list.\textsuperscript{15} As a result, marijuana seems to cause less harm than do two legal substances widely used in America.

These arguments have been around for some time. Apart from occasional efforts to legalize marijuana, most proponents have concentrated efforts on legalizing marijuana for medical use.\textsuperscript{16} To date, fourteen states have adopted compassionate-use statutes, allowing seriously ill individuals to use marijuana.\textsuperscript{17} No doubt, many advocates of medical marijuana see it as a stepping stone towards the legalization of marijuana. But until Ammiano’s bill, the legalization movement in California had been relatively quiet.\textsuperscript{18}

Timing is everything, of course. Headlines have featured three issues that make Ammiano’s proposal credible. The recent budget crises in California have demonstrated gridlock in the legislature, with Democrats virtually unable to raise taxes to meet the projected deficits because of the discipline among Republicans.\textsuperscript{19} Proponents of A.B. 390 project significant income from sales of licenses to sell, and then the sale of marijuana itself. For example, the Chair of the Board of Equalization projects that A.B. 390 could generate about $990 million


\textsuperscript{18} The last serious effort to start an open and honest debate on legalization seems to be in 2005 as evidenced by a report by Harvard University. JEFFREY A. MIRON, THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION (2005), available at http://www.prohibitioncosts.org/mironreport.html (examining the budgetary implications of legalizing marijuana and revealing factors that should be included in a rational debate about marijuana policy).

from the fee imposed on sellers and another $349 million generated by the $50-per-ounce fee on the sale of marijuana.\textsuperscript{20}

Second, A.B. 390 may pick up support from those who have read headlines about California’s prison crisis. The federal courts have taken over the prison health-care system.\textsuperscript{21} The court-appointed receiver’s demand for several billion dollars to build adequate health-care facilities has dominated the news, especially when the state’s Attorney General and Governor sought to have him ousted.\textsuperscript{22} A three-judge panel has hinted that it may order the release of about 55,000 prisoners to bring the system in compliance with the Eighth Amendment.\textsuperscript{23} Proponents of A.B. 390 point to significant savings in prison costs that would flow from its passage. That is so, they argue, because of the large number of prisoners in prison on marijuana charges and those who have been released on parole, only to be returned to prison as a result of failed urine tests, that indicate marijuana use.\textsuperscript{24} Proponents claim another billion dollars that the state will save by legalizing marijuana.\textsuperscript{25}

The third headline issue that may increase support for A.B. 390 is the violence in Mexico relating to the drug trade. Stories about the thousands of murders, especially in border towns, raise the specter of violence spilling into the United States.\textsuperscript{26} Here, too, proponents of A.B. 390 argue that legalizing marijuana will reduce gang violence because, as with the end of prohibition, gangs will no longer be able to profit

\begin{thebibliography}{9}
\bibitem{23} Moore, \textit{supra} note 21.
\bibitem{24} Id.
\bibitem{25} California Board of Equalization, Staff Legislative Bill Analysis: A.B. 390, Marijuana Control, Regulation, and Education Act, Revenue Effect and Assumptions (Feb. 23, 2009); \textit{see also} GIERINGER, \textit{supra} note 14.
\end{thebibliography}
from marijuana sales. As a result, they will give up their turf wars over the sales of marijuana.\footnote{27}

Enter A.B. 390. Ammiano’s bill does several things. A.B. 390 legalizes the possession, sale, transportation, and cultivation of marijuana for adults age twenty-one and older.\footnote{28} Specifically, A.B. 390 amends or repeals several sections of California Health and Safety Code to eliminate civil and criminal penalties associated with marijuana use, possession, and production.\footnote{29} The bill further prohibits the use of state or local funds to assist in the enforcement of federal laws inconsistent with A.B. 390’s provisions, or to “provide for greater sanctions for conduct prohibited by this division.”\footnote{30} A.B. 390 does not alter criminal statutes forbidding driving under the influence or possession of marijuana on school property, nor does it affect the rights of employers concerning employee use.

A.B. 390 raises revenue by enacting a “supplemental fee” of $50 per ounce of marijuana purchased.\footnote{31} It also mandates that the state treasurer deposit payments received to the “Drug Abuse Prevention Supplemental Funding Account” for the purpose of promoting drug education, awareness, and rehabilitation programs.\footnote{32}

II. THE LIKELY FEDERAL RESPONSE

Before investing too much time debating A.B. 390, Californians ought to ask whether the federal government will foreswear criminalizing marijuana. As many learned the hard way, a state’s

\footnotetext{27}{How to Stop the Drug Wars, Economist, Mar. 7, 2009, at 15 (arguing that “prohibition has failed” and legalization is the “least bad solution”).}

\footnotetext{28}{A.B. 390, 2009 Leg., 2009-10 Sess., at § 11,725 (Cal.). Citizens may consume marijuana and cultivate up to ten plants on private premises away from public view. \textit{Id.}}

\footnotetext{29}{A.B. 390 makes the following changes to the California Health and Safety Code: it amends section 11,014.5 to remove from the definition of “drug paraphernalia” objects designed for the ingesting or inhaling of marijuana, hashish, or hashish oil; amends section 11,054(d) to remove marijuana from the list of “hallucinogenic substances;” amends section 11,357 to remove criminal penalties for possession of marijuana; repeals sections 11,358-61 relating to the cultivation, sale, and transportation of marijuana; and amends section 11,703 to remove marijuana cultivation and possession for sale from the definition of “marketing of illegal controlled substances.” Cal. A.B. 390.}

\footnotetext{30}{Cal. A.B. 390 at § 11,727.}

\footnotetext{31}{A.B. 390 also requires that commercial cultivators obtain licenses and abide by specified regulations, including: adequate security to protect against unauthorized access, prohibitions against employees under the age of twenty-one having access to marijuana, adequate recordkeeping, and background checks. Cal. A.B. 390 at §§ 25,402, 34,011.}

\footnotetext{32}{Cal. A.B. 390 at § 34,031.}
decision to legalize marijuana does not bar federal prosecution. In this section, I review the intransigence of the federal authorities, even when the issue was the more limited question whether states should be able to de-criminalize medical use of marijuana. Even though Attorney General Holder has indicated a softer stance on raiding medical providers of marijuana,\textsuperscript{33} I doubt that the federal government will foreswear prosecuting all marijuana offenses. Short of that, marijuana dealers should hesitate to sign up for California’s licensing program. That in turn would render it ineffective as a source of revenue.

A sad story illustrates the problem. Shortly after passage of Proposition 215, which created immunity from state criminal prosecution for certain users and providers of “medical” marijuana,\textsuperscript{34} I received a letter from a man awaiting trial in the local federal court. Over the next few months, I learned that his story was hardly unique. As soon as Proposition 215 became law, marijuana growers like the writer entered into detailed contracts with cannabis clubs, whereby they would provide the club with marijuana. The man who wrote to me learned the hard way that Proposition 215 did not prevent a separate sovereign, the United States, from pursuing a violation of its drug laws.\textsuperscript{35} Despite his good-faith defense, the best offer that he received from the government was a term of seven years in prison.\textsuperscript{36} I lost track of his case after a colleague and I met with one of his supporters and discussed his unlikely success at defending his case on the merits. I believe that he took the bargain. Other defendants pursued various defenses, like necessity, with little success.\textsuperscript{37}

\textsuperscript{33.} See Johnson, supra note 2; see also Despite Obama Admin’s Promise, DEA Continues Raids on Medical Marijuana Growers, RAW STORY, Feb. 13, 2010, available at http://rawstory.com/2010/02/obama-admins-promise-dea-continues-raids-medical-marijuana-growers/ (stating that “the difference between the Obama administration’s stated mission to end the “war on drugs” and the actual enforcement of that policy by DEA agents may not come as a surprise to those who have seen the Office of National Drug Control Policy’s (ONDCP) budget for fiscal year 2011”).

\textsuperscript{34.} CAL. HEALTH & SAFETY CODE § 11,362 (West 2007) (enacted by ch. 875); see also Tammy L. McCabe, It’s High Time: California Attempts to Clear the Smoke Surrounding the Compassionate Use Act, 35 MCGEORGE L. REV. 545, 548 (2004).


\textsuperscript{36.} This statement reflects the author’s recollection of the confidential communications with the prisoner.

\textsuperscript{37.} See United States v. Oakland Cannabis Buyer’s Co-op, 532 U.S. 483, 486 (2001) (holding that there is no medical necessity exception to the Federal Controlled Substance Act’s prohibitions on manufacturing and distributing marijuana).
Apart from California’s inability to limit the federal government’s ability to enforce its law, examining federal policy on drug enforcement should have signaled to marijuana growers that federal drug agents would not sit by idly. While the United States criminalized marijuana less than seventy-five years ago, federal enforcement of drug laws has been vigorous for most of that time.

Commentators attribute early efforts to criminalize marijuana as the product of the end of Prohibition and racism. Many see Harry J. Anslinger, who had aggressively enforced the Harrison Act, as the chief villain in the war against marijuana. As I have written elsewhere, “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.” During hearings on the Act, he claimed, without scientific evidence, that it was addictive and produced “in its users insanity, criminality, and death.” While he believed that Hispanics were the largest problem, he also spread tales about African Americans: his agency reported cases of “colored students” smoking marijuana with white women students and “getting their sympathy with stories of racial persecution.”

Despite Anslinger’s anti-marijuana stance, until the 1970’s, marijuana use and prosecution remained out of the mainstream. That changed with the wholesale use of marijuana by college students and draft protestors. At first, widespread use among the middle class seemed to presage softening of federal law. For example, the National Commission of Marijuana and Drug Abuse, a commission appointed by President Nixon, recommended that federal law effectively de-criminalize possession of marijuana for personal use. Nixon repudiated the Commission’s recommendation.

39. Id. at 99.
40. Vitiello, supra note 35, at 749; see MILLER, supra note 38, at 99.
42. See MILLER, supra note 38, at 99.
43. See Whitebread, supra note 41 (noting that in 1969 Congress passed the Dangerous Substances Act, which actually lowered the penalties for possession of marijuana).
44. See generally MARIJUANA: A SIGNAL OF MISUNDERSTANDING: FIRST REPORT OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE 152 (1972) (stating that “[t]he Commission recommends only the following changes in federal law: Possession of marihuana for personal use would no longer be an offense, but marihuana possessed in public would remain contraband subject to summary seizure and forfeiture” and “[c]asual distribution of small amounts of marihuana for no
Instead of following the Commission’s recommendation, Nixon urged adoption of federal anti-drug legislation. The resulting legislation, the Controlled Substances Act, classifies marijuana as a Schedule I drug, one lacking an “accepted medical use” with “a high potential for abuse.”

For a short period, de-criminalizing marijuana seemed plausible. President Carter recommended decriminalizing it. But presidents since then have continued to work at appearing tough on crime, which increased the number of offenders in prison for drug-related crimes.

The get-tough-on-drugs mentality is evident in litigation surrounding efforts to reschedule marijuana, thereby allowing its medical use. A review of NORML’s efforts to have marijuana reclassified demonstrates the long-standing position of federal-drug enforcement agencies. Beginning in 1972, NORML began the process to reschedule marijuana. Subsequent litigation took twenty years. Drug-enforcement administrators used various procedural tactics to prevent a hearing on the issue, but were reversed by the D.C. Court of Appeals. Eventually, after a two-year hearing with a record “nearly five feet high,” the judge recommended that marijuana be

---

45. LESTER GRINSPOON, MARIJUANA RECONSIDERED 373 (2d ed. 1977).


50. See Nat’l Org. for the Reform of Marijuana Laws v. Drug Enforcement Admin., 559 F.2d 735, 741–44 (D.C. Cir. 1977) (detailing the procedural history); see also Vitiello, supra note 35, at 753.

The DEA administrator again rejected the recommendation, which was affirmed on appeal.\textsuperscript{53} For over a decade, the federal government ran a “compassionate use” program.\textsuperscript{54} Between 1978 and 1992, the agency provided marijuana to approximately thirty approved patients.\textsuperscript{55} With the onset of the AIDS epidemic, and a dramatic increase in applications for the program, the FDA suspended the program for further review.\textsuperscript{56} The government cancelled the program in 1992 in part because the program sent a message that seemed contrary to the first President Bush’s public opposition to illegal drugs.\textsuperscript{57} President Clinton’s administration did not revive the program.\textsuperscript{58} Further, arrests for marijuana increased during Clinton’s term in office.\textsuperscript{59}

Despite President George W. Bush’s strong states-rights rhetoric,\textsuperscript{60} his administration vigorously opposed medical marijuana.\textsuperscript{61} Federal law

\textsuperscript{52} See \textit{In re Marijuana Rescheduling Petition}, No. 86-22, at 67 (Dep’t of Justice Sept. 6, 1988) (on file with the \textit{Univ. of Mich. J. of L. Reform}) (Administrative Law Judge Young noted that other federal and state agencies would likely have to act even if the DEA rescheduled the drug to Schedule II to make marijuana readily available).

\textsuperscript{53} See \textit{Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.}, 15 F.3d 1131 (D.C. Cir. 1994).


\textsuperscript{56} Cf. Paul Cotton, \textit{Government Extinguishes Marijuana Access}, 267 JAMA 2573, 2573 (1992) (stating that the timing of the cancellation of the program was influenced by the influx of applications from AIDS patients).


\textsuperscript{60} See generally Terry Gross, \textit{Looking at President Bush, Seeing an ‘Imposter’} (NPR radio broadcast Feb. 22, 2006), http://www.npr.org/templates/story/story.php?storyId=5227215 (stating that George W. Bush, philosophically has “more in common with liberals, who see no limits to state power as long as it is used to advance what they think is right”).
enforcement frequently raided cannabis clubs in California and elsewhere.\textsuperscript{62} Further, while many conservatives have railed against the sweeping scope of the Supreme Court’s Commerce Clause jurisprudence,\textsuperscript{63} the Bush Justice Department argued an expansive view of the Commerce Clause\textsuperscript{64} in its efforts to overrule the Ninth Circuit’s decision finding that cultivation of a small amount of marijuana for medical use had an insufficient effect on interstate commerce to allow its criminalization.\textsuperscript{65} In \textit{Gonzales v. Raich},\textsuperscript{66} the Supreme Court agreed with the Bush administration in reliance, in part, on \textit{Wickard v. Filburn},\textsuperscript{67} probably the Court’s broadest interpretation of the Commerce Clause.

As a senator, Barack Obama opposed federal legislation that would have furthered federal interference with cannabis clubs.\textsuperscript{68} As a candidate, Obama promised to end raids on cannabis clubs.\textsuperscript{69} Early in his administration, President Obama seems committed to that position,

\begin{itemize}
  \item \textsuperscript{62} See David Johnston & Neil A. Lewis, \textit{Obama Administration to Stop Raids on Medical Marijuana Dispensers}, N.Y. TIMES, Mar. 19, 2009, at A20 (“In the Bush administration, federal agents raided medical marijuana distributors that violated federal statutes even if the dispensaries appeared to be complying with state laws.”).
  \item \textsuperscript{63} See Eric R. Claeys, \textit{The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison}, 11 WM. & MARY BILL RTS. J. 403, 430 (2002) (stating that “whenever a local activity has any ‘effect’ on interstate activity, the Sweeping and Supremacy Clauses give Congress the push it needs to sweep that activity under the Commerce Clause”).
  \item \textsuperscript{64} U.S. CONST. art I, § 8, cl. 3.
  \item \textsuperscript{65} \textit{Raich v. Ashcroft}, 352 F.3d 1222, 1227 (9th Cir. 2003).
  \item \textsuperscript{66} 545 U.S. 1 (2005).
  \item \textsuperscript{67} 317 U.S. 111 (1942); see \textit{Gonzales}, 545 U.S. at 2 (discussing \textit{Wickard}).
as does Attorney General Holder.\textsuperscript{70} But that is a far cry from endorsing the legalization of marijuana. Indeed, in a press conference in early 2009 where Obama took questions submitted online, he quickly distanced himself from legalizing marijuana.\textsuperscript{71}

Further, with far more pressing agenda items—notably two wars and an economy in the tank—Obama is unlikely to take on a divisive issue like legalizing drugs. Imagine the cry from the radio talk-show hosts about the destruction of Western Civilization (despite some of their own problems with illegal drug use)! Despite increased public support for legalization, that support has not been through the crucible of a hard advertising campaign that would portray the risks of marijuana use.\textsuperscript{72}

Absent legalization of marijuana at the federal level, California’s efforts to legalize and tax marijuana are likely to fail. A.B. 390 does propose that state and local law enforcement not cooperate with federal law-enforcement agents if efforts to gain federal approval fail.\textsuperscript{73} But that may be small comfort. Because state law cannot trump federal law, California cannot assure growers that their conduct is lawful.\textsuperscript{74} Producers would face a difficult dilemma: even if the current administration takes a position of benign neglect, registering as a grower would leave a paper trail to the growers.

Apart from any sympathy that the president may have for reform, the federal law-enforcement bureaucracy is not likely to give up its interest in criminalizing marijuana production.\textsuperscript{75} Thus, even if growers


\textsuperscript{73.} A.B. 390, 2009 Leg., 2009–10 Sess. (Cal.). One should not discount the importance of that provision. Some have criticized the current state of affairs where cooperating law enforcement choose whether to proceed under federal or state law, based on the differing severity of the punishment. See, e.g., Michael M. O’Hear, \textit{Federalism and Drug Control}, 57 VAND. L. REV. 783 (2004).

\textsuperscript{74.} \textit{Gonzales v. Raich}, 545 U.S. 1, 29 (2005).

\textsuperscript{75.} No doubt, a government agency like the DEA has a vested interest in maintaining marijuana laws on the books. By comparison, some commentators believe that agents responsible for enforcing Prohibition backed efforts to criminalize marijuana to maintain their power and influence. Harry G. Levine, \textit{CEDRO, The Secret of World-Wide Drug Prohibition: The Varieties and Uses of Drug Prohibition}, Oct. 2001,
avoid prosecution during the Obama presidency, all bets would be off during future administrations. And by signing up with the State, growers would now be out in the open, easy prey for drug-enforcement agents in the future. Further, absent a clear commitment from the current administration, California producers would remain subject to arrest for violating federal law in the immediate term as well.

As indicated, the federal government will not legalize marijuana any time soon. While the current administration takes a benign view towards prosecuting marijuana, that may not be enough to create an incentive for producers to register as producers, were A.B. 390 to pass.

III. THE DEBATE

Despite my doubts about the federal government’s position on marijuana, the growing interest in legalizing marijuana begs further inquiry. On the assumption that California were to pass A.B. 390, would it work?

In April 2009, The Sacramento Bee published an op-ed piece that I wrote on A.B. 390. This Essay expands on the thesis that I advanced there. At its core, I argued that claims by proponents and opponents of A.B. 390 overstated the benefits and harm that would result from passage of the bill. As I argue here, mine is a call for careful examination of the issues surrounding legalizing marijuana. My fear is that the debate will be dominated by the passionate advocates for prohibition or legalization. Legalizing marijuana does create risks.

available at http://www.cedro-uva.org/lib/levine.secret.html (revealing specifically that “Drug prohibition has given all kinds of governments additional police and military powers that they have been freer to deploy than other kinds of police powers”).

77. Id.
78. A peek at the comments that my op-ed evoked supports my fear that most of the interested parties are more passionate than rational. One party stated, “No it should not be legalized. But, if it is I guess we will just all go back to the: ’STONED AGE.’” Another stated, “It should be legalized to make the Left happy . . . and OxyContin should be legalized to make the Right happy.” Another example:

Absolutely. How many young people have criminal records for something that should have been legal long ago? This country is on a binge to destroy young people with our draconian drug laws. It has been proven over and over that the drug war is a failure and it only helps those illegally selling it. Just like prohibition, it doesn’t work. If people want to do it, they will find a way. Tobacco and alcohol are the real killers and they are legal. Doesn’t that make any sense to anyone? MJ doesn’t kill people and its effects are completely reversible. It’s a drug of youth and those living with physical pain. Legalizing it will save lives. Look what is happening at our border over drugs. Legalize most drugs and regulate them. Stop the big profits for
Legalizing Marijuana

But many of those risks, like widespread use by teenagers, already exist. And thoughtful legislation can reduce many of those risks. But creating thoughtful legislation is hard work—the product of genuine debate among policy experts, not just vested interests. Further, legalizing marijuana does generate some benefits, including increased revenue. Whether the benefits outweigh the risks—the question that we ought to be asking—is dependent on careful scrutiny of the risks and benefits. This section does not answer all of the questions that it poses. But it does suggest some of the hard issues that California faces in trying to decide whether to legalize marijuana.

A. Summing Up the Debate: More Heat than Light

1. THE GOOD NEWS

The debate about marijuana has become interesting because of the current economic crisis. Californians face a crushing deficit, which forces unpleasant choices. The requirement of a balanced budget in dealers and the violence stops. BUT THAT IS NOT WHAT LAW ENFORCEMENT WANTS. THEY WANT JOB SECURITY AND DRUG PEDDLERS AND BUYERS ARE EASY BUSTS that keep our prisons overflowing and the taxpayers getting bilked. I would much rather my kid used MJ than alcohol any day of the week. Smoking cigarettes & alcohol have killed many people I know, yet they are legal. Just because we have laws, doesn’t mean they are good laws. They are making money for someone.

Sacbee.com, Forums, http://www.sacbee.com/forums/?plckForumPage=Forum Discussion&plckDiscussionId=Cat%3a2159608f-a073-49c3-97ba-1a25b36cf915Forum %3ab9b0b864-1f07-4190-9da5-78eb1e4a8aadDiscussion%3affdf4d3-59c8-4fee-b477- e5cb9a5d04ba&plckCategoryCurrentPage=0 (last visited Nov. 7, 2009).


According to Ammiano’s press release, A.B. 390 “would generate much needed revenue for the state, restrict access to only those over 21, end the environmental damage to our public lands from illicit crops, and improve public safety by redirecting law enforcement efforts to more serious crimes.”\footnote{Ammiano Proposes Bill, supra note 81.} Quoting several other public officials, the press release makes the case: marijuana is a significant part of California’s economy; it may represent crop worth as much $14 billion that goes untaxed and is widely available.\footnote{Id.} As one of his supporters stated, “it’s time to bring this major piece of our economy into the light of day.”\footnote{Id.}

A Board of Equalization (BOE) spokesperson has estimated the value of California’s marijuana crop at $4 billion.\footnote{Betty T. Yee, Quarterly E-Newsletter: Chairwoman Yee Supports Assembly Bill 390: Marijuana Control, Regulation, and Education Act, CAL. BD. OF EQUALIZATION (Jan.–Mar. 2009), available at http://www.boe.ca.gov/members/yee/pdf/Vol_3 %20issue_1.pdf. See also F. Aaron Smith, A Neglected Revenue Source for California-Marijuana, S.F. CHRON., Jan. 13,} Ammiano’s bill got
a boost from BOE Chairwoman Betty Yee, when she publicly supported A.B. 390.92 She estimated that the bill would raise about $1.3 billion per year ($990 million from a licensing fee and $349 million in sales tax).93 In addition to income from taxes, proponents contend that the state would receive significant savings in reduced prison costs.94

Unlike previous attempts to legalize or de-criminalize marijuana, Ammiano has captured media interest.95 Ammiano’s backers include several people already critical of the war on drugs. For example, former Orange County Superior Court Judge James P. Gray, a longtime opponent of the war on drugs, has appeared on radio talk shows debating against A.B. 390’s opponents.96 In addition to listing his various books, Gray’s Web site includes endorsements of his book on the failed war on drugs from several prominent public figures. The list includes the late Milton Friedman, George Schultz, Adrianna Huffington, and Walter Cronkite.97 Mainstream publications like The Economist have editorialized in favor of ending the failed war on drugs.98 Some TV pundits, including Glenn Beck (Fox) and Jack Cafferty (CNN) have questioned the wisdom of the war on drugs.99 Many proponents advance the financial wisdom of legalization, not just personal-choice arguments.

92. Yee, supra note 91.
93. Joe Eskenazi, Get Up, Stand Up: Ammiano Introduces Marijuana Legalization Bill to the Press, S.F. WEEKLY, Feb. 23, 2009, available at http://blogs.sfweekly.com/thensnitch/2009/02/get_up_stand_up_ammiano_introd.php. The bill calls for an initial fee of $5,000 imposed on marijuana growers and then a $2,500 annual fee in addition to a tax of $50-per-ounce fee. Id. (revealing the tax of $50 per ounce); A.B. 390, § 25,401, 2009 Leg., 2009-10 Sess. (Cal.) (revealing the $5,000 initial application fee and $2,500 per year annual renewal fee).
94. Yee, supra note 92.
98. How to Stop the Drug Wars, supra note 27.
99. See Garofoli, supra note 95; Marinucci, supra note 10.
Proponents also focus on prison savings and better allocation of law-enforcement resources. Proponents project a savings of about a billion dollars based on estimates of the number of offenders in California’s prisons for marijuana offenses.100 While proponents and opponents clash on whether any offenders are currently in California’s prisons for possession of marijuana,101 no one denies that, statewide, law-enforcement officials arrest and prosecute many offenders for marijuana offenses, with many of them ending up in county jails.102 Estimates vary on the amount of those savings.103 Further, proponents argue that even if few, if any, offenders are in prison merely on possession of marijuana charges, many end up back in prison for parole violations based on failed urine tests that show marijuana usage.104 They also contend that A.B. 390 would allow reallocation of law-enforcement resources away from fighting marijuana towards fighting more serious criminal conduct.105 As summarized by a photograph on California NORML’s Web page, someone is arrested for a marijuana offense every forty-five seconds.106

Beyond these significant savings, proponents contend that legalizing marijuana would “declaw powerful and violent Mexican drug cartels.”107 As argued in The Economist, “far from reducing crime, prohibition has fostered gangsterism on a scale that the world has never seen before. According to the U.N.’s perhaps inflated estimate, the illegal drug industry is worth some $320 billion a year.”108 Some proponents analogize to the post-Prohibition era, when legalizing

100. See Forum with Michael Krasny, supra note 96 (debate between Gray and Lovell).
101. Id.
102. NORML, Marijuana Arrests For Year 2007: 872,721 Tops Record High Five Percent Increase over 2006, Sep. 15, 2008, http://www.norml.org/index.cfm?Group_ID=7698 (citing approximately 872,000 arrests related to marijuana and 775,000 of those were charged for possession only).
103. NORML suggests that the savings would be “over $200 million in law enforcement costs for arrest, prosecution, trial and imprisonment of marijuana offenders.” GIERINGER, supra note 14. Others, like the BOE report, suggest a higher figure, as does Judge Gray. Forum with Michael Krasny, supra note 96 (debate between Gray and Lovell); STATE BD. OF EQUALIZATION, STAFF LEGISLATIVE BILL ANALYSIS, A.B. 390, at 6, available at http://www.boe.ca.gov/legdiv/pdf/ab0390-1dw.pdf.
104. See Forum with Michael Krasny, supra note 96.
105. Id.
106. California NORML, http://www.canorml.org/ (last visited May 27, 2009) (showing a photograph of a sign that states “[a] pot smoker is busted every 45 seconds, and you wonder why we’re paranoid”).
107. See Marinucci, supra note 10.
108. See How to Stop the Drug Wars, supra note 27.
alcohol weakened the power of mobsters around the country. In addition to undercutting the drug cartels, legalizing marijuana may reduce corruption among law-enforcement officials in the United States as well. Finally, the medical marijuana experiment seems to have worked. That is, many Americans—and especially Californians—have seen that marijuana can be made available, regulated, and used responsibly. That fact, in combination with the economic arguments and the demographic changes, helps to explain why increasing numbers of Americans and 54 percent of Californians favor legalizing marijuana.

2. THE EVEN BETTER NEWS

The previous Section highlights the arguments surrounding A.B. 390. But the proponent literature includes an even rosier picture of the post-legalized world. For example, NORML, the best known and probably oldest organization advocating legalization, makes some sweeping claims about the benefits flowing from legalization. A brief summary follows.

Beyond the tax revenue, California NORML sees additional benefits. It argues that beyond retail sales of marijuana, the total economic impact should include “spinoff industries such as coffeehouses, paraphernalia, and industrial hemp.” Analogizing to the wine industry, that organization argues that legalized marijuana could generate four times as much economic activity as its retail sales. “If the marijuana industry were just one-third the size of the wine industry, it would generate 50,000 jobs and $1.4 billion in wages, along with additional income and business tax revenues for the state.” It estimates that industrial hemp could become a business comparable to the $3.4-billion cotton industry in California. Meanwhile, hemp is

109. See id.
111. See Marinucci, supra note 10.
112. Id.
113. See GIERINGER, supra note 14.
114. Id.
115. Id.
116. Id. Some true believers in hemp claim that, hemp—had it not been made illegal—would have brought the United States out of the Great Depression. See We Can Put All Our Farmers Back to Work Tomorrow: The Marijuana Trick, The Real Reason Hemp is Illegal, Tree Huggers of America, Nov. 1, 2005, http://www.treehuggersofamerica.org/hemp.php.
better for the environment than cotton. Growers need fewer pesticides for hemp than for cotton and the fields are virtually weed-free after harvest.\textsuperscript{117}

California NORML recognizes that legalizing marijuana will drive down the price, but the decrease would be offset by increased consumption.\textsuperscript{118} NORML also argues that marijuana is far less destructive than alcohol and tobacco.\textsuperscript{119} As a result, one might expect lower human and health-care costs associated with marijuana use than with alcohol and tobacco use.

Further, although not highlighted by proponents of A.B. 390, some commentators argue that tax revenue will increase from a second source.\textsuperscript{120} Employees of illegal drug dealers do not report income and, as a result, do not pay taxes on that income. Legalizing marijuana production and sales would add revenue from legal workers through their state and federal taxes.\textsuperscript{121}

3. THE BAD NEWS

Many critics of A.B. 390 rehash traditional arguments against legalizing marijuana.\textsuperscript{122} But to be effective in the current debate surrounding A.B. 390, they must start by directly rebutting the claims that legalization of marijuana will increase revenue and reduce violent gang activity.\textsuperscript{123} Those are the kinds of issues that have increased public support for legalization.\textsuperscript{124} For example, in a debate that may presage

\begin{itemize}
  \item \textsuperscript{117} NORML, NORML STATEMENT ON THE CULTIVATION OF INDUSTRIAL HEMP (2003), available at http://norml.org/pdf_files/NORML_industrial_use_introduction.pdf.
  \item \textsuperscript{118} See GIERINGER, supra note 14.
  \item \textsuperscript{120} See MIRON, supra note 18, at 2.
  \item \textsuperscript{121} See id. (stating that the costs required to enforce prohibition, and the transfers that occur because income in a prohibited sector is not taxed, are relevant to rational discussion of the policy on legalization).
  \item \textsuperscript{122} See Sanders, supra note 20. The article quotes Assemblyman Tom Berryhill on legalizing marijuana: “I think it’s a slippery slope.” Id.
  \item \textsuperscript{123} See Forum with Michael Krasny, supra note 96 (comment by Lovell).
  \item \textsuperscript{124} See Sanders, supra note 20 (comment posting of CAW916, Feb. 24, 2009, 01:50:36 AM). Further, Lovell contends that polls do not accurately reflect public preference on legalizing marijuana. See Forum with Michael Krasny, supra note 96 (comment by Lovell). He cites rejection of Proposition 5 in the most recent election as evidence of the public’s truer sentiment on legalizing marijuana. Id. Lovell’s position on Proposition 5 ignores the fact that the proposition included a number of other provisions, including one that would reduce parole for methamphetamine dealers. The opponents of Proposition 5 labeled the proposal a Drug Dealers’ Bill of Rights. Id.
\end{itemize}
future heated discussions about A.B. 390.\textsuperscript{125} John Lovell, a lobbyist for the California Police Officers' Association, has argued that the estimates of revenue—and prison and law enforcement savings—are illusory.\textsuperscript{126}

On the question of revenue, Lovell contends that the street price for illegal marijuana will always be less than the price for legally purchased marijuana.\textsuperscript{127} His contention is based on the fact that legal marijuana will always carry a $50 surcharge, making it more expensive than the street variety.\textsuperscript{128} Further, he contends that legal producers will have to comply with various state regulations, like California Occupational Safety and Health Administration (OSHA) and minimum wage laws,\textsuperscript{129} driving up their costs.

Lovell, like the Office of National Drug Control Policy,\textsuperscript{130} rebuts claims that our prisons house thousands of felons convicted of possession of marijuana.\textsuperscript{131} He insists that no one is in prison for smoking marijuana.\textsuperscript{132} While he cannot contend that marijuana offenders do not end up in jail,\textsuperscript{133} he argues that the only marijuana offenders in prison are those involved in drug trafficking.\textsuperscript{134} Further,

Hence, concluding that Californians oppose decriminalizing marijuana based on the rejection of Proposition 5 is questionable at best.

\textsuperscript{125} See Forum with Michael Krasny, supra note 96 (comment by Lovell) (including some sharp rhetoric used by Lovell, calling the statement that there are thousands of felons in prison for marijuana possession a “base canard” and that legalizing marijuana will reduce violence among drug cartels “the height of demagoguery”).

\textsuperscript{126} Id.

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} OFFICE OF NAT'L DRUG CONTROL POL'Y, WHO'S REALLY IN PRISON FOR MARJUANA 9 (2004).

\textsuperscript{131} Forum with Michael Krasny, supra note 96.

\textsuperscript{132} Id. During his debate on the Krasny forum, Lovell called assertions that our prisons house thousands of individuals convicted of possession of marijuana a “base canard.” Id. When questioned about parole violators who failed urine tests, he contended that parole officers never “roll” a parolee merely for a failed urine test that showed marijuana use. Id. Somewhat inconsistently, he also argued that those parolees who were returned to prison for marijuana offenses were in prison not for the marijuana offense but for the original felonious conduct. Id.

\textsuperscript{133} See CAL. DEP’T OF JUSTICE, TABLE 22: ADULT AND JUVENILE ARRESTS REPORTED, 2007 RACE/ETHNIC GROUP BY SPECIFIC OFFENSE STATEWIDE, available at http://stats.doj.ca.gov/cjsc_stats/prof07/00/22.htm (last visited Feb. 7, 2010) (revealing that, for example, in 2007, almost 58,000 individuals were arrested for misdemeanor marijuana offenses).

\textsuperscript{134} Forum with Michael Krasny, supra note 96.
according to Lovell, parole officers do not “roll over” parolees merely for urine tests indicating marijuana use.\footnote{135}

Opponents see no savings in law-enforcement efforts or in a reduction of violence among drug cartels. Lovell argues, for example, that police are not targeting small users of marijuana but instead more serious criminal actors.\footnote{136} Offenders may be charged with marijuana offenses when the police arrest them for other more serious charges. Because a prosecutor may end up offering a plea agreement for a possession offense, rather than a more serious drug-related offense or other criminal offense, some offenders who appear in the statistics as marijuana offenders are in fact more serious criminals.\footnote{137}

Drug cartels will continue to present a problem even if California legalizes marijuana. That is so because they are involved in the drug trade generally, not just in the marijuana trade.\footnote{138} Thus, even if they no longer dominate the marijuana trade (something that some, like Lovell, contest), they will continue to engage in violence as they fight over territory in which to distribute other illegal drugs.\footnote{139}

Opponents to legalizing marijuana also question whether society ought to legalize another mind-altering drug.\footnote{140} Some of the debate is philosophical: for example, Lovell criticizes libertarians as narcissistic, unwilling to accept their social responsibilities to one’s neighbors.\footnote{141} He is critical of alcohol use as well (one of the other mind-altering drugs he targets as a social evil).\footnote{142} While that kind of neo-prohibitionist philosophy is not likely to gain traction with many Americans as they consume high quality wine,\footnote{143} critics point out that problem drinking is already a significant national problem, leading to more than 100,000

\footnote{135} Id.  
\footnote{136} Id.  
\footnote{137} OFFICE OF NAT’L DRUG CONTROL POL’Y, supra note 130, at 9 (“In reality, the vast majority of inmates in state and federal prison for marijuana have been found guilty of much more than simple possession. Some were convicted for drug trafficking, some for marijuana possession along with one or more other offenses. And many of those serving time for marijuana pled down to possession in order to avoid prosecution on much more serious charges.”).  
\footnote{138} Forum with Michael Krasny, supra note 96.  
\footnote{139} Id.  
\footnote{140} Id.  
\footnote{141} Id.  
\footnote{142} Id.  
\footnote{143} While other nations still consume more wine per capita, the U.S. recently overtook Italy and France as the largest consumer of wine in the world. World Wine Consumption Falls for 1st Time in Years, L.A. TIMES, Apr. 8, 2009, available at http://www.latimes.com/business/la-fi-wine8-2009apr08,0,3819303.story.
deaths a year and costing an estimated $184.6 billion a year.\textsuperscript{144} Alcohol costs businesses hundreds of billions in lost productivity, premature death, and crime.\textsuperscript{145} Further, a report by the National Center on Addiction and Substance Abuse at Columbia University focused on the billions of dollars that states spend on coping with the fallout of drug and alcohol abuse: for example, the report estimated that states spend 96 cents of each dollar the federal government spent on substance abuse and addiction went to “shoveling up” the wreckage caused by substance abuse and addiction, including the abuse visited on children of abusing parents.\textsuperscript{146} Legalizing marijuana, and thereby presumably increasing its use, can only exacerbate these problems.

Because of the harm to children and other social costs, opponents of marijuana point to various studies raising serious health concerns for users of marijuana.\textsuperscript{147} Various studies, mostly from abroad where researchers have been able to study marijuana more freely, suggest an array of health problems caused by smoking marijuana. Studies show that marijuana leads to “memory loss, distorted perception, trouble with thinking and problem-solving, and anxiety. Students who use marijuana may find it hard to learn, thus jeopardizing their ability to achieve their full potential.”\textsuperscript{148} Especially among young people, marijuana can lead to various mental-health problems, including depression, anxiety, and panic attacks.\textsuperscript{149} Regular users between twelve and seventeen years old are at a much greater risk than non-users of having thoughts about committing suicide.\textsuperscript{150} Swedish researchers have

\begin{itemize}
\item \textsuperscript{144} U.S. DEP'T OF HEALTH & HUMAN SERVS., TENTH SPECIAL REPORT TO CONGRESS ON ALCOHOL AND HEALTH xi (2000), available at http://pubs.niaaa.nih.gov/publications/10report/intro.pdf (stating that “[b]ecause alcohol use problems exact such a personal, social, and economic toll on the American people—an estimated 100,000 lives and $184.6 billion annually—the scientific progress described in the Tenth Special Report is heartening”). Many of the drivers in alcohol related auto accidents have evidence of alcohol and marijuana in their blood. OFFICE OF NAT'L DRUG CONTROL POL'Y, supra note 79, at 5 (“Another study looked at data concerning shock-trauma patients who had been involved in traffic crashes. The researchers found that 15 percent of the trauma patients who were injured while driving a car or motorcycle had been smoking marijuana, and another 17 percent had both THC and alcohol in their blood.”).
\item \textsuperscript{145} George Washington University Medical Center, Ensuring Solutions to Alcohol Problems, http://www.ensuringsolutions.org/ (last visited May 29, 2009).
\item \textsuperscript{146} THE NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUM. UNIV. (CASA), SHOVELING UP II: THE IMPACT OF SUBSTANCE ABUSE ON FEDERAL, STATE, AND LOCAL BUDGETS 275 (2009).
\item \textsuperscript{147} OFFICE OF NAT'L DRUG CONTROL POL'Y, supra note 79, at 3.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id. at 4.
\item \textsuperscript{150} Id.
\end{itemize}
linked marijuana use to an increased risk of schizophrenia.\textsuperscript{151} That is consistent with findings by other researchers that correlate marijuana use with serious mental illness among adults.\textsuperscript{152} Marijuana, according to the Office of National Drug Control Policy, is associated with similar problems to alcohol abuse, like poor academic and job performance.\textsuperscript{153} According to the Office of National Drug Control Policy, regular marijuana users often experience the same kinds of lung related problems experienced by cigarette smokers.\textsuperscript{154}

Again, according to opponents, legalizing marijuana will only increase the human and social costs. Lovell argues that A.B. 390 will increase marijuana use exponentially. He relies on a study from the Midwest, indicating that when legislation allowed wine to be sold in grocery stories (making it more readily available to consumers), wine consumption went up 700 percent in the first year, and 300 percent over time.\textsuperscript{155} Not only will use go up among adults, but because A.B. 390 reduces penalties for selling drugs to teenagers, their use will also increase.\textsuperscript{156}

Thus, according to critics, legalizing marijuana will lead to increased hardship and damage. Because legal marijuana will be more expensive than the illegal product, A.B. 390 will not provide revenue and will not address prison overcrowding.\textsuperscript{157} Instead, the bill is a drug dealers’ bill of rights.\textsuperscript{158}

\begin{flushright}
\textbf{B. Sorting through the Debate: A Healthy Dose of Agnosticism}
\end{flushright}

Sorting through charges and countercharges presents a daunting task for a number of reasons. Good data are hard to find, making an honest assessment of costs and benefits difficult.\textsuperscript{159} Further, proponents

\begin{flushleft}
\begin{tabular}{ll}
\textsuperscript{151}. & \textit{Id}.
\textsuperscript{152}. & \textit{Id}.
\textsuperscript{153}. & \textit{Id} at 6.
\textsuperscript{154}. & \textit{Id}.
\textsuperscript{155}. & \textit{Forum with Michael Krasny, supra note} 96.
\textsuperscript{156}. & \textit{Id}.
\textsuperscript{157}. & \textit{See id}.
\textsuperscript{158}. & \textit{Id}. Opponents of Proposition 5 such as John Lovell used the same line in helping to defeat the Proposition, calling it the “Drug Dealers’ Bill of Rights” because it shortens parole for meth dealers and other drug felons from three years to six months. Smart Voter, Proposition 5: Nonviolent Drug Offenses, Sentencing, Parole and Rehabilitation, \textit{State of California}, \textit{http://www.smartvoter.org/2008/11/04/ca/state/prop/5/} (last visited Nov. 5, 2009).
\textsuperscript{159}. & Opponents and proponents cite “scientific” studies that support their respective positions. \textit{Compare} Drug Policy Alliance Network, Myths and Facts About Marijuana, \textit{http://www.drugpolicy.org/marijuana/factsmyths/} (last visited Nov. 9, 2009) (listing five myths about the harm caused by marijuana that are rebutted by
\end{tabular}
\end{flushleft}
and opponents seldom engage directly on the same point. Like the
clichéd ships passing in the night, the two sides of the debate often fall
back on familiar themes that are not fully responsive to each others’
main concerns. At a minimum, a healthy dose of skepticism may
bring clarity to the debate.

1. THE ECONOMIC COSTS AND BENEFITS FROM THE MARIJUANA TAX

Assessing claims of cost savings and increased revenues may be
the most important aspect of the debate for many Californians.
Ammiano’s bill has traction because of its promised economic benefits.
Whether A.B. 390 or legalization of marijuana results in net economic
benefits is a close question and depends on many unexamined
assumptions that need to be addressed. The current debate ignores
many salient issues.

Opponents contend that illegal marijuana would always be cheaper
than the legal product because the sellers of the illegal product would
not have to pay a licensing fee and a $50-per-ounce tax and because
legal producers would have to pay workers the minimum wage and
comply with various safety regulations. Further, they contend that
California would not experience a reduced prison population because no

scientific data) with Nat’l Inst. on Drug Abuse, Research Report Series:
demonstrating various risks associated with marijuana use).

160. See Office of Nat’l Drug Control Pol’y, supra note 130, at 31
(stating that “marijuana legalizers claim that thousands of people are imprisoned for
marijuana ‘possession’ . . . . The implication is that these inmates are otherwise law­
abiding individuals arrested for nothing more than smoking a joint. . . . [Legalization
proponents] make their case by lumping together all marijuana defendants regardless of
the quantities involved and the nature or seriousness of the conviction. And yet in doing
so, they blur the critical distinction between ‘simple possession’—a low-level criminal
offense—and ‘simply possessing,’ a vague, all-encompassing term that can mean any
possession, including felony amounts. They also overlook the fact that many of those
technically serving time for marijuana possession were actually sent to prison on much
more serious charges. Claims about disproportionately harsh sentences for those who
violate marijuana laws divert attention from the key point, which is this: The
overwhelming majority of people incarcerated for marijuana offenses are not
occasional, casual, or first-time users. Rather they are criminals who have been found
guilty of trafficking, growing, manufacturing, selling, or distributing the drug, or who
were convicted of multiple offenses that happened to include a marijuana charge”).

161. See Sanders, supra note 20; see also Forum with Michael Krasny, supra
note 96.
one is in prison on possession of marijuana charges. 162 And, according to Lovell, law-enforcement priorities would not change. 163

The argument is flawed in part because it ignores basic market principles: the price of illegal marijuana reflects the cost of doing business and that cost includes the risk of being caught, bribes paid to avoid detection, and the cost of muscle. Further, many buyers would be willing to pay a premium to know the quality of the marijuana—and to deal with a legitimate businessperson without having to fear being ripped off 164—and to avoid the hassle of the illegal trade. While I could find no data on labor costs for workers in the illegal marijuana business, one would guess that illegal workers would make more than employees of a legal marijuana producer because risk is usually a factor in setting wages. 165 But depending on policing decisions, the cost of doing business may go down.

Whether illegal drug-dealers’ costs of doing business would remain the same would depend on the level of enforcement of marijuana laws if A.B. 390 were to pass. Without enforcing the laws against unregistered producers, California would not get the promised benefits. Thus, if proponents of legalization are correct that California would see a shift in law-enforcement priorities away from the marijuana trade to more serious crimes, 166 promises of economic benefits for the State would become illusory. Without strenuous enforcement, illegal dealers’ costs would go down; that is, the scenario predicted by opponents of legalization (a cheaper illegal product undercutting the legal market) would become more probable. Further, as currently drafted, A.B. 390 makes illegal drug sales a violation of tax laws, rather than retaining current criminal penalties. 167

Surely, if the goal of the bill is to raise taxes from legal sales, meaningful penalties must be kept in place to deter dealers who skirt the law.

---

162. See Forum with Michael Krasny, supra note 96; see also OFFICE OF NAT’L DRUG CONTROL POL’Y, supra note 130.

163. See Forum with Michael Krasny, supra note 96.

164. See Drug Dealer Kills Gripping Customer, Police Say, ST. PETERSBURG TIMES, Aug. 3, 1988, at 4B (reporting that a man went to his drug dealer’s house to complain about the quality of the crack cocaine purchased earlier that day and was shot to death by his drug dealer); see also, Bob Mitchell, Drug Dealer Guilty of Killing Client with Metal Bar, THESTAR.COM, Sept. 19, 2008, http://register.thestar.com/News/GTA/article/502700 (stating that the dealer would carry a tire iron to “dominate” people and “enforce his authority” as a drug dealer).

165. David Samuels, Dr. Kush, NEW YORKER, July 28, 2008, at 3, available at http://www.newyorker.com/reporting/2008/07/28/080728fa_fact_samuels?currentPage=1 (stating that being a drug courier was risky but it paid good enough to not have to work for half the year. Mules received a cut from 5–16 percent of the purchase price).

166. See Ammiano Proposes Bill, supra note 81.

Proponents of A.B. 390 may overstate the revenue to be generated for another reason. They analogize legalization of marijuana to legalization of alcohol and tobacco, easily regulated and taxed. Further, legalizing alcohol drove bootleggers out of the business. But marijuana is different from good whiskey, wine, and tobacco. Making good whiskey and growing one’s own tobacco are difficult. While California boasts a good deal of good homemade wine, homemade wine remains a tiny niche with most wine drinkers finding it easier to buy affordable wine. That may be because it is time-consuming, at least to do so on a large scale, and because it requires expensive equipment. By comparison, marijuana is easy to grow, and at least some current dealers will maintain their clientele, even if they must reduce their prices.

Listening to the debate and reading claims by opponents and proponents do not alert Californians to the complexity of the economic issue. Instead, one fears that voters and policy-makers are being fed exaggerated claims by both sides. Californians motivated by the hopes of a cash cow may be disappointed with the results. As this one example suggests, whether A.B. 390 could possibly deliver on its proponents’ promises depends on other public-policy choices, including the need to keep pressure on illegal drug dealers.

That is hardly the only uncertainty in the debate. Whether A.B. 390 would lead to increased marijuana use is also up for grabs. Opponents claim that legalization of marijuana would lead to dramatic increases in marijuana use, a claim that has some, but hardly

168. See Marinucci, supra note 10.
169. See infra note 109 and accompanying text.
171. See Oak Barrel Winecraft, http://www.oakbarrel.com/winemaking/index.shtml (last visited May 29, 2009). Some examples of higher-end prices of winemaking equipment include a stainless steel tank for $950, a crusher for $1,495, a wine press for $2,495, and yeast for $18.95. Id.
174. See infra note 178 and accompanying text.
overwhelming, empirical support.\textsuperscript{175} Of course, increased use would come with attendant social costs unless marijuana use replaced other substance abuse. Thus, if people merely switched substances, say from alcohol to marijuana, harmful health consequences and impaired work performance may remain constant. Further, if ready availability of marijuana were to increase its use, would more potential cocaine or methamphetamine users switch to marijuana? If so, that would appear to be a net benefit, rather than an additional cost. But if California suddenly had far more impaired citizens, it would face increased medical and other costs associated with “shoveling up” after substance abusers.\textsuperscript{176}

Proponents contend that marijuana is already so readily available that marijuana use would not increase—again, a claim with modest empirical support.\textsuperscript{177} In fact, some proponents claim that marijuana use might go down and cite the example of the Netherlands, which has legalized marijuana, and where use is about half the rate as it is in the United States.\textsuperscript{178} Proponents are usually silent on attendant social costs; that is so because the central premise of legalization is that marijuana is so readily available that California already bears those costs.\textsuperscript{179} Legalization would not increase attendant social costs. Perhaps. In one sense, proponents want it both ways: much of the appeal of legalizing marijuana is the found money, the pot of gold to help staunch the economic bleeding in California’s budget.\textsuperscript{180} But if legalizing marijuana would not increase its use and might even reduce its use, as some

\textsuperscript{175} See Studyworld.com, Legalization of Marijuana, http://www.studyworld.com/newsite/ReportEssay/SocialIssues/drug%5CLegalization_of_Marijuana-382564.htm (stating that there is no strong evidence that legalizing marijuana would increase the use of the drug: “In fact, there is some evidence suggesting that drug use under a relaxed legal system might not increase at all”) (last visited Feb. 2, 2010).

\textsuperscript{176} See CASA, supra note 146.

\textsuperscript{177} Craig Reinarman et al., The Limited Relevance of Drug Policy: Cannabis in Amsterdam and in San Francisco, 94 AM. J. OF PUB. HEALTH 836, 836 (2004).

\textsuperscript{178} See CEDRO, Drug Use in the Population of 12 Years and Over in the USA and the Netherlands, 1997 and 2001, http://www.cedroomsu.org/stats/national.nlusa.html (last visited Nov. 15, 2009) (revealing that in 1997, 32.9 percent of people in the U.S. had tried cannabis whereas only 15.6 percent had tried it in the Netherlands, and in 2001, 36.9 percent of people in the U.S. had tried cannabis compared to only 17 percent in the Netherlands).


proponents argue, the economic bonanza would not be as great as promised.\textsuperscript{181}

Whether legalizing marijuana would lead to increased marijuana use is another “maybe.” Opponents of A.B. 390 argue that California should not make available another mind-altering substance.\textsuperscript{182} Were I convinced that legalizing marijuana would lead to a significant increase in marijuana consumption, I might side with the prohibitionists.\textsuperscript{183} At least some of the opponents of legalization see no social value in mind altering drugs.\textsuperscript{184} I am less judgmental on that score—unless those whose minds have been altered are driving, for example. Presumably, millions of Americans enjoy a glass of wine with dinner and do so in part for the mild mind-altering effect. Further, one might launch a defense of mind-alerting substances, as Michael Pollan has done in \textit{Botany of Desire},\textsuperscript{185} as part of the creative process of many artists and religious experiences of many mystics. While I share some of John Lovell’s cynicism about libertarianism, one cannot discount the value that many people place on mild-alteration, something that virtually every civilization has done to some degree.\textsuperscript{186}

But whether A.B. 390 would lead to a dramatic increase in marijuana use and abuse is not a foregone conclusion. Legalization would probably result in a period of experimentation by some adults who have never tried marijuana. But most adults who want to try marijuana have done so already: marijuana is readily available in California’s illegal market and gray market of medical marijuana.\textsuperscript{187} The overwhelming majority of those who sample marijuana do not

\textsuperscript{181} States legalizing gambling have faced a similar dilemma: while recognizing the harm that gambling can cause, states stand to gain economically through increased tax revenues. Those tax revenues are fairly painless for legislators, freed from the need to raise taxes on the wider population. Faced with those temptations, most states aggressively advertise their lotteries. NAT’L GAMBLING IMPACT STUDY COMM’N, NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT 1–1 to 1–2 (1999), available at http://govinfo.library.unt.edu/ngisc/reports/1.pdf.

\textsuperscript{182} \textit{Forum with Michael Krasny}, supra note 96.

\textsuperscript{183} That is so because substance abuse has significant social and health costs. See, e.g., CASA, supra note 146.

\textsuperscript{184} \textit{Forum with Michael Krasny}, supra note 96.

\textsuperscript{185} POLLAN, supra note 47, at 157–60.

\textsuperscript{186} Id. at 157.

\textsuperscript{187} Many Californians smoke marijuana without the immunity from state prosecution provided by Proposition 215. But anyone interested in that protection apparently can find a compliant doctor, willing to make a recommendation allowing the patient to secure “medical marijuana.” As described in \textit{Dr. Kush}, some doctors are willing to recommend marijuana as “treatment” for conditions from which most of us suffer, like stress and anxiety. See Samuels, supra note 165, at 4.
become frequent users.\textsuperscript{188} Brain studies demonstrate that many substance abusers choose a substance because it provides a chemical lacking in the brain in sufficient quantity.\textsuperscript{189} Thus, many schizophrenics are heavy smokers because of the effect of nicotine on their brains.\textsuperscript{190} So, too, un-medicat ed depressed individuals are more likely than their non-depressed peers to be heavy smokers.\textsuperscript{191} Tobacco seems to provide the brain with dopamine and norepinephrine, neurotransmitters that regulate mood.\textsuperscript{192} Marijuana’s active ingredients play a similar role in some of our brains. For example, humans have cannabinoid receptors in the brain.\textsuperscript{193} People whose brain systems lack cannabinoid receptors are especially receptive to marijuana use.\textsuperscript{194} But the large majority of the population would segue back to martinis or red wine even if they were to sample legalized marijuana.

But brain chemistry is not the only factor in substance abuse. Researchers believe that addiction is best explained by a host of biopsychological factors.\textsuperscript{195} For some, genetic and neurotransmitter etiology may predominate, but for others, psychosocial factors predominate.\textsuperscript{196} Those factors include temperament (whether the individual is a risk taker or is harm avoidant), mental-health problems, self-esteem and impulse control, family role models, cultural norms and mores, local availability, and socio-economic status.\textsuperscript{197}

A quick look at the factors leading to substance abuse suggests the difficulty that policy-makers face in predicting whether legalizing marijuana would increase its use significantly. By analogy to tobacco use, we do know that more people want to quit when tobacco taxes are increased.\textsuperscript{198} Thus, keeping the price of marijuana high may limit

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{189} MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 245-46 (2002).
\item \textsuperscript{190} Id.
\item \textsuperscript{191} Id. at 244.
\item \textsuperscript{192} Id. at 245.
\item \textsuperscript{193} See POLLAN, supra note 47, at 153.
\item \textsuperscript{194} Id. at 166-68.
\item \textsuperscript{196} Id. at 8-9.
\item \textsuperscript{197} Id. at 7, 9.
\item \textsuperscript{198} Brian Lockhart, Legislators Likely to Hike Cigarette Tax to Help Deficit, CONN. POST, June 23, 2009 (quoting Margaret LaCroix, a Lung Association spokeswoman, stating that in the past “when there are significant tax increases, smoking decreases overall three to four percent . . . a $7 or $8 pack of cigarettes prices youths out of the market”).
\end{enumerate}
\end{footnotesize}
access and abuse. But, as I argued above, people can grow their own marijuana relatively easily, unlike tobacco, and keeping the price of legal marijuana high does create incentives for illegal dealers absent continued enforcement of drug laws against them.\(^{199}\) Further, at least for some users, part of the lure of a particular substance is the risk associated with its use and the culture surrounding it.\(^{200}\) That may mean that those individuals would not find legalized marijuana a drug of choice—certainly, that may explain why fewer people in the Netherlands use marijuana than do in the United States.\(^{201}\) But those individuals might seek out more dangerous drugs if their motivation is the thrill of the illegality of their conduct.\(^{202}\)

One important provision in A.B. 390 is its requirement that proceeds raised under the law “shall be expended exclusively for drug education, awareness, and rehabilitation programs . . . .”\(^{203}\) The lack of adequate resources for drug treatment is a great weakness in our current “war” on drugs. As I mentioned above, many individuals choose substances (whether alcohol, illegal drugs, tobacco, or caffeine) in part because of the substance’s effect on the individual’s brain chemistry.\(^{204}\) Many people self-medicate through the use of illegal substances.\(^{205}\) Indeed, many professionals who deal with substance abuse lament the lack of money spent on prevention and treatment.\(^{206}\) Elsewhere, in the debate about reducing the prison population, mainstream organizations argue that we can reduce the prison population and reduce recidivism rates by increasing resources for substance-abuse treatment programs.\(^{207}\) Of course, in the short run, using marijuana tax revenue for treatment makes less of the money raised by A.B. 390 available to reduce the budget deficit, one of the selling points for the law.\(^{208}\) But again, legalizing marijuana may increase use and abuse of marijuana, increasing the need for drug treatment. While I suspect that the revenue generated by legalizing marijuana will not reduce the budget deficit, it may provide the resources necessary to address the substance abuse crisis.

\(^{199}\) See supra note 165 and accompanying text.

\(^{200}\) See Samuels, supra note 165.

\(^{201}\) NAT’L INST. ON DRUG ABUSE, supra note 195, at 6 (stating that one of the reasons people take drugs is “to engage in ‘thrilling’ and ‘daring’ behaviors”).

\(^{202}\) See CEDRO, supra note 177.

\(^{203}\) A.B. 390, ch. 4, § 34,031, 2009 Leg., 2009–10 Sess. (Cal.).

\(^{204}\) See GLADWELL, supra note 189, at 245.

\(^{205}\) Id. at 245–46.

\(^{206}\) See CASA, supra note 146, at 45.


\(^{208}\) See Ammiano Proposes Bill, supra note 81 (stating that the revenue “from casual marijuana use directed to treating serious drug addiction is a prudent use of limited resources”).
marijuana\textsuperscript{209} would exceed the increased need for treatment, the current
debate about the effects of legalizing marijuana ignores these kinds of
difficult questions.

2. ECONOMIC BENEFITS FROM THE REDUCED PRISON POPULATION

Legalizing marijuana will reduce California's overcrowded prison
population and save another billion dollars.\textsuperscript{210} Or so the argument goes.
While proponents of A.B. 390 claim that California's prisons
include thousands of paroled felons who are in prison because their
urine tests indicate marijuana use,\textsuperscript{211} the data do not support the
contention that legalizing marijuana will lead to significant reductions in
prison spending for several reasons. The Prison Census Data for 2007
do not support the claim that California's prisons contain thousands of
inmates who were guilty of marijuana possession offenses.\textsuperscript{212} In 2007,
new admissions for marijuana-related offenses included the following:
marijuana possession for sale, 27 women and 519 men; marijuana
sales, 12 women and 191 men; other marijuana offenses, 2 women and
82 men.\textsuperscript{213}

Data for several years prior to 2007 suggest somewhat higher total
numbers of marijuana offenders. For example, between 1998 and 2006,
the total number of new prison admissions for marijuana offenses
ranged from a high of 1817 in 1998, and a low of 1253 in 2004.\textsuperscript{214}
During that nine-year period, on average, California imprisoned
approximately 1480 new marijuana offenders each year.\textsuperscript{215} But most of

\textsuperscript{209}. As suggested above, that would depend on how the law is administered,
for example, to assure that illegal drug users really are drummed out of the business.
\textit{See supra} notes 164-165 and accompanying text.

\textsuperscript{210}. \textit{See supra} Part III.A.1-2.

\textsuperscript{211}. \textit{See Forum with Michael Krasny, supra} note 96; \textit{see also} Interview with
Eric Schlosser, \textit{Journalist, Frontline: Busted-America's War on Marijuana} (transcript)

Parolees], available at http://www.cdcr.ca.gov/Reports_Research/Offender_
Information_Services_Branch/Annual/CalPris/CALPRISd2007.pdf.}

\textsuperscript{213}. \textit{Id.}

\textsuperscript{214}. \textit{See Cal. Dep't of Corr. & Rehab. Offender Info Servs.,
nual/CensusArchive.html.}

\textsuperscript{215}. \textit{Id.}
2009:1349 Legalizing Marijuana 1381

those offenders were incarcerated for the sale of marijuana or the possession with the intent to sell, not simply possession of marijuana.216

Nor do the data suggest that California’s prisons warehouse thousands of parolees returned to prison for marijuana use. In the 2004 consent decree in Valdivia v. Schwarzenegger,217 the State agreed to a different approach to the treatment of offenders whose violation of parole involved drug use, making it somewhat harder to re-incarcerate an offender for such a violation.218 Consistent with the consent degree, the Prison Census Data for 2007 show that few felons parole violators returned to prison for marijuana related offenses: marijuana possession for sale, 10 women and 231 men; marijuana sales, 2 women and 69 men; other marijuana offenses, 0 women and 9 men.219 Even if a consensus existed that marijuana offenses do not warrant prison time, the total numbers are small by comparison to the total prison population and are not likely to generate significant savings.

California’s data are similar to those nationwide. The Office of National Drug Control Policy reports the following data: “at midyear 2002, approximately 8,400 state prison inmates were serving time for [possessing marijuana in any amount], and fewer than half of’ that group, or about 3,600 inmates, were incarcerated on a first offense.”220 And, of course, some of those offenders may have faced more serious charges but plead to the lesser charge.

Those data also mask other realities. As reported, the data do not show how many of those offenders plead guilty to lesser charges to avoid more serious penalties. But given that most offenders plead guilty,221 one can infer that most of the offenders in prison for marijuana offenses plead to those charges to avoid trial on more serious charges. Similarly, at least some of the offenders who have parole revoked because of marijuana charges may have faced other charges. Authorities often seek parole revocation rather than referring offenders

216. Id. New admissions for “other marijuana offenses” ranged from a high of 137 in 2003 to a low of 104 in 2004. Id.
218. Id. at 1278–79.
219. CAL. PRISONERS & PAROLEES, supra note 212, at 51–52, tbl.31. Even in the years prior to Valdiva, California was not revoking parole for a large numbers of offenders whose only violation was marijuana use. See, e.g., id. at 63, tbl.40 (Other Marijuana Offenses (Marijuana Other): 10 (.1%)).
220. OFFICE OF NAT’L DRUG CONTROL POL’Y, supra note 130, at 20.
221. A report prepared by the Legislative Analyst’s Office states that only 0.60 percent of criminal cases are tried to juries. See ELIZABETH G. HILL, CAL. LEGIS. ANALYST’S OFFICE, CALIFORNIA’S CRIMINAL JUSTICE SYSTEM: A PRIMER 34 (2007), available at http://www.lao.ca.gov/2007/cj_primer/cj_primer_013107.pdf. Of the remaining cases, 80 percent are resolved by guilty plea. Id.
for new felony charges because parole revocation is a less time-consuming process.\textsuperscript{222} Thus, legalizing marijuana would not even reduce the prison population by the small number of offenders currently there for marijuana related offenses. For some significant number of offenders, the state would pursue more serious charges anyway.

Focusing on savings for the prison system may be the wrong place to look for savings. Most possession of marijuana offenses are misdemeanors, less likely to result in incarceration.\textsuperscript{223} Nationwide, almost 900,000 people were arrested for marijuana related offenses in 2007.\textsuperscript{224} Over 88 percent of those were charged with possession only.\textsuperscript{225} Some charged with more serious offenses of sale or manufacture were growing marijuana for personal or medical use.\textsuperscript{226} Despite California's medical marijuana law, in 2007, authorities arrested more than 74,000 people in California for marijuana related offenses.\textsuperscript{227} About 80 percent of those were arrested for misdemeanor marijuana offenses.\textsuperscript{228} The cost of prosecuting and jailing those individuals is substantial, and California would avoid much of that expense were A.B. 390 to become law. The savings would not flow directly to the state to relieve its current budgetary crisis but to local governments that are under similar financial pressure as is the state.\textsuperscript{229}

Less easy to measure is the human cost of being arrested for marijuana-related offenses. Criminal charges involve collateral

\textsuperscript{222}Dale G. Parent et al., Office of Justice Programs, U.S. Dep't of Justice, Responding to Probation and Parole Violations 10 (1994) (stating that "revocation is used as a substitute for prosecution on new alleged crimes [because it] decreases the burden of proof for the alleged new crime from beyond a reasonable doubt to a preponderance of evidence and invokes the far less rigorous due-process safeguards of a quasi-adversarial hearing process. . . . Overburdened prosecutors sometimes rely on revocation to dispose of probationers and parolees who are charged with new crimes, particularly when the new offense is minor or the evidence is weak").

\textsuperscript{223}For example, according to the California Attorney General's Web page, statewide, there were 57,995 misdemeanor marijuana arrests, compared to 16,124 felony marijuana arrests. See Cal. Dep't of Justice, Table 3A: Total Felony Arrests by Gender, Offense and Arrest Rate Statewide (1998-2007), available at http://stats.doj.ca.gov/cjse_stats/prof07/00/3A.htm (last visited Feb. 21, 2010); Cal. Dep't of Justice, Table 4A, supra note 133.


\textsuperscript{225}Marijuana Arrests For Year 2007, supra note 102.

\textsuperscript{226}See Cal. Dep't of Justice, Table 3A, supra note 223.

\textsuperscript{227}Cal. Dep't of Justice, Table 4A, supra note 133.

\textsuperscript{228}Id. Of 74,119 marijuana arrests, only 16,124 were felony arrests—about 21 percent. Id.

\textsuperscript{229}Kevin O'Leary, Shrinking California in Order to Save It, TIME, July 21, 2009, available at http://www.time.com/time/nation/article/0,8599,1911862,00.html; see also Cal. Dep't of Justice, Table 4A, supra note 133.
consequences that offenders may carry with them for many years. For example, many states disenfranchise an individual convicted of a felony.\textsuperscript{230} Even here, I want to add a caution about the net benefit to local governments. Like the use of tax-evasion charges to prosecute Al Capone,\textsuperscript{231} authorities no doubt use violations of marijuana laws to arrest and prosecute offenders whom they suspect of more serious conduct. Certainly, police use a variety of means to prosecute gang members. For example, in California, many district attorneys have used broad gang injunctions.\textsuperscript{232} In many of those cases, they are not able to find evidence of other, more serious offenses.\textsuperscript{233} In effect, police may use marijuana laws like the police in New York used violations of petty offenses to reduce the rate of more serious crime.\textsuperscript{234} Whether using marijuana laws in that fashion is a legitimate exercise of police power may be debated. Historically, arrest rates for drug offenses had a discriminatory effect.\textsuperscript{235} Thus, while roughly the same percentage of whites, African Americans, and Hispanics are involved with drugs, arrest and incarceration rates for minorities are far higher than for whites.\textsuperscript{236} Finally, proponents of A.B. 390 face the same problem in arguing that California authorities would get out of the business of prosecuting marijuana offenses. At a minimum, they would still have to prosecute illegal drug dealers if the licensing and taxing provisions are to be effective.

\textsuperscript{230} See, e.g., MISS. CONST. art. 12, § 241. Mississippi allows a former felon disenfranchised under § 241 to regain the right to vote only if a super-majority of the legislature passes a bill allowing it. \textit{Id.} § 253. California allows a felon to vote once she has completed parole. CAL. CONST. art. 2, § 4.


\textsuperscript{232} For an extensive discussion of issues surrounding the use of gang injunctions to deal with lawless behavior, see \textit{People ex rel Gallo v. Acuna}, 929 P.2d 596, 601–02 (Cal. 1997).


\textsuperscript{236} \textit{Id.} at 4–5, 8.
3. REDUCING VIOLENCE AMONG THE DRUG CARTELS

Proponents of A.B. 390 contend that legalizing marijuana would “declaw powerful and violent Mexican drug cartels.”237 Outside California, some commentators see narco-violence and international criminal organizations that thrive on drug proceeds as threats to economic and political stability.238 As argued in an editorial in The Economist, “far from reducing crime, prohibition has fostered gangsterism on a scale that the world has never seen before. According to the U.N.’s perhaps inflated estimate, the illegal drug industry is worth some $320 billion a year.”239

Proponents analogize legalization to the post-Prohibition era, when legalizing alcohol weakened the power of mobsters around the country.240 Legalizing marijuana may reduce corruption among law-enforcement officials in the United States as well.241

These are real and worthwhile benefits that may flow from legalizing marijuana. But even if California legalized marijuana, Mexican drug cartels would still compete for the markets elsewhere in the United States.

Further, proponents of legalizing drugs are caught in a political dilemma. While some commentators urge legalizing all drugs for personal use,242 proponents of A.B. 390 have eschewed that position.243 Further, despite large numbers of recreational users of drugs like Ecstasy, cocaine, LSD, and even heroin,244 the public is simply not

237. See Marinucci, supra note 10.
238. See, e.g., Drug Policy Alliance Network, What’s Wrong with the War on Drugs, http://www.drugpolicy.org/drugwar/ (last visited Aug. 27, 2009).
239. See How to Stop the Drug Wars, supra note 27. Insofar as some of those proceeds flow to organizations like al Qaeda, the risk of continued illegal drug trafficking is even greater. Lara Jakes, U.S. Targets Afghan Druglords for Death or Capture, ASSOC. PRESS, Aug. 10, 2009 (stating that linking the fight against Taliban or al Qaeda insurgents to people seen driving the country’s illegal drugs trade is an issue that has long stirred debate inside NATO).
240. See How to Stop the Drug Wars, supra note 27.
242. Miron, supra note 241 (stating that legalization is desirable for all drugs, not just marijuana).
244. Don Dahler, Study: Baby Boomers’ Drug Use Skyrockets, WCBSTV.COM, Aug. 20, 2009, http://wcbstv.com/health/baby.boomers.drug.2.1135709.html (stating that “[a]ccording to the Substance Abuse and Mental Health Services Administration, the percentage of
interested in such sweeping reform. But failing to legalize other illegal drugs leaves a thriving business for drug cartels. Any hope that legalizing marijuana would reduce violence between Mexican gangs may be illusory. In fact, it may increase violence as gangs fight for distribution of other illegal drugs. Additionally, legalizing marijuana may risk making the remaining illegal drugs more attractive to some users—as discussed above, for some, part of the allure of marijuana is the risk associated with its illegality. At a minimum, dealers would have added incentive to make drugs that were still illegal more readily available if they were to lose the marijuana market.

I find the debate between proponents and opponents of A.B. 390 singularly unhelpful. Proponents contend that marijuana use would go down after a period of increased use and also contend that depriving Mexican gangs of billions in income would reduce narco-corruption. Opponents contend that illegal marijuana use would go up because illegal marijuana would always be less expensive than the legal form and that narco-violence would continue as drug cartels expand their trade into other drug activities. They surely cannot have it both ways. But that is the frustrating thing about the debate thus far.

4. INCREASED USE AMONG TEENS

What about increased use among teenagers? Most voters would oppose legalizing marijuana if we were convinced that use of marijuana by teenagers would increase significantly. As with alcohol abuse


246. That has certainly been the case during the crack epidemic in the 1980's when gangs competed over territory in U.S. cities. See ZIMRING, supra note 234, at 81.

247. See supra note 201; see also Alison Stateman, Can Marijuana Help Rescue California's Economy?, TIME, Mar. 13, 2009.

248. See How to Stop the War on Drugs, supra note 27.

249. See supra notes 125-126 and accompanying text.

among teens, excessive use of marijuana by teens presents special concerns according to reported studies.252 Whether legalization will lead to significant increases in use and abuse is far from a foregone conclusion.

Opponents of A.B. 390 argue that legalizing marijuana sends the message that marijuana use is acceptable and that its ready availability will lead to increased use among teens.253 But that ignores the fact that marijuana is available to teens today.254 Legalizing marijuana would only make it marginally more available.

Even if marijuana were more widely available, teens might not be more likely to use marijuana. Cigarette consumption provides an interesting analogy: teen smoking has not correlated to the amount spent on educational campaigns.255 Teens smoke because of image, not because of the threat of wrinkled skin, lung cancer or heart attacks. Studies show that young people who smoke emulate “cool” adults who smoke.256 Shaping the message about “cool” is difficult and American society has failed badly to make marijuana use “uncool.”257 At least some in the Netherlands believe that marijuana usage is lower there than in the United States because its use is legal and uncool.258

252. See OFFICE OF NAT’L DRUG CONTROL POL’Y, supra note 79, at 4; see also JOHNSON ET AL., supra note 80, at 12.
254. See OFFICE OF NAT’L DRUG CONTROL POL’Y, supra note 79, at 17 (stating that “most high school seniors said they could obtain the drug fairly easily or very easily”).
255. See GLADWELL, supra note 189, at 250.
256. Id.
257. Drug Use Down Among Uncool Kids, ONION, Oct. 21, 1997, available at http://www.theonion.com/content/node/29880 (a satirical newspaper stating that “Health and Human Services researchers tested the limits of uncool kids’ aversion to drugs by enlisting 15 popular kids to pressure a sample group of A.P. calculus students to smoke marijuana. Resistance was universal. ‘I was trying to get this geek named Jonathan to smoke a joint, and he just started crying,’ Sandusky High School (OH) star quarterback Chris Mitchell said. ‘What a girl!’”).
Consider also how films portray marijuana use. Obvious examples like Cheech and Chong movies are easy to find. But even in more mainstream films, like Bull Durham and American Beauty, the main characters routinely smoke marijuana. One anti-drug website observes, for example, that teens are influenced when they see film and rock stars using marijuana. See Teen Drug Abuse, Marijuana Use Among Teens, http://www.teendrugabuse.us/marijuana.html (last visited Nov. 3, 2009). Wikipedia even lists a sub-genre of film, the “Stoner film,” in which marijuana is central to the plot, usually portrayed in a comedic or other favorable way. Wikipedia, Stoner Film, http://en.wikipedia.org/wiki/Stoner_film (last visited Nov. 3, 2009).
258. Forum with Michael Krasny, supra note 97.
Predicting how teenagers will react to legalization is difficult. While A.B. 390 directs that funds be used for drug education,\textsuperscript{259} that may be unproductive, as it apparently has been with regard to anti-tobacco advertising.\textsuperscript{260} As currently written, A.B. 390 falls back on the tried-and-not-so-true method of trying to scare teens through drug education. Ensuring that legalizing marijuana does not substantially increase use by teens would require creative efforts by experts in substance abuse and teen psychology. Parties to the debate are not currently thinking outside the box. Opponents are falling back on the old scare tactics and proponents on largely useless drug-education strategies.

5. PERSONAL FREEDOM

Those who listen closely to the debate about legalization will hear another set of charges and countercharges that need to be explored, if only briefly. Those charges surround issues of personal freedom.

Conservatives, or at least conservative opponents of legalization of marijuana, accuse the other side of hypocrisy. For example, they point to the willingness of liberals to regulate all sorts of substances, from tobacco to trans fats, while they are willing to legalize a substance as dangerous as those that they would ban.\textsuperscript{261} Risk-adverse when it comes to global warming or exposure to possible cancer causing substances, we are suddenly willing to legalize a substance that can cause significant harm. Surely, those of us who favor legalizing marijuana ought to address that charge.\textsuperscript{262}

But conservatives are guilty of the same kind of inconsistency, if not hypocrisy. Conservatives tout freedom constantly.\textsuperscript{263} For example, former President George W. Bush filled his speeches with references to freedom.\textsuperscript{264} Conservatives often sneer at liberals for our unwillingness to accept risk.\textsuperscript{265} They denigrate Al Gore’s commitment to the fight

\textsuperscript{259} A.B. 390, ch. 4, 2009 Leg., 2009–10 Sess. (Cal.).
\textsuperscript{260} See GLADWELL, supra note 189, at 250.
\textsuperscript{262} See discussion infra Part IV for my tepid defense of my support for legalization.
\textsuperscript{263} See LAKOFF, supra note 261, at 180–83.
\textsuperscript{264} Id. at 179–80.
against global warming and accuse liberals of being unwilling to accept all matter of risk in our lives. Nonetheless, when it comes to legalizing marijuana, many conservatives see the end of civilization as we know it. They portray legalization as imposing unavoidable and extreme risks and discount the choice of millions of Americans to try marijuana.  

Concerned listeners to the debate surrounding A.B. 390 or legalization generally ought to demand proponents and opponents to address the appropriate limits of personal freedom.

IV. SOME THOUGHTS AND CONCLUSIONS

The debate surrounding A.B. 390 does not prove that civil discourse has gone downhill in recent years. But as someone who was undecided on the question of legalization when I began focusing on the question, I have found the debate unhelpful. Almost all of the discussion about legalization is passionate advocacy, not reasoned debate. Even after considering the questionable assumptions about savings in prison costs or the supposed dramatic increase in use of marijuana, I am a tepid supporter of legalization.

Legalizing marijuana would bring the law in line with the behavior of millions of Americans. For most of them, it has produced little harm. American law favors freedom of choice, absent compelling arguments to the contrary. I must tolerate a great deal of behavior that I do not believe in for myself, but have little say in those matters. That is a cost of freedom.

In deciding whether to make some conduct unlawful, legislatures often do a cost-benefit analysis of the legislation. A cost-benefit analysis seems to support legalizing marijuana.

Part of the problem with the current debate is that opponents of marijuana focus on the total cost to society associated with marijuana

---

266. See LAKOFF, supra note 261, at 188–89.

267. See supra Part III.A.3.

use. That is the wrong place to start. Years of an expensive war on drugs has not and cannot eradicate marijuana use. In California, as long as marijuana is available for medical use, eradicating marijuana use is simply not going to happen. As a result, the right cost figure in the legalization debate is the marginal rate of increased use, with marginal increased health costs. Thus, the cost is considerably less than opponents contend.

But what about the benefit side of the equation? To state the obvious, California is in bad financial shape. Indeed, anyone who witnessed the spectacle of the legislature’s budget morass during the past year might hope for a quick fix, marijuana or stronger! I cannot fault the proponents of A.B. 390 for trying to find free money to help the state resolve its financial woes. But A.B. 390 would probably not generate as much money as its proponents contend, if only because it would not produce the reduced prisons costs, and without continued law-enforcement efforts against illegal sellers of marijuana, tax revenue would be far lower than projected.

Nonetheless, properly done, legalizing marijuana might generate some revenue and depending on how the law was structured, policymakers could reduce some of the risks created by legalizing marijuana. The best outcome of all might be the generation of substance abuse funds. Even if more Californians use marijuana after its legalization, a very small number would become chronic users. The best outcome for all Californians would be if legalization generated enough money to put in place real drug-treatment programs for substance abusers. That kind of legislation would be worth backing with enthusiasm.

---

271. See supra Part III.B.2.
272. CannabisHealing.com, supra note 188.