



2018

# Legalizing Marijuana: Lessons from the United States

Michael Vitiello

*University of the Pacific, McGeorge School of Law, [mvitiello@pacific.edu](mailto:mvitiello@pacific.edu)*

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## Recommended Citation

Michael Vitiello, Legalizing Marijuana: Lessons from the United States, *STUDI SENESI* (forthcoming 2018).

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## *Legalizing Marijuana: Lessons from the United States\**

Michael Vitiello\*\*

### *Introduction*

As the Italian people and government consider legalizing marijuana, are there lessons that they may learn from the American experience with marijuana? This article addresses that question.

The United States is on a fast track towards allowing states to permit the production, sale and use of marijuana for recreational purposes.<sup>1</sup> In November 2016, national and international headlines proclaimed that California legalized marijuana for recreational use.<sup>2</sup> Even earlier, readers learned that other states like Colorado and Washington legalized the production and sale of marijuana for recreational use.<sup>3</sup> Nationally, eight states have legalized recreational use of marijuana and twenty-nine states allow some medical use of marijuana.<sup>4</sup> What many observers do not understand is that the possession, use or sale of even a single marijuana cigarette is a violation of federal law.<sup>5</sup> Thus, even though entrepreneurs are pouring capital into marijuana businesses,<sup>6</sup> the federal government could disrupt all of those transactions in short order. Unpacking the complex interplay of state and federal law is important at the outset for those who hope to learn from the American experience with marijuana legalization.

Part I of this article explains why the United States is about to change the long-standing policy against the recreational use of marijuana.<sup>7</sup> Part II then turns to states where medical and recreational use of marijuana has been lawful for several years and explores some of the lessons that one might draw from the experiences there.<sup>8</sup> Part III examines the impact that California's decision to legalize recreational use of marijuana may have on the national and potentially international markets.<sup>9</sup> Part IV offers some concluding thoughts about the future.<sup>10</sup>

### *Part I: The March towards Recreational Pot*

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\* This article is based in part on Michael Vitiello, *Introduction: Regulating Marijuana At Home and Abroad*, 49 U. PAC. L. REV. 1 (2017).

\*\* Distinguished Professor of Law, the University of Pacific, McGeorge School of Law; University of Pennsylvania, J.D., 1974; Swarthmore College, B.A., 1969. I want to thank Professor Roberto Guerrini for inviting me to submit this article and my research assistant Kendall Fisher for her excellent research efforts.

<sup>1</sup> See Todd Campbell, *Every State Could Legalize Marijuana by 2021*, THE MOTLEY FOOL (Mar. 19, 2017), <https://www.fool.com/investing/2017/03/19/every-state-could-legalize-marijuana-by-2021.aspx>.

<sup>2</sup> See, e.g., Kory Grow, *California Passes Recreational Marijuana Bill Prop 64*, ROLLING STONE (Nov. 8, 2016), <http://www.rollingstone.com/culture/news/california-passes-recreational-marijuana-bill-prop-64-w448877>; *US Election: California Voters Approve Marijuana for Recreational Use*, BBC NEWS (Nov. 10, 2016), <http://www.bbc.com/news/world-us-canada-37917472>.

<sup>3</sup> Christina Ng & Clayton Sandell, *Colorado, Washington Become First States to Legalize Recreational Marijuana*, ABC NEWS (Nov. 7, 2012), <http://abcnews.go.com/Politics/OTUS/colorado-washington-states-legalize-recreational-marijuana/story?id=17652774>.

<sup>4</sup> See *State Marijuana Laws in 2017 Map*, GOVERNING (Mar. 23, 2017), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.

<sup>5</sup> Controlled Substances Act, 21 U.S.C. §§ 812, 844 (2017); see *Federal Laws & Penalties*, NORML, <http://norml.org/laws/item/federal-penalties-2> (last visited May 22, 2017).

<sup>6</sup> See, e.g., *Marijuana Business Private Equity & Investment Resources*, MARIJUANA BUSINESS DAILY, <https://mjbizdaily.com/industry-directory/private-equity-investment-resources/> (last visited May 22, 2017).

<sup>7</sup> *Infra* Part I.

<sup>8</sup> *Infra* Part II.

<sup>9</sup> *Infra* Part III.

<sup>10</sup> *Infra* Part IV.

A majority of Americans now favor legalization of recreational marijuana use.<sup>11</sup> Over 70% favor preventing the federal government from enforcing marijuana laws in states that have legalized recreational use of marijuana.<sup>12</sup> Given that a majority of Americans live in states that have legalized either medical or recreational marijuana, such a result is not surprising. The shift in sentiment is likely to be long-term as well. Support for legalization of marijuana is far greater among young Americans than their parents' and grandparents' generations.<sup>13</sup>

Consider the cultural shift between, say, 1970 and today. As part of a seminar that I taught on Marijuana Law during the spring of 2017, I showed students the 1936 cult film *Reefer Madness*.<sup>14</sup> The students who watched the film were as amused with its excesses as, no doubt, many of their peers would be. Yet, many in my generation took films like *Reefer Madness*, *Marihuana*,<sup>15</sup> and *Assassin of Youth*<sup>16</sup> seriously.<sup>17</sup> My current students grew up on a steady diet of marijuana films that made light of the stoner lifestyle, a trend dating back to the 1970s when performers like Cheech and Chong came on the scene.<sup>18</sup> Here is partial list of shows that my students told me they watched in their teen and college years: films like *Harold and Kumar Go to White Castle*,<sup>19</sup> *How High*,<sup>20</sup> *Friday*,<sup>21</sup> and *Pineapple Express*,<sup>22</sup> and TV shows like *Workaholics*,<sup>23</sup> *Weeds*,<sup>24</sup> and *That '70s Show*.<sup>25</sup>

Majority sentiment alone cannot predict legislative change. For example, a significant number of Americans favor stricter gun regulations than are currently in place.<sup>26</sup> Despite that fact, efforts to tighten guns laws fail far more often than they succeed.<sup>27</sup> Legislating preferences takes more than popular sentiment.<sup>28</sup> Gun rights organizations, notably the National Rifle Association (the NRA), demonstrate that effective lobbying and fundraising can beat majoritarian preferences.<sup>29</sup>

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<sup>11</sup> See Nick Gass, *National Poll: Majority Supports Legalizing Marijuana*, POLITICO (June 6, 2016, 6:51 AM), <http://www.politico.com/story/2016/06/do-people-support-legalizing-marijuana-223928>.

<sup>12</sup> See *Quinnipiac Poll: 71% Oppose Enforcing Federal Marijuana Laws in States Where the Drug is Legal*, HOT AIR (Feb. 25, 2017, 4:01 PM), <http://hotair.com/archives/2017/02/25/quinnipiac-poll-71-oppose-enforcing-federal-marijuana-laws-in-states-where-the-drug-is-legal/>.

<sup>13</sup> See Tim Marcin, *Marijuana Legalization 2016: Younger Generation More Permissive Toward Pot, Study Finds*, IB TIMES (May 20, 2016, 11:33 AM), <http://www.ibtimes.com/marijuana-legalization-2016-younger-generation-more-permissive-toward-pot-study-finds-2371858>.

<sup>14</sup> REEFER MADNESS (Motion Picture Ventures 1936).

<sup>15</sup> MARIHUANA (Roadshow Attractions Inc. 1936).

<sup>16</sup> ASSASSIN OF YOUTH (BCM Roadshow Productions 1937).

<sup>17</sup> See Philip Bump, *The Long-Term Power of the 'War on Drugs,' in Two Graphs*, WASHINGTON POST (Apr. 14, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/04/14/the-long-term-power-of-anti-pot-propaganda-in-two-graphs/?utm\\_term=.487f116014fe](https://www.washingtonpost.com/news/the-fix/wp/2015/04/14/the-long-term-power-of-anti-pot-propaganda-in-two-graphs/?utm_term=.487f116014fe); see also Jane Susskind, *80 Years After Reefer Madness, Grandpa Still Doesn't Want You Smoking Weed*, IVN (Apr. 15, 2015), <https://ivn.us/2015/04/15/80-years-reefer-madness-grandpa-still-hates-marijuana/>.

<sup>18</sup> *Cheech & Chong Biography and History*, ALLMUSIC, <http://www.allmusic.com/artist/cheech-chong-mn000106298/biography> (last visited Mar. 8, 2017).

<sup>19</sup> HAROLD & KUMAR GO TO WHITE CASTLE (New Line Cinema 2004).

<sup>20</sup> HOW HIGH (Jersey Films 2001).

<sup>21</sup> FRIDAY (New Line Cinema 1995).

<sup>22</sup> PINEAPPLE EXPRESS (Colombia Pictures 2008).

<sup>23</sup> *Workaholics* (Comedy Central).

<sup>24</sup> *Weeds* (Showtime).

<sup>25</sup> *That '70s Show* (Fox).

<sup>26</sup> See, e.g., Jennifer Agiesta & Tom LoBianco, *Poll: Gun Control Support Spikes After Shooting*, CNN POLITICS (June 20, 2016, 6:49 PM), <http://www.cnn.com/2016/06/20/politics/cnn-gun-poll/>.

<sup>27</sup> See *id.*

<sup>28</sup> See Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/>.

<sup>29</sup> See *US Gun Control: What is the NRA and Why is it so Powerful?*, BBC NEWS (Jan. 8, 2016), <http://www.bbc.com/news/world-us-canada-35261394>; Drutman, *supra* note 28.

For several years, even when support for legalization of marijuana exceeded opposition,<sup>30</sup> marijuana reformers faced numerous obstacles. Law enforcement agencies routinely opposed such changes in the law.<sup>31</sup> Parent groups did as well.<sup>32</sup> Many marijuana growers and sellers opposed reform – something that remains true today.<sup>33</sup> While the National Organization for the Reform of Marijuana Laws (NORML) has lobbied for reform of marijuana laws since its inception in 1970s, it has lacked the influence, for example, of the NRA.<sup>34</sup>

Legalization efforts faced two major hurdles. The first truly substantial hurdle was that any use of marijuana is a violation of federal law, under which even minor possession is an offense.<sup>35</sup> Since the 1930s, the federal government has pursued aggressive enforcement of marijuana laws almost without exception.<sup>36</sup> The Controlled Substances Act, enacted in 1970, treats marijuana as a Schedule I drug—one for which there is no recognized medical use.<sup>37</sup> After a period when President Carter signaled a willingness to rethink the aggressive federal enforcement of marijuana laws,<sup>38</sup> the Reagan administration vigorously pursued the war on drugs.<sup>39</sup> Often working with local law enforcement agencies, federal authorities used a variety of strategies to fight that war. Aerial surveillance, followed by police raids, became common during the 1980s,<sup>40</sup> and a practice that continues today.<sup>41</sup> Forfeiture laws gave police agencies further incentives to enforce drug laws aggressively, especially where the agencies were able to keep proceeds of raids.<sup>42</sup> Beyond that, government agents can elect merely to give notice, say, to landlords who rent to marijuana operations, that the government will seek forfeiture of the landlords' facilities.<sup>43</sup> Aggressive enforcement of federal law certainly deterred many business investors from entering the industry.

The second hurdle that slowed progress towards legalization follows from the last point. Many proponents of legalization analogize the failures of Prohibition and the War on Drugs.<sup>44</sup> Similarities exist: enforcement of liquor and marijuana laws was erratic and discriminatory, and hardly stemmed demand.<sup>45</sup> Use of both intoxicants by prominent members of society and

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<sup>30</sup> Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, PEW RESEARCH CENTER (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>.

<sup>31</sup> See, e.g., Lee Fang, *Police and Prison Guard Groups Fight Marijuana Legalization in California*, THE INTERCEPT (May 18, 2016, 8:21 AM), <https://theintercept.com/2016/05/18/ca-marijuana-measure/>.

<sup>32</sup> See, e.g., Patrick McGreevy, *Parents Group Rallies Against Proposition 64, Which Would Legalize Recreational Use of Marijuana*, LOS ANGELES TIMES (Oct. 4, 2016, 12:12 PM), <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-parents-group-rallies-against-1475607380-htlmstory.html>.

<sup>33</sup> See, e.g., Rory Carroll, *Some California Marijuana Growers are Against Legalization Over Fears of 'Economic Injustice'*, BUSINESS INSIDER (Oct. 4, 2016, 9:01 AM), <http://www.businessinsider.com/some-california-marijuana-growers-are-against-legalization-2016-10>.

<sup>34</sup> *State Lobbying Campaign*, NORML, <http://norml.org/component/zoo/category/state-lobbying-campaign> (last visited Mar. 11, 2017).

<sup>35</sup> Controlled Substances Act, 21 U.S.C. §§ 812, 844 (2017).

<sup>36</sup> See *Marijuana Timeline*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Mar. 11, 2017).

<sup>37</sup> 21 U.S.C. § 812.

<sup>38</sup> *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> (last visited Mar. 11, 2017).

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

<sup>40</sup> See Kenneth B. Nunn, *The Drug War as Race War*, UNIVERSITY OF DAYTON (2002), <http://academic.udayton.edu/race/03justice/crime09.htm>.

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

<sup>42</sup> See, e.g., Lucy Steigerwald, *Asset Forfeiture, the Cash Cow of the Drug War*, VICE (July 15, 2013, 9:27 AM), [https://www.vice.com/en\\_us/article/bad-cop-blotter-asset-forfeiture-the-cash-cow-of-the-drug-war](https://www.vice.com/en_us/article/bad-cop-blotter-asset-forfeiture-the-cash-cow-of-the-drug-war).

<sup>43</sup> See Hilary Bricken, *Real Property Forfeiture for Marijuana Tenants: Your Marijuana Leasehold is Key*, CANNA LAW BLOG (Sept. 15, 2014), <http://www.cannalawblog.com/asset-forfeiture-why-your-marijuana-leasehold-is-key/>.

<sup>44</sup> See, e.g., Norm Stamper, *Prohibition: A Parallel to Modern War on Drugs*, SEATTLE TIMES (Sept. 30, 2011, 4:00 PM), <http://www.seattletimes.com/opinion/prohibition-a-parallel-to-modern-war-on-drugs/>.

<sup>45</sup> *Against Drug Prohibition*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/other/against-drug-prohibition> (last visited Mar. 11, 2017).

politicians demonstrated rank hypocrisy.<sup>46</sup> However, the analogy was somewhat flawed insofar as whether repeal of Prohibition served as a model for repeal of marijuana laws.

The booze, beer, and wine industry prior to Prohibition was big business – the fifth largest industry in the United States prior to the Eighteenth Amendment.<sup>47</sup> Many producers of alcohol went broke during Prohibition, but the most resourceful and well-financed producers found ways to survive.<sup>48</sup> Several major wineries produced “sacramental” wine for the Catholic Church.<sup>49</sup> Some beer companies survived by producing a variety of products, including brewer’s yeast, malt extract, and near-beer, a malt beverage that contained only a small amount of malt alcohol.<sup>50</sup> Similarly, some of the liquor barons were able to stay afloat.<sup>51</sup> When other factors pointed towards exhaustion with Prohibition, established industry leaders had resources to lobby for the repeal of the Eighteenth Amendment.<sup>52</sup> (As an aside, once Prohibition ended, those producers were able to resume production easily.)<sup>53</sup>

Until recently, marijuana reformers lacked the kinds of resources needed to get legislation passed in state and federal legislatures. Drug cartels dominated part of the industry and did not invest in reform efforts.<sup>54</sup> The transformation of California’s Emerald Triangle to a pot-growing epicenter was part of the hippie-back-to-nature movement.<sup>55</sup> Many of those producers are deeply anti-establishment.<sup>56</sup> Often distrustful of government, many of them lived through the worst of the war on drugs and found ways to stay in business despite aggressive anti-drug strategies.<sup>57</sup> Few were interested in investing in legalization efforts.<sup>58</sup>

Two developments over the past several years have changed the prospects for legalization. Again, one starting point was federal law enforcement attitudes towards marijuana laws. For a good part its twenty-year history, medical marijuana law in California has been chaotic. Proposition 215 in California, passed in 1996 and the first medical marijuana law in the United States, was intentionally open-ended, an effort for *de facto* legalization of marijuana. Federal and state law enforcement agencies aggressively pursued even medical marijuana producers from the outset, continuing through former President George W. Bush’s administration.<sup>59</sup> Former President Barack Obama promised a more tolerant approach towards state-authorized medical marijuana

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<sup>46</sup> See Robyn Short, *Politicians, Hypocrisy & the War on Drugs*, THE NEW BOTTOM LINE, <http://thenewbottomline.com/politicians-hypocrisy-the-war-on-drugs/> (last visited Mar. 11, 2017); *Hypocrisy During Prohibition of Alcohol in the U.S.*, ALCOHOL PROBLEMS AND SOLUTIONS, <https://www.alcoholproblemsandsolutions.org/hypocrisy-prohibition-alcohol-u-s/> (last visited Mar. 11, 2017).

<sup>47</sup> *The Rise and Fall of Prohibition*, NATIONAL CONSTITUTION CENTER, <http://prohibition.constitutioncenter.org/exhibition.html> (last visited Mar. 11, 2017).

<sup>48</sup> *What Really Happened During Prohibition*, WINE FOLLY (July 2, 2014), <http://winefolly.com/update/prohibition-facts/>.

<sup>49</sup> *Id.*

<sup>50</sup> Nick Greene, *How Breweries Kept Busy During Prohibition*, MENTAL FLOSS, <http://mentalfloss.com/article/55157/how-breweries-kept-busy-during-prohibition> (last visited Mar. 11, 2017).

<sup>51</sup> *Everything You Ever Wanted to Know About Prohibition*, OXFORD UNIVERSITY PRESS BLOG, <https://blog.oup.com/2011/10/prohibition/> (last visited Mar. 11, 2017).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Olga Khazan, *How Marijuana Legalization Will Affect Mexico’s Cartels*, in *Charts*, WASHINGTON POST (Nov. 9, 2012), [https://www.washingtonpost.com/news/worldviews/wp/2012/11/09/how-marijuana-legalization-will-affect-mexicos-cartels-in-charts/?utm\\_term=.efd886160023](https://www.washingtonpost.com/news/worldviews/wp/2012/11/09/how-marijuana-legalization-will-affect-mexicos-cartels-in-charts/?utm_term=.efd886160023).

<sup>55</sup> See, e.g., Emily Brady, *How Humboldt Became America’s Marijuana Capital*, SALON (Jun. 30, 2013, 9:30 AM), [http://www.salon.com/2013/06/30/how\\_humboldt\\_became\\_americas\\_marijuana\\_capital/](http://www.salon.com/2013/06/30/how_humboldt_became_americas_marijuana_capital/).

<sup>56</sup> Max Daly, *The Stoner’s Paradise of Humboldt County is Dreading Weed Legalization*, VICE (Feb 25, 2014, 8:00 AM), <http://www.vice.com/read/the-us-weed-growing-town-dreading-weed-legalisation>.

<sup>57</sup> *Id.*; see also Benjamin Wallace-Wells, *The Truce on Drugs*, NEW YORK MAGAZINE (Nov. 25, 2012), <http://nymag.com/news/features/war-on-drugs-2012-12/>.

<sup>58</sup> Daly, *supra* note 56; Wallace-Wells, *supra* note 57.

<sup>59</sup> PETER HECHT, WEED LAND 129-31 (2014).

facilities during his 2008 Presidential campaign.<sup>60</sup> In 2009, the Justice Department announced its new policy in what has come to be known as the “Ogden memo,” a memorandum explaining the government’s position and laying out ground rules for “legitimate” medical marijuana providers.<sup>61</sup> A state’s compliance with the terms of the memorandum would implicitly give the state latitude in enforcement of its medical marijuana laws.<sup>62</sup>

Attempting to move one step further, legalization advocates in California managed to get Proposition 19 on the ballot in 2010.<sup>63</sup> Proposition 19 would have legalized recreational use of marijuana.<sup>64</sup> However, in truth, it would have done little else to regulate marijuana in the state.<sup>65</sup> Perhaps, legalization proponents got lucky when California voters rejected Proposition 19—its lack of strict controls might have invited greater federal intervention that evolved during the Obama administration.<sup>66</sup>

Marijuana proponents in Washington and Colorado learned from the failure of Proposition 19. Both states had more carefully drafted legalization initiatives on the ballot during the 2012 Presidential election.<sup>67</sup> Not only were those proposals more in line with the Ogden memo than was Proposition 19,<sup>68</sup> but timing the vote on the initiatives to coincide with a Presidential election meant that more young people would vote than in an off-year election.<sup>69</sup> The Obama administration’s response to the passage of those initiatives was a critical moment towards what I see as the eventual change in federal law governing marijuana.

An aggressive law enforcement response to Washington and Colorado’s legalization efforts would almost certainly have been a major setback for legalization proponents. Few producers would sign up for licenses, few sellers would comply with a host of regulations, and few investors would risk capital if the federal government might shut them down for violating federal law. That did not happen.

Similar to the Ogden memo, a newly published memorandum, authored by Department of Justice Deputy Attorney General James Cole, laid out guidelines for businesses in states that wanted to legalize recreational use of marijuana.<sup>70</sup> Some critics pointed out that the memorandum seemed to say very little of substance<sup>71</sup> and, more to the point, that it did not have the full force of law.<sup>72</sup> A

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<sup>60</sup> *Id.* at 113-14.

<sup>61</sup> *Id.* at 12-13; Memorandum from David W. Ogden, Deputy Attorney General, to Selected United States Attorneys (Oct. 19, 2009), available at <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

<sup>62</sup> Ogden, *supra* note 61.

<sup>63</sup> See *California Proposition 19, the Marijuana Legalization Initiative (2010)*, BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_19,\\_the\\_Marijuana\\_Legalization\\_Initiative\\_\(2010\)](https://ballotpedia.org/California_Proposition_19,_the_Marijuana_Legalization_Initiative_(2010)) (last visited Mar. 11, 2017).

<sup>64</sup> *Id.*

<sup>65</sup> See *Text of Proposition 19, the “Regulate, Control and Tax Cannabis Act of 2010” California*, BALLOTPEdia, [https://ballotpedia.org/Text\\_of\\_Proposition\\_19,\\_the\\_%22Regulate,\\_Control\\_and\\_Tax\\_Cannabis\\_Act\\_of\\_2010%22\\_\(California\)](https://ballotpedia.org/Text_of_Proposition_19,_the_%22Regulate,_Control_and_Tax_Cannabis_Act_of_2010%22_(California)) (last visited Mar. 11, 2017).

<sup>66</sup> *Id.*; Tim Dickinson, *Obama’s War on Pot*, ROLLING STONE (Feb. 16, 2012), <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216>.

<sup>67</sup> See *Amendment 64: Use and Regulation of Marijuana*, CITY OF FORT COLLINS, available at <http://www.fcgov.com/mmj/pdf/amendment64.pdf> (last visited Mar. 11, 2017); *Initiative Measure No. 502*, WASHINGTON SECRETARY OF STATE (July 8, 2011), available at [https://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](https://sos.wa.gov/_assets/elections/initiatives/i502.pdf).

<sup>68</sup> See CITY OF FORT COLLINS, *supra* note 67; Ogden, *supra* note 61; WASHINGTON SECRETARY OF STATE, *supra* note 67.

<sup>69</sup> *Voter Turnout*, FAIRVOTE, [http://www.fairvote.org/voter\\_turnout#voter\\_turnout\\_101](http://www.fairvote.org/voter_turnout#voter_turnout_101) (last visited Mar. 11, 2017).

<sup>70</sup> Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys (Aug. 29, 2013), available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter “Cole Memo”].

<sup>71</sup> See James Higdon, *Jeff Sessions’ Coming War on Legal Marijuana*, POLITICO (Dec. 5, 2016), <http://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501>.

new administration could end the Obama administration's tolerance of marijuana businesses at the stroke of a pen.

Despite those realities, the Cole memo created a brave new world for marijuana businesses. One commentator suggested that James Cole has had a bigger impact on the marijuana industry than has any other individual.<sup>73</sup> His memo was a green light to the industries in Colorado and Washington. With some fits and starts, the marijuana business in those states is a growth industry, and both states are seeing increasing tax revenue from it.<sup>74</sup>

Encouraged by the Obama administration's tolerance of the industry, marijuana proponents have pushed through legal reforms in a number of other states, including Alaska, California, Maine, Massachusetts, Nevada, and Oregon.<sup>75</sup> Like Colorado and Washington, Oregon, which now has an industry up-and-running, has exceeded its early projections on tax revenues.<sup>76</sup>

Not only did the Obama administration give states room to experiment with recreational use of marijuana, but also it invited investment in the industry.<sup>77</sup> Accurate predictions about the size of the marijuana market are difficult to make, but plenty of mainstream media have published stories about the potential growth of the industry.<sup>78</sup> Naturally, most advisers warn of the risks inherent in investing in the industry.<sup>79</sup> That has not stopped capital from flowing in.<sup>80</sup> Finding stories about creative efforts to invest in the industry is not difficult; for example, one creative entrepreneur is attempting to create marijuana real estate investment trusts to allow producers to invest their capital in creating the product, while investors share the risk and profits by buying the land for production.<sup>81</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> John Schroyer, *The Famous Marijuana Memos: Q&A with Former DOJ Deputy Attorney General James Cole*, MARIJUANA BUSINESS DAILY (July 27, 2016), <http://mjbizdaily.com/the-famous-marijuana-memos-qa-with-former-doj-deputy-attorney-general-james-cole/>.

<sup>74</sup> Gavin Ekins & Joseph Henchman, *Marijuana Legalization and Taxes: Federal Revenue Impact*, TAX FOUNDATION (May 12, 2016), <https://taxfoundation.org/marijuana-tax-legalization-federal-revenue/>.

<sup>75</sup> *Where is Weed Legal? Map of U.S. Marijuana Laws by State*, THE CANNABIST (Oct. 14, 2016, 12:59 PM), <http://www.thecannabist.co/2016/10/14/legal-marijuana-laws-by-state-map-united-states/62772/>.

<sup>76</sup> Nigel Jaquiss, *Oregon's Recreational Cannabis Tax Revenue for 2016 Exceeded One Original Estimate More than Six-Fold*, WILLAMETTE WEEK (Jan. 21, 2017), <http://www.wweek.com/news/2017/01/21/recreational-marijuana-tax-revenue-for-2016-exceeded-one-original-estimate-more-than-six-fold/>.

<sup>77</sup> See Danielle Douglas, *Obama Administration Clears Banks to Accept Funds From Legal Marijuana Dealers*, WASHINGTON POST (Feb. 14, 2014), [https://www.washingtonpost.com/business/economy/obama-administration-clears-banks-to-accept-funds-from-legal-marijuana-dealers/2014/02/14/55127b04-9599-11e3-9616-d367fa6ea99b\\_story.html?utm\\_term=.108c028dc3d9](https://www.washingtonpost.com/business/economy/obama-administration-clears-banks-to-accept-funds-from-legal-marijuana-dealers/2014/02/14/55127b04-9599-11e3-9616-d367fa6ea99b_story.html?utm_term=.108c028dc3d9).

<sup>78</sup> See, e.g., Debra Borchardt, *Six Predictions for the Marijuana Industry in 2017*, FORBES (Dec. 26, 2016, 11:19 AM), <https://www.forbes.com/sites/debraborchardt/2016/12/26/here-are-the-top-2017-predictions-for-the-marijuana-industry/#b3649812ad84>; Keith Speights, *Marijuana Investing in 2017: 5 Numbers Everyone Should Know*, THE MOTLEY FOOL (Dec. 11, 2016, 3:02 PM), <https://www.fool.com/investing/2016/12/11/marijuana-investing-in-2017-5-numbers-everyone-sho.aspx>; Tom Anderson, *Investors Seek High Returns in Marijuana Stocks*, CNBC (Oct. 15, 2016, 9:00 AM), <http://www.cnbc.com/2016/10/14/investors-seek-high-returns-in-marijuana-stocks.html>; Paul Cohn, *The Smartest Way to Invest in Cannabis*, FORBES (June 27, 2016, 6:49 AM), <https://www.forbes.com/sites/quora/2016/06/27/the-smartest-way-to-invest-in-cannabis/#272669dc55da>; Siddhi Bajaj, *4 Top Stocks in the Growing Medical Marijuana Industry*, THE STREET (May 18, 2016, 3:40 PM), <https://www.thestreet.com/story/13575404/1/4-best-stocks-in-the-thriving-medical-marijuana-industry.html>; Michelle Castillo, *How to Legally Invest in Pot Companies*, CNBC (June 22, 2015, 10:10 AM), <http://www.cnbc.com/2015/06/22/how-to-legally-invest-in-pot-companies.html>.

<sup>79</sup> Some or most of the ones in the previous note do so.

<sup>80</sup> Borchardt, *supra* note 78.

<sup>81</sup> Justin Ho, *Real Estate Investors Help Grow the Medical-Marijuana Business*, MARKETPLACE (Feb. 28, 2017, 5:41 AM), <https://www.marketplace.org/2017/02/28/business/funding-high-costs-pot-business>; see also *A Smokin' Hot Pot REIT*, REAL WEALTH NETWORK (Nov. 1, 2016), <https://www.realwealthnetwork.com/learn/news/smoking-hot-pot-reit/>.

As I mentioned, analogizing the legalization of marijuana to the repeal of the Eighteenth Amendment did not make sense – until now. Investors with fists full of cash want into the industry and, no doubt, want to eliminate the risk associated with aggressive enforcement of federal law.<sup>82</sup>

Donald Trump's election as the President has startled many observers.<sup>83</sup> It has also raised serious doubts about the short-term future of states' efforts to legalize marijuana.<sup>84</sup> Those doubts became more acute with Trump's appointment of Alabama Senator Jeff Sessions as the Attorney General of the United States.<sup>85</sup>

No one will confuse Sessions with Attorney General Eric Holder, the head of the Department of Justice when David Ogden and James Cole published their memoranda. Many commentators quoted Sessions' hardline stance on marijuana when President Trump nominated Sessions to be Attorney General.<sup>86</sup> During a Senate hearing on the Obama administration's enforcement of marijuana laws, the then-Senator famously said, "[G]ood people don't smoke marijuana."<sup>87</sup>

More recently, first White House press secretary Sean Spicer and then Attorney General Sessions have made statements creating enormous confusion about the Trump administration's position on marijuana enforcement. On February 23, 2017, Spicer said, "I do believe you will see greater enforcement of [federal drug laws].... There is a big difference between medical marijuana... and recreational marijuana.... [Recreational marijuana] is a very, very different subject."<sup>88</sup> Somewhat bizarrely, he also stated that marijuana use leads to increase opioid use.<sup>89</sup> Several days later, Sessions told reporters that he is "not a fan of marijuana,"<sup>90</sup> and falsely claimed that increased marijuana use has resulted in an increase in violent crime.<sup>91</sup>

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<sup>82</sup> See, e.g., *id.*

<sup>83</sup> See, e.g., Maxwell Tani, *Donald Trump Shocks World, Wins Presidential Election in Biggest Upset in Political History*, BUSINESS INSIDER (Nov. 9, 2016, 2:32 AM), <http://www.businessinsider.com/donald-trump-wins-election-results-2016-11>.

<sup>84</sup> Ylan Mui, *Donald Trump and His Attorney General Are Freaking Out the \$7 Billion Pot Industry*, CNBC (Mar. 14, 2017, 9:57 AM), <http://www.cnbc.com/2017/03/14/donald-trump-and-jeff-sessions-anti-legal-pot-industry.html>.

<sup>85</sup> See, e.g., Tom Angell, *Exclusive: Sessions Asks Congress to Undo Medical Marijuana Protections*, MASSROOTS (June 12, 2017), <https://www.massroots.com/news/exclusive-sessions-asks-congress-to-undo-medical-marijuana-protections>; Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, WASHINGTON POST (Apr. 8, 2017), [https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3\\_story.html?utm\\_term=.0f66548ba835](https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.0f66548ba835).

<sup>86</sup> Nathan Rott, *Trump's Choice for Top Law Enforcer has Cannabis Proponents Fearing Future*, NPR (Nov. 20, 2016, 3:46 PM), <http://www.npr.org/2016/11/20/502712513/trumps-choice-for-top-law-enforcer-has-cannabis-proponents-fearing-future>.

<sup>87</sup> Christopher Ingraham, *Senators Held a Hearing to Remind You That 'Good People Don't Smoke Marijuana' (Yes, Really)*, WASHINGTON POST (Apr. 5, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/04/05/senators-one-sided-marijuana-hearing-is-heavy-on-anecdote-light-on-data/?utm\\_term=.2637529a0b15](https://www.washingtonpost.com/news/wonk/wp/2016/04/05/senators-one-sided-marijuana-hearing-is-heavy-on-anecdote-light-on-data/?utm_term=.2637529a0b15).

<sup>88</sup> Kevin Liptak, *White House: Feds Will Step Up Marijuana Law Enforcement*, CNN POLITICS (Feb. 24, 2017, 9:27 AM), <http://www.cnn.com/2017/02/23/politics/white-house-marijuana-donald-trump-pot/>.

<sup>89</sup> Suzannah Weiss, *Sean Spicer Thinks Smoking Weed Leads to Opioid Addiction & That's a Problem*, REFINERY 29 (Feb. 26, 2017, 11:30 AM), <http://www.refinery29.com/2017/02/142670/sean-spicer-weed-opioid-addiction>. He made that statement at a time when a body of scientific evidence suggests that opioid addicts are able to get pain relief by using marijuana. Greg Miller, *Could Pot Help Solve the U.S. Opioid Epidemic?*, SCIENCE MAGAZINE (Nov. 3, 2016, 2:00 PM), <http://www.sciencemag.org/news/2016/11/could-pot-help-solve-us-opioid-epidemic>.

<sup>90</sup> Mark Hensch, *Sessions: I'm 'Not a Fan' of Marijuana Expansion*, THE HILL (Feb. 27, 2017, 8:34 PM), <http://thehill.com/homenews/administration/321483-sessions-im-not-a-fan-of-marijuana-expansion>.

<sup>91</sup> See, e.g., Shane Dixon Kavanaugh, *Jeff Sessions Peddles Anti-Pot Hysteria*, VOCATIV (Feb. 28, 2017, 5:16 PM), <http://www.vocativ.com/406663/jeff-sessions-hysteria-legal-marijuana/>; Debra Borchardt, *Jeff Sessions Cites Increased Violence as He Once Again Threatens the Marijuana Industry*, FORBES (Feb. 28, 2017, 8:59 AM), <https://www.forbes.com/sites/debraborchardt/2017/02/28/sessions-cites-increased-violence-as-he-once-again-threatens-the-marijuana-industry/#68fc33471fe3>; Christopher Ingraham, *Attorney General Sessions Wants to Know the Science on Marijuana and Opioids. Here It Is.*, WASHINGTON POST (Feb. 28, 2017),



Obviously, comments like these have shocked legalization proponents,<sup>92</sup> who are at odds with how to respond to the threat of renewed vigorous enforcement of marijuana laws.<sup>93</sup> A lot is at stake. Obviously, investors in existing enterprises in Colorado, Washington, and Oregon, where recreational use rules are already in place, may lose their shirts or worse.<sup>94</sup> Investors looking for investment opportunities must be holding onto their wallets until the Trump administration clarifies its position on enforcement of marijuana laws.

I would certainly not advise someone to invest in the marijuana industry at this point, unless the investor was a serious risk-taker with plenty of spare cash. However, I doubt that the Trump administration will derail legalization of marijuana. That is so for a number of reasons. First, Trump himself made numerous statements on the campaign trail that are at odds with Sessions.<sup>95</sup> There, he indicated that he saw marijuana regulation as within the purview of the states.<sup>96</sup> Further, some signals out of the White House indicate that the administration will leave states free to administer medical marijuana laws.<sup>97</sup> During his confirmation hearing, even Sessions told Colorado Republican Senator Cory Gardner that enforcing marijuana laws in states where recreational use is legal would not be a Justice Department priority.<sup>98</sup>

Second, do a quick Google search for stories about statements made by Spicer and Sessions. No longer is it only *High Times* and other pro-marijuana media that are commenting unfavorably on those statements. Far more mainstream media and *pro-business* media have criticized the administration.<sup>99</sup> Undoubtedly, mainstream media representatives view the emerging majority of Americans as favoring legalization of recreational marijuana.

Third, as indicated above, more than half of Americans live in states where some form of marijuana is legal. Albeit, most of the states that have legalized marijuana for recreational use are blue states, which limits the political risk to a Republican administration. However, legislators in those states will receive an earful from constituents who voted in favor of recreational marijuana laws.<sup>100</sup> In addition, while few elected officials in states that passed recreational use laws backed

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[https://www.washingtonpost.com/news/wonk/wp/2017/02/28/attorney-general-sessions-wants-to-know-the-science-on-marijuana-and-opioids-here-it-is/?utm\\_term=.e69a3765fe2f](https://www.washingtonpost.com/news/wonk/wp/2017/02/28/attorney-general-sessions-wants-to-know-the-science-on-marijuana-and-opioids-here-it-is/?utm_term=.e69a3765fe2f).

<sup>92</sup> See, e.g., Steve Elliott, *Washington State Vows to Fight Back Against Trump Marijuana Crackdown*, TOKE SIGNALS (Feb. 24, 2017), <https://tokesignals.com/washington-state-vows-to-fight-back-against-trump-marijuana-crackdown/> (on file with *The University of the Pacific Law Review*); Alicia Wallace, *Trump Administration Puts Recreational Marijuana in Crosshairs*, THE CANNABIST (Feb. 23, 2017, 2:14 PM), <http://www.thecannabist.co/2017/02/23/sean-spicer-marijuana-medical-recreational-trump-administration/74255/>.

<sup>93</sup> See Patrick McGreevy, *California Officials and the Marijuana Industry Prepare to Fight a Federal Crackdown*, LOS ANGELES TIMES (Feb. 25, 2017, 12:05 AM), <http://www.latimes.com/politics/la-la-pol-ca-federal-pot-crackdown-response-20170225-story.html>.

<sup>94</sup> See Sean Williams, *Here's What a Trump Presidency Means for Marijuana*, THE MOTLEY FOOL (Nov. 9, 2016, 3:15 AM), <https://www.fool.com/investing/2016/11/09/heres-what-a-trump-presidency-means-for-marijuana.aspx>.

<sup>95</sup> Compare Chris Nichols, *TRUE: During Campaign, Trump Pledged to Leave Marijuana Legalization Up to States*, POLITIFACT (Feb. 28, 2017, 6:00 AM), <http://www.politifact.com/california/statements/2017/feb/28/gavin-newsom/true-campaign-trump-said-states-should-decide-legal/>, with Ingraham, *supra* note 78.

<sup>96</sup> Nichols, *supra* note 95.

<sup>97</sup> See Jennifer Kaplan, *Trump Administration's Desire to Separate Recreational Weed from Medical is Impractical at Best*, THE CANNABIST (Mar. 3, 2017, 2:49 PM), <http://www.thecannabist.co/2017/03/03/trump-administration-marijuana-policy-recreational-medical/74852/>.

<sup>98</sup> Reid Wilson, *Confusion Mounts over Trump Administration's Stance on Marijuana*, THE HILL (Feb. 28, 2017, 4:31 PM), <http://thehill.com/homenews/state-watch/321639-confusion-mounts-over-trump-administrations-stance-on-marijuana>.

<sup>99</sup> See, e.g., Allison Kite, *Some in Marijuana Industry Fear Jeff Sessions Will Hinder – or Reverse – Legalization Trend*, WALL STREET JOURNAL (Nov. 21, 2016, 1:30 PM), <http://blogs.wsj.com/washwire/2016/11/21/marijuana-industry-fears-jeff-sessions-will-hinder-or-reverse-marijuana-legalization/>.

<sup>100</sup> Wilson, *supra* note 98.

such legislation, many have recognized the benefits for their states, including significant increased tax revenues.<sup>101</sup>

Fourth and closely related to the previous point, not only will legislators hear from their constituents, but also they will hear from investors, ones with enough capital to be able to lobby for favorable legislation.<sup>102</sup> Even with recent statements from Spicer and Sessions, the administration has enough wiggle room to adopt policies that will allow the steady march towards legalized marijuana.

Fifth, the most plausible outcome is legislation that gives states that want to legalize recreational use the ability to do so. “Cooperative federalism”<sup>103</sup> taps into traditional conservative arguments about states’ rights,<sup>104</sup> giving political cover for many politicians who may otherwise be hesitant to support legislation legalizing marijuana.

## *Part II: Rethinking the Debate*

As developed in this section, the previous discussion is essential for two reasons: first, the United States now has over twenty years of experience with marijuana. That includes a better understanding of its effects on users. That also offers insights into models for regulating the marijuana market. Second, if the Trump administration gives states a green light to allow the development of their marijuana industry, California’s legal and quasi-legal market will come on line in full force. The size of its industry and its long-standing history of surviving the war on drugs and then thriving in the gray market of the past twenty years make it difficult to predict the future of the American marijuana industry and, in turn, the marijuana industry in other countries.

### *(A) A more informed debate*

For most of the past century since the United States began regulating marijuana, proponents and opponents of legalization had little hard data on costs and benefits of marijuana use. In large part because of adoption of medical marijuana laws and, now, because of lawful recreational use of marijuana in several states, the debate is increasingly data-driven. The scale is tipping in favor of the proponents of legalization.

Take health effects. Opponents have made a number of claims about the physical and psychological effects of marijuana. Proponents have made a variety of competing, glowing claims about the health benefits of marijuana use.

In a recent report, the National Academies of Sciences, Engineering, and Medicine<sup>105</sup> (“NASEM”) reached several conclusions about some of marijuana’s health benefits. NASEM did not conduct new research, but surveyed the current literature to reach conclusions that are more general.<sup>106</sup> It assessed the quality of the support for various claims made by proponents and opponents of marijuana use.

For example, the report found the evidence “conclusive or substantial” that marijuana is effective in treating chronic pain in adults, as anti-nausea medicine during chemotherapy, and for

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<sup>101</sup> *Id.*

<sup>102</sup> See *Marijuana Lobby Grows as Legalization Spreads Throughout Country*, ENTREPRENEUR (Feb. 28, 2017), <https://www.entrepreneur.com/article/289831>.

<sup>103</sup> See generally Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015).

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

<sup>105</sup> An unofficial, prepublication copy of the report is available here: <https://www.nap.edu/read/24625/chapter/2#10>.

<sup>106</sup> *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE 1-2 (2017), available at <https://www.nap.edu/read/24625/chapter/2#10>.

easing multiple sclerosis spasticity symptoms.<sup>107</sup> On the next level, the report found “moderate evidence” that it improves sleep quality for people who suffer from sleep apnea, fibromyalgia, and multiple sclerosis.<sup>108</sup> Next, it found “limited evidence” that marijuana is beneficial for improving symptoms of Tourette’s, general social anxiety, PTSD, and increasing appetite for HIV/AIDS patients.<sup>109</sup> The report also stated that there is “no or insufficient evidence to support or refute” some popular conclusions, such as that cannabis is an effective treatment for epilepsy, Parkinson’s disease, cancer, and Huntington’s disease.<sup>110</sup> It also pointed out that there is “moderate evidence of a statistical association” between marijuana use and “better cognitive performance” among people with psychotic disorders.<sup>111</sup> It also noted that there is “moderate evidence of *no* statistical association” between marijuana use and a worsening of schizophrenia symptoms.<sup>112</sup>

Some recent research may show that marijuana is useful in curbing opioid abuse – the doctor behind one of the studies has seen the connection anecdotally with his patients.<sup>113</sup> Marijuana apparently provides three benefits in this setting: serving as an alternative source of relief to opioids for both chronic pain and acute pain, as well as helping alleviate opioid withdrawal symptoms.<sup>114</sup>

Some studies suggest that marijuana can help people suffering from alcoholism.<sup>115</sup> Other studies support findings that marijuana might be an effective treatment for depression, although this conflicts with the NASEM report’s summary of current literature detailed below.<sup>116</sup>

NASEM’s positive findings are good news for proponents of marijuana, at least for its medical use. Its findings concerning adverse effects did not provide much good news for marijuana’s opponents.

The adverse health effect of marijuana often cited by its critics is the damage that smoking the substance can do to a person’s respiratory system.<sup>117</sup> Fewer studies have been conducted on cannabis specifically, but smoking both cannabis and tobacco produces toxins and carcinogens that the user inhales.<sup>118</sup> However, cannabis does not produce these harmful materials when smoked because of its psychoactive chemicals, namely THC and CBD – rather, the combustion of plant material causes their release.<sup>119</sup> Several studies do not show any significant link between occasional or moderate marijuana smoking and lung cancer, while mixed evidence suggests a correlation for heavy marijuana smokers.<sup>120</sup> The NASEM report concluded, “There is moderate evidence of *no*

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<sup>107</sup> *Id.* at 10.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 10-11.

<sup>111</sup> *Id.* at 14.

<sup>112</sup> *Id.*

<sup>113</sup> Sarah Zhang, *Patients Are Ditching Opioid Pills for Weed*, THE ATLANTIC (Feb. 2, 2017), <https://www.theatlantic.com/health/archive/2017/02/marijuana-cannabinoids-opioids/515358/>.

<sup>114</sup> Doug Berman, *Yet Another Serious Study Finds Link Between Medical Marijuana Reforms and Reduced Opioid Problems*, MARIJUANA LAW, POLICY & REFORM (Mar. 29, 2017),

[http://lawprofessors.typepad.com/marijuana\\_law/2017/03/yet-another-serious-study-find-link-between-medical-marijuana-reforms-and-reduced-opioid-](http://lawprofessors.typepad.com/marijuana_law/2017/03/yet-another-serious-study-find-link-between-medical-marijuana-reforms-and-reduced-opioid-problems.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+MarijuanaLaw+%28Marijuana+Law%2C+Policy+%26+Reform%29)

[problems.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+MarijuanaLaw+%28Marijuana+Law%2C+Policy+%26+Reform%29](http://lawprofessors.typepad.com/marijuana_law/2017/03/yet-another-serious-study-find-link-between-medical-marijuana-reforms-and-reduced-opioid-problems.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+MarijuanaLaw+%28Marijuana+Law%2C+Policy+%26+Reform%29); Sarah Zhang, *Patients Are Ditching Opioid Pills for Weed*, THE ATLANTIC (Feb. 2, 2017), <https://www.theatlantic.com/health/archive/2017/02/marijuana-cannabinoids-opioids/515358/>.

<sup>115</sup> See, e.g., Maureen Meehan, *Smoking Weed Could Help Alcoholics Quit Drinking, Study Suggests*, HIGH TIMES (Nov. 17, 2016), <http://hightimes.com/medicinal/smoking-weed-could-help-alcoholics-quit-drinking-study-suggests/>.

<sup>116</sup> *Id.*

<sup>117</sup> See, e.g., Nick Jikomes, *Is Smoking Cannabis Bad for You*, LEAFLY, <https://www.leafly.com/news/health/is-smoking-marijuana-bad-for-you> (last visited Apr. 2, 2017); see also JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 46-47 (2d ed. 2016).

<sup>118</sup> Jikomes, *supra* note 117.

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

<sup>120</sup> *Id.*

statistical association” between marijuana use and lung cancer or head and neck cancers.<sup>121</sup> Vaporizing marijuana instead of smoking it largely resolves the problem.<sup>122</sup> When users vaporize cannabis, they only intake the psychoactive chemicals, because the plant material is not actually burned but only heated enough to release the psychoactive chemicals.<sup>123</sup> In one study, researchers measured that marijuana smoke contained over one hundred different components, and that non-cannabinoids (non-psychoactive chemicals) made up at least 88% of the smoke the user was ingesting.<sup>124</sup> At least six identified polynuclear aromatic hydrocarbons (PAHs), which are carcinogens, were present in the smoke.<sup>125</sup> The study contrasted this with a vaporizer – this study used the popular Volcano-brand vaporizer – which produced vapor that consisted of 95% THC.<sup>126</sup> The other 5% consisted of three substances, a caryophyllene (a natural cannabis oil), a cannabinoid “relative,” and one “suspected PAH.”<sup>127</sup>

Secondhand marijuana smoke presents risks to those nearby as well.<sup>128</sup> Researchers have only recently examined the effects of secondhand marijuana smoke, but one study conducted on lab rats suggests that the effects of secondhand marijuana smoke may actually be more harmful than secondhand tobacco smoke.<sup>129</sup> The actual effect of the secondhand smoke is the same between tobacco and marijuana – it compromises “flow-mediated dilation,” the ability of arteries to widen and accommodate increased blood flow – but the effect lasts three times longer when the smoke is from marijuana than from tobacco.<sup>130</sup> However, similar to the risks outlined above, the harm from secondhand marijuana smoke is not due to the psychoactive chemicals in the smoke, but rather the burning of the plant material.<sup>131</sup> The researchers in this study removed the THC and other cannabinoids from the marijuana before conducting the experiment.<sup>132</sup> Therefore, the risks that marijuana use presents to the respiratory system of both users and passersby are not unique to the substance, but to inhaling the smoke of any combusted plant material, and thus vaporizing marijuana, eating edibles or any of the other ways one can ingest THC besides through smoking can alleviate these risks.

Studies seem to show that regular marijuana smoking during adolescence can have negative effects on brain development.<sup>133</sup> The earlier a person begins smoking marijuana before the brain is fully developed, the stronger the consequences.<sup>134</sup> One study noted that individuals, aged 21-50 at the time of the study and who self-reported that they had used marijuana at least once a week during adolescence, had different gyrification patterns in their brains than did their counterparts who had not smoked marijuana during adolescence.<sup>135</sup> These patterns were less developed than normal, and

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<sup>121</sup> *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE 11 (2017), available at <https://www.nap.edu/read/24625/chapter/2#10> (emphasis in original).

<sup>122</sup> *Cal NORML/MAPS Study Shows Vaporizer Can Drastically Reduce Toxins in Marijuana Smoke*, CALIFORNIA NORML (last visited Apr. 2, 2017).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

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

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

<sup>127</sup> *Id.*

<sup>128</sup> Leigh Beeson, *One Minute of Secondhand Marijuana Smoke Impairs Cardiovascular Function*, UNIVERSITY OF CALIFORNIA (July 29, 2016), <https://www.universityofcalifornia.edu/news/one-minute-secondhand-marijuana-smoke-impairs-cardiovascular-function>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

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

<sup>132</sup> *Id.*

<sup>133</sup> *Starting Age of Marijuana Use May Have Long-Term Effects on Brain Development*, SCIENCE DAILY (Feb. 10, 2016), <https://www.sciencedaily.com/releases/2016/02/160210135334.htm>; CAULKINS ET AL., *supra* note 117, at 51-52.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

thus their brains had fewer “folds” and “wrinkles” that develop during adolescence to help speed up brain function.<sup>136</sup> Any of marijuana’s adverse effects on brain development are necessarily limited to smoking during the period of brain development, however, which is complete at approximately 25 years of age.<sup>137</sup>

Another common claim is that marijuana reduces IQ and causes general cognitive impairment, beyond the time when a user is under the influence of the substance.<sup>138</sup> However, there is no solid evidence that this is true, and if anything studies suggest the contrary – whenever lower IQ accompanies marijuana use, the combination of the two is more likely due to a common third factor than to the marijuana use itself.<sup>139</sup> One study that followed twins noted that IQ declines were present in both the marijuana-using and abstinent siblings, further suggesting that any change in IQ is due to familial or other environmental influences rather than marijuana use.<sup>140</sup> No study to date has shown a causal relationship between marijuana use and long-term cognitive impairment beyond the period of use when a person is actively under the influence of marijuana.<sup>141</sup>

There are also claims that marijuana use leads to mental illness, particularly schizophrenia.<sup>142</sup> Once again, studies on the connection between mental illness and marijuana use are largely inconclusive – some show a higher rate of mental illness with increase marijuana use, but cannot prove a causal relationship.<sup>143</sup> One study does show a stronger connection than others do, but still fails to prove causation.<sup>144</sup> Marijuana use can exacerbate symptoms of schizophrenia and potentially cause an earlier onset of the disease than a person would otherwise experience, particularly if the person smokes marijuana during adolescence.<sup>145</sup> The authors of that study indicate, “cannabis may be a component cause in the emergence of psychosis” but acknowledge that the evidence fulfills “not all of the standard criteria for causality.”<sup>146</sup> Other similar studies come to similar conclusions – that marijuana may have some sort of causal effect, but remains as of yet to be proven to scientific standards.<sup>147</sup> The NASEM study concluded that there is “substantial evidence of a statistical association” between marijuana use and the development of schizophrenia, but similarly, this does not prove causation.<sup>148</sup> There is “moderate evidence” of a statistical association between thoughts of suicide, depression, and worsening of bipolar disorder with marijuana use.<sup>149</sup> Finally, there is “limited evidence” of a statistical association between worsening of schizophrenia and an increased risk of developing bipolar disorder.<sup>150</sup>

Mainstream media now often report on other positive effects of marijuana as well. For example, CNN reported on efforts to use marijuana as a treatment for more serious drug addiction, a

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<sup>136</sup> *Id.*; see also *Gyrification*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Gyrification> (last visited Apr. 2, 2017).

<sup>137</sup> *Understanding the Teen Brain*, UNIVERSITY OF ROCHESTER MEDICAL CENTER, <https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=3051> (last visited Apr. 2, 2017).

<sup>138</sup> CAULKINS ET AL., *supra* note 117, at 52.

<sup>139</sup> Emily Underwood, *Twins Study Finds No Evidence That Marijuana Lowers IQ in Teens*, SCIENCE MAG (Jan. 18, 2016, 3:00 PM), <http://www.sciencemag.org/news/2016/01/twins-study-finds-no-evidence-marijuana-lowers-iq-teens>.

<sup>140</sup> *Id.*

<sup>141</sup> CAULKINS ET AL., *supra* note 117, at 52-53.

<sup>142</sup> *Id.* at 54-57.

<sup>143</sup> *Id.*

<sup>144</sup> Rajiv Radhakrishnan et al., *Gone to Pot – A Review of the Association Between Cannabis and Psychosis*, FRONTIERS IN PSYCHIATRY (May 22, 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4033190/>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> CAULKINS ET AL., *supra* note 117, at 56-57.

<sup>148</sup> *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE 14 (2017), available at <https://www.nap.edu/read/24625/chapter/2#10>.

<sup>149</sup> *Id.* at 13.

<sup>150</sup> *Id.* at 14.

philosophy called harm reduction.<sup>151</sup> Without long term, well-designed studies, some of the proponents' claims may not pan out. However, the sheer number of positive reports substantially rebut the opponents' claims of serious health risks associated with marijuana.

One might argue that the reports like NASEM's only supports legalization of medical marijuana, a step that far more states have taken than those that have legalized recreational use of marijuana. Some critics of recreational marijuana are critical of intoxicants generally.<sup>152</sup> The end of Prohibition did not end the debate about the use of alcohol. Powerful organizations in the United States, notably religious groups like the Mormons and Southern Baptists, influence alcohol policy in states like Utah and those in the American South.<sup>153</sup> Despite those influences, a majority of Americans now favor legalization, often on libertarian grounds: absent harm to others, individuals should be free to make life style choices.<sup>154</sup> Legalization opponents, therefore, must make arguments in addition to the negative health effects of marijuana on the individual user.

Opponents advance several arguments against legalization of marijuana in addition to the health risks. Those include claims that proponents' predictions of increased tax revenue are overblown,<sup>155</sup> as are claims that illegal sellers and producers will be forced out of the market;<sup>156</sup> that the legalization of marijuana leads to an increase in violent crime;<sup>157</sup> that incidents of driving under the influence of marijuana will increase, along with more highway deaths;<sup>158</sup> and that teen use will increase.<sup>159</sup> Opponents also rebut specific claims made by proponents, like the fact that legalization will result in significant law enforcement and prison costs as police stop arresting offenders for marijuana-related crimes.<sup>160</sup>

As with health effects, legalization in Colorado, Washington, and elsewhere allows a more data-driven debate than could be had in the past. Opponents' claims have some truth to them. Some proponents of legalization overstate savings in law enforcement and prison costs.<sup>161</sup> Although I generally favor legalization of marijuana for a variety of reasons, I have criticized proponents of legalization for overstating its benefits.<sup>162</sup> For example, proponents cannot promise high tax revenue without keeping in place law enforcement efforts against illegal producers. Without the risk of arrest, trial, and collateral consequences of arrest, like forfeiture of property

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<sup>151</sup> Susan Scutti, *New Potential for Marijuana: Treating Drug Addiction*, CNN (May 17, 2017), <http://edition.cnn.com/2017/05/17/health/addiction-cannabis-harm-reduction/>.

<sup>152</sup> See, e.g., Greg Garrison, *Lobbying Against Sin: Baptist Leader Ready to Fight Marijuana*, AL.COM (Mar. 29, 2017, 8:25 AM),

[http://www.al.com/news/birmingham/index.ssf/2017/03/lobbying\\_against\\_sin\\_former\\_pa.html?utm\\_campaign=should-recreational-marijuana-use-be-leg-oRzE&utm\\_customer=aldotcom&utm\\_medium=facebook&utm\\_source=opinary](http://www.al.com/news/birmingham/index.ssf/2017/03/lobbying_against_sin_former_pa.html?utm_campaign=should-recreational-marijuana-use-be-leg-oRzE&utm_customer=aldotcom&utm_medium=facebook&utm_source=opinary).

<sup>153</sup> See, e.g., Lee Davidson, *With Utah Legislature's Mormon Supermajority, Is It Representative of the People?*, SALT LAKE TRIBUNE (Dec. 12, 2016, 9:43 AM), <http://www.sltrib.com/home/4663941-155/is-utah-legislature-representative-of-the>.

<sup>154</sup> See, e.g., Jennifer De Pinto et al., *Marijuana Legalization Support at All-Time High*, CBS NEWS (Apr. 20, 2017, 11:57 AM), <http://www.cbsnews.com/news/support-for-marijuana-legalization-at-all-time-high/>.

<sup>155</sup> *Supra* Part II(A).

<sup>156</sup> *Supra* Part II(A).

<sup>157</sup> *Supra* Part II(A).

<sup>158</sup> *Supra* Part II(A).

<sup>159</sup> *Supra* Part II(A).

<sup>160</sup> *Supra* Part II(A).

<sup>161</sup> See, e.g., Emily Gray Brosious, *California Could Take in \$1 Billion Annually in Legal Marijuana Taxes*, EXTRACT, <http://extract.suntimes.com/extract-news/california-marijuana-legalization-taxes-1-billion-predicted/> (last visited June 14, 2017).

<sup>162</sup> See, e.g., *CA NORML Analysis Finds Marijuana Legalization Could Yield California \$1.5-\$2.5 Billion Per Year*, CA NORML, [http://www.canorml.org/background/CA\\_legalization.html](http://www.canorml.org/background/CA_legalization.html) (last visited June 17, 2017).

used for marijuana production, illegal producers have little incentive to comply with licensing and taxing regulations.<sup>163</sup> That is, some of proponents' rosy projections are questionable at best.

Some of the other claims vs. counterclaims are a tossup. For example, illegal sellers still serve some significant percentage of the market in states like Colorado and Washington.<sup>164</sup> At the same time, tax revenues have exceeded expectations, suggesting that at least purchasers are making a transition to the legal market.<sup>165</sup> The increased tax revenue, especially if targeted to address some of the social costs associated with heavy marijuana use, is obviously a benefit of legalization.<sup>166</sup> At a minimum, that is revenue no longer in the hands of illegal sellers and producers.

Data on increased danger of driving under the influence are conflicting. Law enforcement officials, in particular, have pointed to some studies showing an increase in accidents in states that have legalized marijuana.<sup>167</sup> One can find competing studies and competing explanations for the uptick in accidents where that uptick has occurred (including the fact that motorists are driving more than in the past). A more thorough study suggests that states in which medical marijuana is lawful have had a downturn in highway deaths.<sup>168</sup> Another factor that may be at play is that, at least in Colorado, beer consumption went down after marijuana was on sale there.<sup>169</sup> Almost certainly, drinking alcohol and driving are a more deadly combination than marijuana consumption and driving.<sup>170</sup>

Similarly, teen marijuana use appears not to have increased.<sup>171</sup> Again, one can find anecdotal evidence and the occasional study to the contrary.<sup>172</sup> Although longitudinal studies require the passage of time, opponents were wrong about teen behavior.

As an aside, one might speculate about why teen use may not have spiked. Teens already have ready access to marijuana and so legalization would not change behavior.<sup>173</sup> More uncertain and potentially troubling is whether teens find marijuana attractive because it is illegal. Does its legality make it unappealing? If so, will teens seeking the excitement of engaging in illegal conduct

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<sup>163</sup> See Debra Borchart, *Marijuana Prices Fall in 2016 as Growers Flood the Market With Pot*, FORBES (Jan. 31, 2017, 8:00 AM), <https://www.forbes.com/sites/debraborchart/2017/01/31/marijuana-prices-fall-in-2016-as-growers-flood-the-market-with-pot/#1eee532c2f7f>.

<sup>164</sup> See, e.g., Carisa Scott, *Black Market Marijuana Business Booming in Colorado*, FOX 31 DENVER (Mar. 3, 2017, 7:52 PM), <http://kdvr.com/2017/03/03/black-market-marijuana-business-booming/>; Tobias Coughlin-Bogue, *Four Years After Legal Weed, Seattle's Black Market Still Thrives*, SEATTLE WEEKLY (Sept. 21, 2016, 1:30 AM), <http://www.seattleweekly.com/news/four-years-after-legal-weed-seattles-black-market-still-thrives/>.

<sup>165</sup> Henchman & Scarboro, *supra* note 74.

<sup>166</sup> See, e.g., CBS News, *Tax Revenue From Colorado Post Helps Fund Community Projects, Scholarships*, CBS NEWS (Apr. 20, 2017, 7:00 AM), <http://www.cbsnews.com/news/pot-marijuana-tax-revenue-colorado-national-weed-day/>.

<sup>167</sup> See, e.g., Tamra Johnson, *Fatal Crashes Involving Marijuana Double After State Legalizes Drug*, AAA NEWSROOM, <http://newsroom.aaa.com/2016/05/fatal-road-crashes-involving-marijuana-double-state-legalizes-drug/> (last visited May 25, 2017).

<sup>168</sup> Julian Santaella-Tenorio et al., *US Traffic Fatalities, 1985-2014, and Their Relationship to Medical Marijuana Laws*, AJPH (Jan. 11, 2017), <http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2016.303577>.

<sup>169</sup> The Cannabist, *Is Legal Pot Flattening Beer Sales?*, THE DENVER POST (Dec. 2, 2016, 12:44 PM), <http://www.denverpost.com/2016/12/02/is-legal-pot-flattening-beer-sales/>.

<sup>170</sup> See Brian Palmer, *DWI Versus DW-High*, SLATE (Nov. 30, 2011, 5:40 PM), [http://www.slate.com/articles/health\\_and\\_science/explainer/2011/11/does\\_marijuana\\_make\\_you\\_a\\_more\\_dangerous\\_driver\\_than\\_alcohol\\_.html](http://www.slate.com/articles/health_and_science/explainer/2011/11/does_marijuana_make_you_a_more_dangerous_driver_than_alcohol_.html).

<sup>171</sup> *Colorado's Teen Marijuana Use Dips After Legalization*, SCIENTIFIC AMERICAN, <https://www.scientificamerican.com/article/colorado-s-teen-marijuana-usage-dips-after-legalization/> (last visited May 25, 2017).

<sup>172</sup> See, e.g., Janice Wood, *Marijuana Use Up Among Teens Since Legalized in Colorado, Washington*, PSYCH CENTRAL (Dec. 27, 2016), <https://psychcentral.com/news/2016/12/27/marijuana-use-up-among-teens-since-legalized-in-colorado-washington/114378.html>.

<sup>173</sup> Paul Armentano, *Study Says It's Easier for Teens to Buy Marijuana Than Beer*, NORML (Aug. 28, 2009), <http://blog.norml.org/2009/08/28/study-says-its-easier-for-teens-to-buy-marijuana-than-beer/>.

seek other drugs? Any claim that we can assess that risk already is suspect. And, of course, states that have legalized marijuana outlaw use by minors, perhaps, keeping the thrill aspect.

Crime statistics tend to rebut claims that marijuana use will increase crime.<sup>174</sup> Again, the results are mixed and based on incomplete data. One study focused on two counties, one in southern Washington and the other in northern Oregon, after Washington legalized marijuana, but Oregon had yet to do so.<sup>175</sup> Violent crime went down in the Washington county but not in the Oregon county.<sup>176</sup> That fits a stereotype: stoners are too mellow to be violent. Especially because some alcohol users shift to marijuana, one would expect a decrease in violent crime.<sup>177</sup> Alcohol and violence are inextricably linked – violent offenders are often drunk when they commit their crimes.<sup>178</sup>

Elsewhere, the data conflict. Some reports suggest that crime rates are down in legalization states.<sup>179</sup> However, one can find conflicting studies. One troubling datum is that arrests for minority young offenders have increased in Colorado since that state legalized recreational use.<sup>180</sup> One goal offered by some proponents of legalization is to eliminate the racial disparity in arrests of minorities: use among races is similar but arrests of minorities are much higher than the arrests of whites.<sup>181</sup> At least in Colorado, the trend has deepened.<sup>182</sup>

Another unique aspect of the marijuana trade may explain the correlation between that industry and crime. Because any marijuana activity remains a violation of federal law, federally guaranteed banks cannot accept proceeds from marijuana businesses.<sup>183</sup> They cannot allow industry members to open bank accounts or to accept credit card payment from customers.<sup>184</sup> The result is that the marijuana industry is a cash-only business. Obviously, thieves are drawn to locations where they know that they will find large stashes of cash.<sup>185</sup> Of course, blaming crime on legalization of marijuana is a bit of a canard: the obvious remedy is for the federal government to allow the banks to deal with marijuana businesses in states where recreational and medical use of marijuana is lawful.

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<sup>174</sup> See, e.g., Erin Delmore, *Study: Marijuana Legalization Doesn't Increase Crime*, MSNBC (Apr. 14, 2014, 11:18 PM), <http://www.msnbc.com/all/does-marijuana-lower-the-crime-rate>.

<sup>175</sup> Davide Dragone et al., *Recreational Cannabis Reduces Rapes and Thefts: Evidence From a Quasi-Experiment*, U. BOLOGNA DEPT. OF ECONOMICS (Sept. 19, 2016), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841267](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841267).

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

<sup>177</sup> Jennifer Calfas, *A Quarter of American Beer Drinkers Say They're Switching to Pot*, TIME MONEY (Mar. 17, 2017), <http://time.com/money/4705155/beer-marijuana-pot/>.

<sup>178</sup> Harold Pollack, *Alcohol is Still the Deadliest Drug in the United States, and It's Not Even Close*, WASHINGTON POST (Aug. 19, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/08/19/alcohol-is-still-the-deadliest-drug-in-the-united-states-and-its-not-even-close/?utm\\_term=.99e7186c6620](https://www.washingtonpost.com/news/wonk/wp/2014/08/19/alcohol-is-still-the-deadliest-drug-in-the-united-states-and-its-not-even-close/?utm_term=.99e7186c6620).

<sup>179</sup> Shelley Schlender, *Legalizing Pot Brings Down Drug-Related Crime*, VOA NEWS (June 18, 2016, 9:59 AM), <http://www.voanews.com/a/legal-marijuana-and-crime/3379448.html>.

<sup>180</sup> Ben Markus, *As Adults Legally Smoke Pot in Colorado, More Minority Kids Arrested For It*, CAPITAL PUBLIC RADIO (June 28, 2016, 4:50 AM), <http://www.npr.org/2016/06/29/483954157/as-adults-legally-smoke-pot-in-colorado-more-minority-kids-arrested-for-it>.

<sup>181</sup> *Id.*

<sup>182</sup> Almost certainly, this trend has at least two causes. First, Colorado law prevents individuals with criminal records to secure licenses to sell marijuana, thereby perpetuating past discriminatory arrest patterns. Two, given the need to assure compliance with the new law, police must keep pressure on illegal sellers.

<sup>183</sup> See Kristina Davis, *Licensed Marijuana Business Operate in the Shadows Without Access to Banks*, SAN DIEGO UNION-TRIBUNE (Feb. 18, 2017, 6:00 AM), <http://www.sandiegouniontribune.com/business/sd-me-pot-banking-20170210-story.html>.

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

<sup>185</sup> *Id.*



In 2014, the libertarian Cato Institute issued a favorable report about developments in Colorado.<sup>186</sup> Even if one is more cautious in assessing the state of affairs in states with recreational and medical marijuana businesses, at this point, the naysayers have overplayed their hand. Most of the parade of horrible consequences of legalization have not occurred. In several respects, legalization has been a benefit to states like Colorado, including increased tax revenues and movement towards a legal market, slowly and seemingly steadily eliminating the illegal market.<sup>187</sup>

The view from the United States may change significantly in 2018, or whenever California puts its regulations in place. (While Californians adopted Proposition 64 in November 2016, which requires regulations to be in place by January 2018, some observers are doubtful that will occur.<sup>188</sup>) The impact of bringing California online promises to change the marijuana industry, if only because of the enormous size of California's marijuana crop.<sup>189</sup>

First, though, one needs to understand what Proposition 64's drafters intended. Second, one can speculate whether the law will achieve those goals. However, one can only speculate given the large number of variables.

### *III: California's Proposition 64*

In 2010, Californians rejected Proposition 19, a ballot initiative that would have legalized recreational use of marijuana.<sup>190</sup> The initiative was vague, with few limitations on the industry.<sup>191</sup> Legalization advocates in Washington and Colorado learned from California's experience and put in place much more structured laws.<sup>192</sup> In turn, Proposition 64's drafters learned lessons from those states.<sup>193</sup> At least, in theory, Proposition 64 should provide a model for future development of the marijuana industry. This section reviews some of the law's key provisions and explores some uncertainty about the future.<sup>194</sup>

Proposition 64 stated twenty-five goals.<sup>195</sup> Its broad goals are to eliminate the black market for marijuana; establish an effective regulatory structure to both transition parties from the gray

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<sup>186</sup> Jeffrey Miron, *Marijuana Policy in Colorado*, CATO INSTITUTE (Oct. 23, 2014), [https://object.cato.org/sites/cato.org/files/pubs/pdf/working-paper-24\\_2.pdf](https://object.cato.org/sites/cato.org/files/pubs/pdf/working-paper-24_2.pdf).

<sup>187</sup> *See id.*

<sup>188</sup> *See, e.g.*, Rosalie Murphy, *A 'Massive Undertaking' as California Races to Regulate Marijuana so Legal Sales Can Begin Jan. 1*, DESERT SUN (Apr. 3, 2017, 3:18 PM), <http://www.desertsun.com/story/money/business/2017/04/03/marijuana-california-regulation-legalization/98970628/>.

<sup>189</sup> Orange County Register, *California's Marijuana Production is Already Mind Boggling*, ORANGE COUNTY REGISTER (Dec. 29, 2016, 2:26 PM), <http://www.ocregister.com/2016/12/29/californias-marijuana-production-is-already-mind-boggling/>.

<sup>190</sup> *California Proposition 19, the Marijuana Legalization Initiative (2010)*, BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_19,\\_the\\_Marijuana\\_Legalization\\_Initiative\\_\(2010\)](https://ballotpedia.org/California_Proposition_19,_the_Marijuana_Legalization_Initiative_(2010)) (last visited June 14, 2017).

<sup>191</sup> *Id.*; *see, e.g.*, Editorial Board, *No On Proposition 19: Prop. 19 Is Vague, Poorly Written; It Would Do More Harm Than Good to the Legalization Debate*, DAILY BRUIN (Nov. 1, 2010, 12:46 AM), [http://dailybruin.com/2010/11/01/no\\_on\\_proposition\\_19\\_prop\\_19\\_is\\_vague\\_poorly\\_written\\_it\\_would\\_do\\_more\\_harm\\_than\\_good\\_to\\_the\\_legaliza/](http://dailybruin.com/2010/11/01/no_on_proposition_19_prop_19_is_vague_poorly_written_it_would_do_more_harm_than_good_to_the_legaliza/).

<sup>192</sup> *See* Matt Welch, *Lessons From Legalization: What Californians Are Teaching the Rest of the Country About Policy Change*, LOS ANGELES TIMES (Oct. 20, 2016, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-welch-marijuana-legalization-lessons-20161020-snap-story.html>.

<sup>193</sup> *See, e.g.*, Peter Fimrite & Joe Garofoli, *6 Lessons From Legal Pot in Washington and Colorado*, SAN FRANCISCO CHRONICLE (Sept. 30, 2016), <http://www.sfchronicle.com/crime/article/6-lessons-from-legal-pot-in-Washington-and-9487445.php>.

<sup>194</sup> *Infra* Part II(3).

<sup>195</sup> Control, Regulate and Tax Adult Use of Marijuana Act § 3 (2016 Cal. Legis. Serve. Prop. 64).

market to the legal, regulated market and to gather tax revenue; and to keep marijuana out of the hands of people under twenty-one years of age.<sup>196</sup>

More specifically, Proposition 64 stated its goal to “[s]trictly control the cultivation, processing, manufacture, distribution, testing, and sale of nonmedical marijuana through a system of state licensing, regulation, and enforcement,”<sup>197</sup> and “[r]equire track and trace management procedures to track nonmedical marijuana from cultivation to sale.”<sup>198</sup> Requiring these provisions increases the likely compliance with the Cole Memorandum, which, unless the Trump administration reverses course, will reduce the likelihood of federal intervention in the state-level marijuana activities.<sup>199</sup>

Not surprisingly, many illegal producers have criminal records.<sup>200</sup> Often, laws governing licensing bar convicted offenders from securing licenses.<sup>201</sup> However, barring convicted marijuana producers from entering the legal market makes more difficult the establishment of a legal market. As a result, Proposition 64’s drafters included a provision that does not automatically exclude convicted felons from securing licenses.<sup>202</sup>

Also relevant to moving from an illegal to a legal market, the Proposition created some fixed costs for licensing and taxation, but left flexibility for lawmakers to adapt to the changing environment.<sup>203</sup> Commentators have observed that predicting the impact of a particular tax rate on the illegal market is next to impossible.<sup>204</sup> Leaving room for state and local governments to adjust taxing and licensing fees increases chances of expanding the legal market in light of changing conditions.<sup>205</sup>

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<sup>196</sup> Gage Marchini & Brian Parino, *Proposition 64: Marijuana Legalization*, MCGEORGE SCHOOL OF LAW CALIFORNIA INITIATIVE REVIEW 11 (Oct. 2016), available at [http://www.mcgeorge.edu/Documents/Publications/prop64\\_CIR2016.pdf](http://www.mcgeorge.edu/Documents/Publications/prop64_CIR2016.pdf).

<sup>197</sup> Control, Regulate and Tax Adult Use of Marijuana Act § 3(b) (2016 Cal. Legis. Serve. Prop. 64).

<sup>198</sup> *Id.* § 3(e). This is one of the lessons that the drafters learned from the experience in other states. Keegan Hamilton, *How America’s Legal Weed is Changing the Black Market and Influencing Mexican Cartels*, VICE NEWS (Aug. 25, 2015, 10:10 AM), <https://news.vice.com/article/how-americas-legal-weed-is-changing-the-black-market-and-influencing-mexican-cartels>.

<sup>199</sup> Cole Memo, *supra* note 70.

<sup>200</sup> See, e.g., Noelle Crombie, *Medical Marijuana Growers With Criminal Records Are Being Licensed*, THE OREGONIAN (Sept. 23, 2012, 3:21 PM), [http://www.oregonlive.com/health/index.ssf/2012/09/medical\\_marijuana\\_growers\\_with.html](http://www.oregonlive.com/health/index.ssf/2012/09/medical_marijuana_growers_with.html).

<sup>201</sup> See, e.g., Patrick McGreevy, *New Law Could Put Some Medical Marijuana Dispensaries Out of Business*, LOS ANGELES TIMES (May 13, 2016, 11:57 AM), <http://www.latimes.com/politics/la-pol-sac-pot-dispensary-felon-owners-20160513-story.html>.

<sup>202</sup> See *Proposition 64: Frequently Asked Questions*, DRUG POLICY ACTION, [https://d3n8a8pro7vhmx.cloudfront.net/responsiblemarijuanareform/pages/31/attachments/original/1468260214/Drug\\_Policy\\_Action\\_Fact\\_sheet\\_Prop\\_64\\_FAQs.pdf?1468260214](https://d3n8a8pro7vhmx.cloudfront.net/responsiblemarijuanareform/pages/31/attachments/original/1468260214/Drug_Policy_Action_Fact_sheet_Prop_64_FAQs.pdf?1468260214) (last visited June 14, 2017). In contrast, Colorado bars individuals with any felony conviction in the last five years and any controlled substance felony conviction in the last ten years from eligibility for a retail marijuana license. *Business License Applicant Criteria – Retail Marijuana*, COLORADO DEPARTMENT OF REVENUE, <https://www.colorado.gov/pacific/enforcement/business-license-applicants-retail-marijuana-2> (last visited June 14, 2017). The continued existence of Colorado’s black market for marijuana may be in part due to this bar on licensure for individuals with felony convictions. See Emily Gray Brosious, *Colorado’s Marijuana Black Market is Thriving Despite Legalization*, EXTRACT, <http://extract.suntimes.com/extract-news/colorado-marijuana-black-market-legalization/> (last visited June 14, 2017).

<sup>203</sup> See generally Control, Regulate and Tax Adult Use of Marijuana Act § 7 (2016 Cal. Legis. Serve. Prop. 64); see also Scott Johnson, *What You Need to Know About Prop 64*, MGO, <http://www.mgocpa.com/idea/need-know-prop-64/> (last visited June 14, 2017).

<sup>204</sup> See Beau Kilmer, *Marijuana Legalization, Government Revenues, and Public Budgets*, RAND CORPORATION 2 (Jan. 2016), [http://www.rand.org/content/dam/rand/pubs/testimonies/CT400/CT449/RAND\\_CT449.pdf](http://www.rand.org/content/dam/rand/pubs/testimonies/CT400/CT449/RAND_CT449.pdf).

<sup>205</sup> See, e.g., Rachel La Corte, *Washington State Pot Law Overhaul: Marijuana Tax Reset at 37 Percent*, THE CANNABIST (July 1, 2015, 8:36 AM), <http://www.thecannabist.co/2015/07/01/washington-state-pot-law-overhaul-marijuana-tax-reset-at-37-percent/37238/>.

In theory, consumers will favor legally sold marijuana if they are sure of the quality of the product. As a result, Proposition 64 requires that sellers of nonmedical marijuana test for contaminants before sale,<sup>206</sup> that they package marijuana in child-restraint containers that bear labels indicating the potency of the marijuana and the effects of consumption,<sup>207</sup> and manufacturers adhere to strict environmental and product safety standards.<sup>208</sup>

Consistent with a recommendation a blue ribbon commission report on legalizing marijuana,<sup>209</sup> Proposition 64 earmarked tax revenues, rather than allowing them to flow to the general fund.<sup>210</sup> Marijuana taxes are regressive, falling on heavy users, who tend to have low incomes.<sup>211</sup> Additionally, making marijuana revenue available for general fund obligations gives the state an incentive to increase demand for marijuana, a result that may not be wise.<sup>212</sup> The new directs that revenue go towards various uses, including funding environmental repair, youth drug treatment and prevention, community investment, and law enforcement.<sup>213</sup>

Proposition 64 makes nonmedical marijuana cultivation and consumption legal only for those 21 years of age or older.<sup>214</sup> Many of the regulations serve the purpose of keeping marijuana away from minors including the requirement of child-restraint containers,<sup>215</sup> the taxation of marijuana,<sup>216</sup> and the prohibition of using marijuana in public places including near schools and other places where children are present.<sup>217</sup> Additionally, Proposition 64 prohibits the marketing of marijuana to those less than 21 years of age and marketing near schools or other public places where children are present.<sup>218</sup> If a minor commits a marijuana-related offense, they are required to complete drug prevention education or counseling in addition to a sentence of community service.<sup>219</sup>

While Proposition 64 established broad policy goals, almost necessarily, the proposition did not include specific regulations.<sup>220</sup> As written, the proposition was 62 pages,<sup>221</sup> requiring voters to spend considerable time reading its provisions. Regulations implementing the law no doubt will run into hundreds of pages.<sup>222</sup>

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<sup>206</sup> Control, Regulate and Tax Adult Use of Marijuana Act § 3(f) (2016 Cal. Legis. Serve. Prop. 64).

<sup>207</sup> *Id.* § 3(g).

<sup>208</sup> *Id.* § 3(h). The Proposition also includes rules prohibiting driving under the influence of marijuana, CAL. HEALTH & SAFETY CODE § 11362.2, selling marijuana where alcohol and tobacco are sold, CAL. BUS. & PROF. CODE § 26054(a), using marijuana in public, CAL. HEALTH & SAFETY CODE § 11362.3(a)(1), and allowing employers to maintain drug free workplaces, CAL. HEALTH & SAFETY CODE § 11362.45(f).

<sup>209</sup> *Pathways Report*, BLUE RIBBON COMMISSION ON MARIJUANA POLICY (July 22, 2015), available at <http://www.sfchronicle.com/file/110/4/1104-BRCReportJuly20-FINAL.pdf>.

<sup>210</sup> CAL. REV. & TAX CODE § 34018(c) (West 2017).

<sup>211</sup> See, e.g., *Study: Poorer Marijuana Users Smoking the Most*, WASHINGTON POST (Aug. 14, 2016, 10:04 PM), <http://www.denverpost.com/2016/08/14/study-poorer-marijuana-users-smoking-the-most/>.

<sup>212</sup> See, e.g., *The Adverse Effects of Marijuana (For Healthcare Professionals)*, CALIFORNIA SOCIETY OF ADDICTION MEDICINE, <http://www.csam-asam.org/adverse-effects-marijuana-healthcare-professionals> (last visited June 17, 2017). For example, despite current medical knowledge, researchers remain uncertain about long-term effects and costs of widespread marijuana use.

<sup>213</sup> Control, Regulate and Tax Adult Use of Marijuana Act § 3(t) (2016 Cal. Legis. Serve. Prop. 64).

<sup>214</sup> *Id.* § 3(n).

<sup>215</sup> *Id.* § 3(g).

<sup>216</sup> *Id.* § 3(s).

<sup>217</sup> *Id.* § 3(o).

<sup>218</sup> *Id.* § 3(j).

<sup>219</sup> *Id.* § 3(y).

<sup>220</sup> See generally Control, Regulate and Tax Adult Use of Marijuana Act (2016 Cal. Legis. Serve. Prop. 64).

<sup>221</sup> *Id.*

<sup>222</sup> For example, Colorado already had 136 pages of implementing regulations less than a year after legalizing recreational marijuana. *Permanent Rules Related to the Colorado Retail Marijuana Code*, COLORADO DEPARTMENT OF REVENUE (Sept. 9, 2013),

Implementation of any proposition is daunting, but Proposition 64 presents several unique difficulties. Perhaps the most important issue is that a “gray market” for marijuana has existed for several decades in California since the state legalized medical marijuana in 1996.<sup>223</sup> After passing Proposition 64, the state must attempt to bring those industry participants into the legal recreational market in order to eradicate the black market and reap the benefits anticipated from legalization. The regulations imposed on the new recreational marijuana industry must give incentives for producers to enter the legal industry, but also provide enough deterrence against noncompliance to ensure that parties abide by the new regulations.

California is attempting to create an extensive seed-to-sale tracking system similar to those used in Colorado and Washington.<sup>224</sup> As discussed above, this supports the state’s compliance with the Cole Memo and helps keep track of marijuana in the state, preventing diversion to the black market.<sup>225</sup> Particularly given the scale of marijuana operations in California – both due to the amount of marijuana grown in the state as well as the state’s geography – a strong seed-to-sale tracking system is necessary to keep the marijuana industry under control.<sup>226</sup>

Another difficulty California may face in implementing Proposition 64 is the risk of regulatory capture.<sup>227</sup> Regulatory capture arises when the parties in the regulated industry begin to exert too much of an influence on the regulating agency, threatening the agency’s independence.<sup>228</sup> The stronger the parties in the industry, the larger the risk of regulatory capture – through lobbying and other campaigning tactics, these parties can push for legislation sympathetic to their own self-interest, ultimately overtaking the regulating agency’s independent mission.<sup>229</sup> One notorious example of regulatory capture in the United States contributed to the Great Recession of 2008.<sup>230</sup> The agencies then charged with regulating the financial sector had “misaligned incentives” which led them to put the interests and success of the regulated banks above the public interest.<sup>231</sup> In response to the resulting stock market crash and recession in 2008, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, which established the Consumer Financial Protection Bureau (“CFPB”).<sup>232</sup> The CFPB has been largely successful, mostly in part due to its structure preserving its independence from the regulated industry.<sup>233</sup>

The risk of regulatory capture in the marijuana industry is greater in states that allow vertical integration – permitting one individual or a single business to engage in more than one area of the industry, like both cultivation and retail, for example.<sup>234</sup> Vertical integration allows parties to grow stronger both in having a broader presence throughout the industry, and simply by providing more

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[https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D\\_0.pdf](https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf).

<sup>223</sup> See, e.g., Lisa M. Krieger, *Medical Marijuana: California’s New Weed Czar Tours State to Tout New Cannabis Rules*, MERCURY NEWS (Oct. 5, 2016, 10:41 AM), <http://www.mercurynews.com/2016/10/05/medical-marijuana-californias-new-weed-czar-tours-state-to-tout-new-cannabis-rules/>.

<sup>224</sup> CAL. BUS. & PROF. CODE § 26170 (West 2017).

<sup>225</sup> Hamilton, *supra* note 198.

<sup>226</sup> See Hamilton, *supra* note 198.

<sup>227</sup> See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 351-55, 542-43 (2d ed. 2013).

<sup>228</sup> See *id.*

<sup>229</sup> See *id.*

<sup>230</sup> Sheldon Whitehouse, *How Government Can Root Out Regulatory Capture*, THE REGULATORY REVIEW (June 15, 2016), <https://www.theregview.org/2016/06/15/whitehouse-how-government-can-root-out-regulatory-capture/>.

<sup>231</sup> Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 124 (2013).

<sup>232</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376 (2010).

<sup>233</sup> Michael C. Nissim-Sabat, *Capturing This Watchdog? The Consumer Financial Protection Bureau Keeping the Special Interests Out of Its House*, 40 W. ST. U. L. REV. 1, 21 (2012).

<sup>234</sup> Vikas Bajaj, *Rules for the Marijuana Market*, NEW YORK TIMES (Aug. 4, 2014),

<https://www.nytimes.com/2014/08/05/opinion/high-time-rules-for-the-marijuana-market.html?op-nav>.

business opportunities to make money.<sup>235</sup> Currently, California is setting up its regulations to permit vertical integration, and so regulatory capture may be more of an issue than it would be if the law had not allowed or restricted vertical integration.<sup>236</sup>

#### IV. Concluding Thoughts

Many policymakers and supporters of legalization of marijuana, including me, draw generally positive lessons from the experience with legalized recreational marijuana in Colorado, Washington and elsewhere.<sup>237</sup> Those states have exceeded projected tax revenues.<sup>238</sup> They have not had a sharp increase in teen use of marijuana or of marijuana use in general.<sup>239</sup> Highway fatalities and accidents have not spiked because of driving under the influence of marijuana.<sup>240</sup> Some evidence exists that marijuana use decreases violent crime.<sup>241</sup>

While one has cause for optimism, bringing California online will reshape the marijuana industry. That is so because of the sheer size of the industry.<sup>242</sup> It has the capacity to fill the world's demand for marijuana.<sup>243</sup> It also has a massive workforce that has survived years of the government's war on drugs.<sup>244</sup> Leaving that workforce in place, while reducing law enforcement efforts against illegal producers, risks subverting legalization efforts.<sup>245</sup> At least anecdotal evidence suggests that many younger marijuana producers favor entering the legal market.<sup>246</sup> However, whether that happens is dependent on many moving parts.

California's future remains uncertain. Proposition 64 directs relevant agencies to have regulations in place by January 2018.<sup>247</sup> Questions abound about those regulations. I offer only a few: will the levels of taxation create an economic incentive for participants in the illegal market to enter the legal market? Will law enforcement keep enough pressure on illegal producers to add to the cost of black market participants? Will agencies be strategic about changing regulations in light of experience on the ground? For example, if costs of licenses, taxes and product testing are too high, will governmental agencies be flexible in rethinking cost structures? Will California succeed in keeping large corporations at bay or will a lucrative market bring an influx of capital to the state, creating an incentive to expand demand? Elsewhere, I have raised questions whether California can achieve all of the goals advanced by proponents of legalization.<sup>248</sup> Despite doubts whether California can fully achieve all of its goals, Proposition 64 incorporated many progressive provisions that, if implemented intelligently, holds promise for the future.

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<sup>235</sup> *Id.*

<sup>236</sup> *Proposed Trailer Bill Legislation*, DEPARTMENT OF CONSUMER AFFAIRS 3-4, [http://www.dof.ca.gov/Budget/Trailer\\_Bill\\_Language/documents/200CannabisRegulationDraft.pdf](http://www.dof.ca.gov/Budget/Trailer_Bill_Language/documents/200CannabisRegulationDraft.pdf) (last visited Apr. 9, 2017).

<sup>237</sup> *Supra* Part II.

<sup>238</sup> *Supra* Part II.

<sup>239</sup> *Supra* Part II.

<sup>240</sup> *Supra* Part II.

<sup>241</sup> *Supra* Part II.

<sup>242</sup> *Supra* Part III.

<sup>243</sup> *Supra* Part III.

<sup>244</sup> *Supra* Part III.

<sup>245</sup> *Supra* Part III.

<sup>246</sup> *Supra* Part III.

<sup>247</sup> *See, e.g., California Medical Cannabis Cultivation Licensing Regulations*, CALCANNABIS CULTIVATION LICENSING, <http://calcannabis.cdfa.ca.gov/> (last visited June 14, 2017). Uncertainty remains as to whether California's agencies will be ready to issue licenses by January 2018. *See, e.g., Patrick McGreevy, Lawmakers Have Doubts That the System to License Marijuana Sales in California Will Be in Place By Deadline*, LOS ANGELES TIMES (Jan. 31, 2017, 12:05 AM), <http://www.latimes.com/politics/la-pol-ca-marijuana-license-timeline-20170131-story.html>.

<sup>248</sup> Michael Vitiello, *Legalizing Marijuana and Abating Environmental Harm: An Overblown Promise?*, 50 UC DAVIS L. REV. 773 (2017); Michael Vitiello, *Legalizing Marijuana: California's Pot of Gold*, 2009 WIS. L. REV. 1349 (2009).

Italian policymakers have an advantage over Californians. Not only can they learn from the experiences in smaller states, like Colorado and Washington, but also they can watch as California implements its law, which may include some false starts along the way.

### *Addendum*

My article *Legalizing Marijuana: Lessons from the United States* argued that, despite President Trump's appointment of marijuana foe Jeff Sessions to serve as the Attorney General, the United States was still on the path towards a national solution, allowing states to regulate marijuana as they saw fit.<sup>249</sup> On January 4, 2018, the Attorney General seemed to prove me wrong.<sup>250</sup> This brief addendum to my article explains why the Attorney General's reversal of an Obama administration position on marijuana will not derail progress towards a national solution and why, in fact, it may hasten that national solution.

As developed above, in 2008, Presidential candidate Barack Obama promised greater tolerance towards states that allowed the sale and possession of marijuana for medical uses.<sup>251</sup> In 2009, the Justice Department published a memorandum announcing, in effect, that as long as states followed certain policies, the federal government would allow them to regulate their medical marijuana laws as the states saw fit.<sup>252</sup> That position allowed medical marijuana to flourish in many states where marijuana dispensaries had opened.<sup>253</sup> Advocates for recreational marijuana in Colorado and Washington were emboldened by the Obama administration's position.<sup>254</sup> Those states adopted recreational marijuana laws in 2012.<sup>255</sup> Again, the Obama justice department signaled similar tolerance for state laws as long as those states followed federal guidelines.<sup>256</sup> James Cole, an attorney in the Department of Justice, signed the memo stating the government's position.<sup>257</sup>

Since 2012, the movement towards legalization has accelerated. Several other states, including California, enacted recreational marijuana laws.<sup>258</sup> Most recently, Vermont became the ninth state to do so.<sup>259</sup> Vermont was the first to do so through the normal legislative process, rather than through the voter initiative process.<sup>260</sup> In addition, medical marijuana is now legal in some

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<sup>249</sup> Michael Vitiello, *Legalizing Marijuana: Lessons From the United States*, STUDI SENESI (forthcoming 2018).

<sup>250</sup> See, e.g., Josh Gerstein & Cristiano Lima, *Sessions Announces End to Policy That Allowed Legal Pot to Flourish*, POLITICO (Jan. 4, 2018, 3:49 PM), <https://www.politico.com/story/2018/01/04/jeff-sessions-marijuana-policy-us-attorney-enforcement-324020>.

<sup>251</sup> *Supra*.

<sup>252</sup> Memorandum from David W. Ogden, Deputy Attorney General, to Selected United States Attorneys (Oct. 19, 2009), available at <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

<sup>253</sup> *Id.*

<sup>254</sup> See, e.g., Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect*, HUFFINGTON POST (Aug. 29, 2013, 1:30 PM), [https://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj\\_n\\_3837034.html](https://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html).

<sup>255</sup> Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN MONEY (Nov. 8, 2012, 11:46 AM), <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html>.

<sup>256</sup> Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys (Aug. 29, 2013), available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>257</sup> *Id.*

<sup>258</sup> Melina Delkic, *Recreational Marijuana is Legal in These States—And Maine Might Be Next*, NEWSWEEK (Oct. 24, 2017, 11:37 AM), <http://www.newsweek.com/where-recreational-marijuana-legal-691593>.

<sup>259</sup> Sarah Gray, *Vermont Becomes Ninth State to Legalize Recreational Marijuana*, FORTUNE (Jan. 22, 2018), <http://fortune.com/2018/01/22/vermont-becomes-ninth-state-to-legalize-recreational-marijuana/>.

<sup>260</sup> *Id.*

form in over forty states.<sup>261</sup> Increasingly large majorities of Americans favor legalization of marijuana.<sup>262</sup>

Despite that, on January 4, 2018, Attorney General Sessions announced that the Department of Justice was rescinding the Cole memorandum.<sup>263</sup> Some commentators and marijuana industry participants have reacted fearfully.<sup>264</sup> The Department of Justice has powerful tools to undercut the marijuana industry.<sup>265</sup> That includes the threat of long prison sentences and forfeiture of assets used in the industry.<sup>266</sup>

One might legitimately ask whether Sessions' decision to void the Cole memo demonstrates that my thesis proved wrong. Marijuana stocks plummeted on January 4 on news out of the Attorney General's Office.<sup>267</sup> But a close look at Sessions' announcements and events since January 4 support my original thesis.

Start with the contents of Sessions' announcement. It seems to leave enforcement of federal marijuana laws to the United States Attorney for each federal district.<sup>268</sup> Some U.S. Attorneys have signaled that they will begin some enforcement efforts; others have suggested that enforcement of marijuana laws remains a low priority for their offices.<sup>269</sup> Given other federal law enforcement priorities – including Trump's aggressive anti-immigrant stance and his recognition that the United States has an opioid crisis<sup>270</sup> – one should not be surprised that many U.S. Attorneys have little enthusiasm for aggressive enforcement of marijuana laws.

Indeed, after plummeting on January 4, marijuana stocks rebounded almost immediately.<sup>271</sup> At least some investors seem to see opportunity in chaos.<sup>272</sup> Surely, investors had to have factored

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<sup>261</sup> *State Medical Marijuana Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 22, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

<sup>262</sup> Linley Sanders, *Marijuana Legalization 2018: Which States Might Consider Cannabis Laws This Year?*, NEWSWEEK (Jan. 2, 2018, 8:00 AM), <http://www.newsweek.com/marijuana-legalization-2018-which-states-will-consider-cannabis-laws-year-755282>.

<sup>263</sup> Gerstein & Lima, *supra* note 2.

<sup>264</sup> *Id.*

<sup>265</sup> Charlie Savage and Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, NEW YORK TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html>.

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

<sup>267</sup> Graham Rapiere, *Marijuana Stocks are Getting Slammed After Reports That Jeff Sessions Plans to Roll Back Legal Pot Rules*, BUSINESS INSIDER (Jan. 4, 2018, 3:51 PM), <http://markets.businessinsider.com/news/stocks/marijuana-stocks-slammed-on-reports-sessions-to-roll-back-pot-rules-2018-1-1012477686>.

<sup>268</sup> Memorandum from Jefferson B. Sessions, III, Attorney General, to All United States Attorneys (Jan. 4, 2018), available at <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>269</sup> Kathleen Foody & Don Thompson, *Sans Cole Memo, U.S. Attorneys Empowered to Enforce—or Ignore—Federal Marijuana Laws*, THE CANNABIST (Jan. 5, 2018, 11:45 PM), <https://www.thecannabist.co/2018/01/05/prosecutors-pot-friendly-states-will-decide-crackdown/96164/>.

<sup>270</sup> See, e.g., Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, NEW YORK TIMES (Dec. 23 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html?mtref=www.google.com&gwh=FB AF406FA9514444A248A39589D1F4E1&gwt=pay>.

<sup>271</sup> Brandon A. Dorfman, *Cannabis Stocks Rally as Marijuana Markets Rebound on Industry Assurances*, POT NETWORK (Jan. 5, 2018), <https://www.potnetwork.com/news/cannabis-stocks-rally-marijuana-markets-rebound-industry-assurances>.

<sup>272</sup> Jeremy Berke, *Jeff Sessions Has Fired the First Shot in His Long-Awaited Crackdown on Marijuana—and Some Investors See It as an Opportunity*, BUSINESS INSIDER (Jan. 6, 2018, 9:45 AM), <http://www.businessinsider.com/sessions-crackdown-on-cannabis-cole-memo-legal-marijuana-industry-2018-1>.

the possibility that the Trump administration would reverse the Obama administration's approach as soon as he nominated Sessions as his Attorney General.<sup>273</sup>

The political storm that Sessions has created may benefit the marijuana industry. Notably, not only do increasingly large majorities favor legalization of marijuana, but most Americans now live in states where medical or recreational marijuana is now lawful.<sup>274</sup> As indicated, less than three weeks after Sessions' announcement, Vermont became the first state to legalize recreational marijuana through legislative action, not through the voter initiative process.<sup>275</sup> That suggests a changing attitude among legislators. That trend is evident in the response of members of Congress.<sup>276</sup>

No major politician took a stance on the Cole memorandum during the Obama administration. Indeed, there would seem to be little to be gained by taking a stance. That has changed. Many prominent members of Congress on both sides of the aisle have come out against Sessions' position.<sup>277</sup> The recent continuing budget resolution again includes a provision preventing the Department of Justice from using resources to prosecute offenders who are in compliance with state medical marijuana laws.<sup>278</sup> A number of members of Congress have promised to pursue legislation that would, in effect, tolerate a state-by-state approach to marijuana, the approach that I predicted in my article.<sup>279</sup> Of course, that legislation is not a foregone conclusion, but members of Congress seem finally to have noticed the significant shift in national attitudes towards marijuana.

Finally, despite Trump's erratic behavior and shifting policies,<sup>280</sup> one should doubt that he will kill an industry that is almost certainly the fastest growing industry in the United States. One can question his grandiose rhetoric about being a job creator, but one should doubt that he will impair an industry that is creating thousands of jobs nationwide.

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<sup>273</sup> See, e.g., Joyce Koh, *What Jeff Sessions Thinks About Marijuana*, WASHINGTON POST (Jan. 4, 2018, 10:35 AM), [https://www.washingtonpost.com/video/politics/what-jeff-sessions-thinks-about-marijuana/2018/01/04/0f512e18-f17e-11e7-95e3-eff284e71c8d\\_video.html?utm\\_term=.d4a4a209fc13](https://www.washingtonpost.com/video/politics/what-jeff-sessions-thinks-about-marijuana/2018/01/04/0f512e18-f17e-11e7-95e3-eff284e71c8d_video.html?utm_term=.d4a4a209fc13).

<sup>274</sup> See Delkic, *supra* note 10.

<sup>275</sup> Gray, *supra* note 11.

<sup>276</sup> Maya Rhodan, *Lawmakers Are Furious Over Justice Department Decision on Marijuana Enforcement*, TIME (Jan. 4, 2018), <http://time.com/5088721/jeff-sessions-marijuana-weed-congress/>.

<sup>277</sup> *Id.*

<sup>278</sup> Alex Pasquariello, *Trump Signs Stopgap Spending Bill Extending Federal Medical Marijuana Protections a Few More Weeks*, THE CANNABIST (Dec. 22, 2017, 11:07 AM), <https://www.thecannabist.co/2017/12/22/federal-budget-medical-marijuana-rohrbacher-blumenauer-extended/95178/>.

<sup>279</sup> See Rhodan, *supra* note 28.

<sup>280</sup> See, e.g., Joe Scarborough, *Trump's Mental Meltdown*, WASHINGTON POST (Dec. 7, 2017), [https://www.washingtonpost.com/opinions/trumps-mental-meltdown/2017/12/07/a010dbcc-d605-11e7-b62d-d9345ced896d\\_story.html?utm\\_term=.fd82524fa56c](https://www.washingtonpost.com/opinions/trumps-mental-meltdown/2017/12/07/a010dbcc-d605-11e7-b62d-d9345ced896d_story.html?utm_term=.fd82524fa56c).