

## **BOOK REVIEW: MARIJUANA LAW, POLICY, AND AUTHORITY BY ROBERT A. MIKOS, PROFESSOR OF LAW, VANDERBILT UNIVERSITY LAW SCHOOL**

*Michelle H. Walton\**

### **INTRODUCTION**

In March 2017, United States Attorney General Jeff Sessions made his stance on the prohibition of marijuana clear:

I reject the idea that America will be a better place if marijuana is sold in every corner store. And I am astonished to hear people suggest that we can solve our heroin crisis by legalizing marijuana—so people can trade one life-wrecking dependency for another that's only slightly less awful. . . . Our nation needs to say clearly once again that using drugs will destroy your life.<sup>1</sup>

The Trump Administration has threatened to crack down on marijuana use, whether be it medical or recreational, in efforts to combat the drug epidemic, violent crime, and to fully enforce the Controlled Substances Act (CSA).<sup>2</sup> This policy is in stark contrast to the Obama Administration's "hands-off approach to enforcement,"<sup>3</sup> including not challenging the legality of state laws

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\* J.D. Candidate, Albany Law School '18; M.A., Clarkson University '14; B.A., SUNY Albany '13.

<sup>1</sup> Janice Williams, *Jeff Sessions on Marijuana: Drug is 'Only Slightly Less Awful' than Heroin*, NEWSWEEK (Mar. 15, 2017, 2:42 PM), <http://www.newsweek.com/jeff-sessions-marijuana-legalization-states-heroin-opioids-568499>.

<sup>2</sup> See Lydia Wheeler, *Trump's DOJ Gears up for Crackdown on Marijuana*, THE HILL (July 23, 2017, 7:30 AM), <http://thehill.com/regulation/administration/343218-trumps-doj-gears-up-for-crackdown-on-marijuana>.

<sup>3</sup> Sadie Gurman, *Huff, Puff, Pass? AG's Pot Fury Not Echoed by Task Force*, AP NEWS (Aug. 5, 2017), <https://apnews.com/ad37624fcb8e485a8d57a013d48a227c>.

allowing the recreational use of marijuana, such as those in Colorado and Washington, so long as legalization states strictly regulate its sale and distribution.<sup>4</sup> The dichotomy in policy between the Trump and Obama administrations illustrates a balancing act of federalism.<sup>5</sup>

The ongoing tension between state and federal law is just one of the reasons why Professor Robert Mikos' new textbook, *Marijuana Law, Policy, and Authority*,<sup>6</sup> is so welcome and timely. This article serves as a book review of his textbook. Federalism and a history of marijuana law and policy at the federal level are used to illustrate the relevance of the textbook as a valuable contribution to legal scholarship in the new and emerging specialization of marijuana law. As more states and jurisdictions legalize either recreational or medical use, the demand for informed advice concerning marijuana law will continue to grow. And as long as the conflict between federal and state law remains, the job of providing such advice will remain particularly complicated.

The current division between federal and state marijuana policy can be illustrated through Deputy Attorney General James Cole's 2013 memorandum [hereinafter the Cole Memo] to U.S. Attorneys providing new guidelines for enforcement of marijuana laws under the CSA after movement by states to legalize marijuana.<sup>7</sup> The Cole Memo provided the Department of Justice (DOJ) will only intervene against state and local jurisdictions legalizing marijuana "only when the use, possession, cultivation, or distribution of marijuana has threatened" one of the aims of the

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<sup>4</sup> Brady Dennis, *Obama Administration Will Not Block State Marijuana Laws if Distribution Is Regulated*, WASH. POST (Aug. 29, 2013), [https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws--for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcde09410972\\_story.html?utm\\_term=.282626d89626](https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws--for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcde09410972_story.html?utm_term=.282626d89626).

<sup>5</sup> See *id.* (quoting Washington Governor Jay Inslee's statement that Obama's policy "reflects a balanced approach by the federal government that respects the states' interests in implementing these laws and recognizes the federal government's role in fighting illegal drugs and criminal activity.").

<sup>6</sup> ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY (2017). See also *Marijuana Law, Policy, and Authority*, VANDERBILT UNIVERSITY LAW SCHOOL, <https://my.vanderbilt.edu/marijuanalaw/> (last visited Feb. 1, 2018) (the companion website for Mikos' textbook).

<sup>7</sup> Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Justice, to all U.S. Att'y's, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

CSA.<sup>8</sup> Additionally, U.S. Attorneys were directed to “continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system.”<sup>9</sup>

Federalism and state marijuana legalization laws notably came into conflict in *Gonzalez v. Raich*,<sup>10</sup> wherein California medical marijuana growers and users challenged the application and the constitutionality of the CSA as applied to individuals covered under California’s Compassionate Use Act. In authoring the majority opinion, Justice Stevens maintained that the issue in the case is not to determine “whether it is wise to enforce the [CSA] in these circumstances; rather, it is whether Congress’ power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally.”<sup>11</sup> The Court held that the CSA is a “valid exercise of federal power” within the scope of the Commerce Clause to “prohibit the local cultivation and use of marijuana in compliance with California law.”<sup>12</sup>

## HISTORY OF FEDERAL MARIJUANA LAW AND POLICY

The history of marijuana law and policy is necessary to show the

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<sup>8</sup> *Id.* In order to combat large scale criminal activity associated with illegal distribution of marijuana, DOJ has narrowed its CSA enforcement priorities by:  
Preventing the distribution of marijuana to minors;  
Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;  
Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;  
Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;  
Preventing violence and the use of firearms in the cultivation and distribution of marijuana;  
Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;  
Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and  
Preventing marijuana possession or use on federal property.

*Id.*

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

<sup>10</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.* at 5. *See also* U.S. CONST. art. I, § 8, cl. 3.

evolution of societal norms and attitudes toward marijuana use, possession, and distribution in the United States. Marijuana's history is colorful and largely influenced by racist and nativist sentiments. Its use during the late nineteenth and twentieth centuries was synonymous with migrant farmworkers, jazz musicians, and social deviants.<sup>13</sup> Several studies refuting the "marijuana menace" have been suppressed throughout the years to fit the narrative of "law and order" politics and the supremacy of the federal Controlled Substance Act over state marijuana legalization statutes.<sup>14</sup>

Since the colonial era, government, whether it be federal, state, or local, has propagated policies regulating the use of marijuana and hemp products.<sup>15</sup> During the seventeenth century, colonial governments encouraged settlers to grow hemp for industrial material and textiles for clothing.<sup>16</sup> Specifically, in 1619, the Virginia Assembly enacted legislation mandating farmers to grow hemp.<sup>17</sup> Moreover, hemp was used as currency in the colonies of Virginia, Pennsylvania, and Maryland.<sup>18</sup> Agricultural production of industrial hemp continued into the nineteenth century.<sup>19</sup> Notably, during the Civil War, the First Battle of Lexington was

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<sup>13</sup> § 8 Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970). See also Nick Wing, *Marijuana Prohibition was Racist from the Start. Not Much Has Changed.*, HUFFPOST (Jan. 14, 2014), [https://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist\\_n\\_4590190.html](https://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist_n_4590190.html).

<sup>14</sup> See, e.g., Michael Berkey, Note, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 424 (2011) (mentioning the 1925 Panama Canal Zone Report as a relevant scientific report that conflicted with the narrative of "law and order" politics at the time).

<sup>15</sup> *Busted: American's War on Marijuana: Marijuana Timeline*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Oct. 11, 2017).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* See also W.W. Henry, *The First Legislative Assembly in America: Sitting at Jamestown, Virginia 1619*, 2 VA. MAG. OF HIST. & BIOGRAPHY 55, 64 (1894).

Other of this class of laws related to intercourse with the Indians, and to educating and Christianizing them, to the planting of corn, mulberry trees, silk-flax, hemp and grapevines, to the regulation of contracts with trades people, tenants, and servants, and to the management of the magazine or storehouse of the Colony.

*Id.*

<sup>18</sup> *Busted: American's War on Marijuana*, *supra* note 15.

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

known as Union forces at Lexington.<sup>20</sup> Recreational use of cannabis became popularized during the nineteenth century, as literature of the era, such as Alexandre Dumas's *The Count of Monte Cristo*, vividly describing hashish use.<sup>21</sup> Additionally, during the nineteenth century, cannabis was used for medicinal purposes and sold in pharmacies to the public,<sup>22</sup> as cannabis was used to treat "tetanus, neuralgia, dysmenorrhea (painful menstruation), convulsion, the pain and rheumatism of childbirth, asthma, postpartum psychosis, gonorrhea, and chronic bronchitis."<sup>23</sup>

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<sup>20</sup> Terry Beckenbaugh, *First Battle of Lexington (or "Battle of the Hemp Bales")*, CIVIL WAR ON THE WESTERN BORDER, <http://www.civilwaronthewesternborder.org/encyclopedia/first-battle-lexington-or-battle-hemp-bales> (last visited Oct. 11, 2017).

MSG [Missouri State Guard] Brigadier General Thomas Harris, or someone in his 2nd division, originated the idea of using hemp bales as a moving fortification. Soaked in water, the hemp bales were very heavy, but they were also fireproof and impervious to cannon and small arms fire. Other division commanders quickly adopted the idea, and soon a hemp ring surrounded the federal position atop College Hill. The ring gradually tightened, and the Unionists were powerless to stop the MSG's advance.

*Id.*

<sup>21</sup> The Associated Press, *As pot goes proper, a history of weed*, N.Y. DAILY NEWS (Dec. 6, 2012, 10:06 AM), <http://www.nydailynews.com/news/national/pot-proper-history-weed-article-1.1214613>. See also ALEXANDRE DUMAS, THE COUNT OF MONTE CRISTO 351–52 (Robin Buss trans., Penguin Books 2003) (1844).

'In this valley were magnificent gardens planted by Hassen-ben-Sabah, and in these gardens isolated pavilions. Into these pavilions he admitted the elect, and there, says Marco Polo, gave them to eat a certain herb, which transported them to Paradise, in the midst of ever-blooming shrubs, ever-ripe fruit, and ever-lovely virgins. What these happy persons took for reality was but a dream; but it was a dream so soft, so voluptuous, so entralling, that they sold themselves body and soul to him who gave it to them, and obedient to his orders as to those of a deity, struck down the designated victim, died in torture without a murmur, believing that the death they underwent was but a quick transition to that life of delights of which the holy herb, now before you had given them a slight foretaste.' . . . 'When you return to this mundane sphere from your visionary world, you would seem to leave a Neapolitan spring for a Lapland winter—to quit paradise for earth—heaven for hell! Taste the hashish, guest of mine—taste the hashish.'

*Id.*

<sup>22</sup> *Busted: American's War on Marijuana*, *supra* note 15.

<sup>23</sup> Lester Grinspoon, *History of Cannabis as a Medicine* 3, (Aug. 16, 2005) (statement during DEA hearing), [http://www.maps.org/research-archive/mmj/grinspoon\\_history\\_cannabis\\_medicine.pdf](http://www.maps.org/research-archive/mmj/grinspoon_history_cannabis_medicine.pdf). In 1860, Dr. RR M'Meens reported

The twentieth century brought the beginning of regulation to cannabis. In 1906, President Theodore Roosevelt enacted the Pure Food and Drug Act.<sup>24</sup> Section eight of the original Federal Food and Drugs Act of 1906 pertains to misbranding<sup>25</sup> of drugs, noting that food and drug packaging must provide for the labeling of “cannabis indica.”<sup>26</sup>

Also in the early twentieth century, cannabis propaganda became widespread due to the influx of Mexican immigration to the Southwest resulting from the 1910 Mexican Revolution.<sup>27</sup> Journalist and author Eric Schlosser described the racist history of anti-marijuana propaganda in the United States using the fear-based, exaggerated claims about Mexican immigrants’ “traditional means of intoxication: smoking marijuana. Police officers in Texas claimed that marijuana incited violent crimes, aroused a ‘lust for

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the uses of medical cannabis to the Ohio State Medical Society, noting that the hypnotic effect of cannabis is similar to that of opium. *Id.* at 3–4.

‘Its [cannabis] effects are less intense, and the secretions are not so much suppressed by it. Digestion is not disturbed; the appetite rather increased; . . . The whole effect of hemp being less violent, and producing a more natural sleep, without interfering with the actions of the internal organs, it is certainly often preferable to opium, although it is not equal to that drug in strength and reliability.’

*Id.*

<sup>24</sup> *Busted: American’s War on Marijuana*, *supra* note 15.

<sup>25</sup> Federal Food and Drugs (Wiley) Act of 1906, Pub. L. No. 59-384, § 8, 34 Stat. 768, 770 (repealed 1938).

That the term ‘misbranded,’ as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the indigents or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

*Id.*

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

[I]f the contents of the packages as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if [the package] fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

*Id.*

<sup>27</sup> *Busted: American’s War on Marijuana*, *supra* note 15.

blood,’ and gave its users ‘superhuman strength.’ Rumors spread that Mexicans were distributing this ‘killer weed’ to unsuspecting American school children.”<sup>28</sup>

As “The Marijuana Menace”<sup>29</sup> propaganda spread, jurisdictions across the United States began to prohibit its possession, use, and sale.<sup>30</sup> In 1914, El Paso, Texas was the first municipality to prohibit the possession or sale of marijuana.<sup>31</sup> Prohibition further spread across the country, and by 1931 twenty-nine states banned marijuana.<sup>32</sup> As nativist sentiments swirled around the United States during the 1920s and 1930s, jurisdictions began to petition the federal government to prohibit marijuana uniformly across the United States.<sup>33</sup> These prohibition advocates sensationalized the “horrors” of marijuana use by using headlines such as “Murder Weed Found Up and Down Coast”<sup>34</sup> and “Deadly Marijuana Dope Plant Ready For Harvest That Means Enslavement of California Children.”<sup>35</sup>

In 1930, the Federal Bureau of Narcotics (FBN) was established within the Department of the Treasury to enforce narcotics

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<sup>28</sup> Eric Schlosser, *Reefer Madness*, THE ATLANTIC (Aug. 1994), <https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476/>. Schlosser further notes that marijuana’s racist history is not just limited to Mexican immigrants.

Sailors and West Indian immigrants brought the practice of smoking marijuana to port cities along the Gulf of Mexico. In New Orleans newspaper articles associated the drug with African-Americans, jazz musicians, prostitutes, and underworld whites. ‘The Marijuana Menace,’ as sketched by anti-drug campaigners, was personified by inferior races and social deviants.

*Id.* In addition to Mexicans, African-Americans, and jazz musicians, Indians were targeted for their marijuana use. *Id.* See also Matt Thompson, *The Mysterious History of Marijuana*, NPR (July 22, 2013, 11:46 AM), <http://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana>.

Within the last year we in California have been getting a large influx of Hindus [sic] and they have in turn started quite a demand for cannabis indica. . . . They are a very undesirable lot and the habit is growing in California very fast; the fear is now that it is not being confined to the Hindus [sic] alone but that they are initiating our whites into this habit.

*Id.*

<sup>29</sup> *Busted: American’s War on Marijuana*, *supra* note 15.

<sup>30</sup> See Thompson, *supra* note 28.

<sup>31</sup> Schlosser, *supra* note 28.

<sup>32</sup> *Id.* See also *Busted: American’s War on Marijuana*, *supra* note 15.

<sup>33</sup> Schlosser, *supra* note 28.

<sup>34</sup> *Id.*

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

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regulations under the Harrison Act.<sup>36</sup> Harry Anslinger, the FBN's first commissioner, continued the racist trend of anti-marijuana vitriol, making statements like: "the primary reason to outlaw marijuana is its effect on the degenerate races,"<sup>37</sup> and that most marijuana users "are Negros, Hispanics, Filipinos, and entertainers. Their Satanic music, jazz, and swing, result from marijuana use. This marijuana causes white women to seek sexual relations with Negros, entertainers, and any others."<sup>38</sup> Essentially, Anslinger declared a war on drugs decades before the term was coined, testifying before Congress that "the major criminal in the United States is the drug addict; that of all the offenses committed against the laws of this country, the narcotic addict is the most frequent offender."<sup>39</sup>

Anslinger's propaganda crusade was instrumental in bolstering support for federal marijuana prohibition.<sup>40</sup> Under his leadership, the FBN depicted the marijuana user as "a fiend with savage or 'cave man' tendencies. His sex desires are aroused and some of the most horrible crimes result. He hears light and sees sound. To get away from it, he suddenly becomes violent and may kill."<sup>41</sup>

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<sup>36</sup> LISA N. SACCO, CONG. RESEARCH SERV., DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 2–3 (2014), <https://fas.org/sgp/crs/misc/R43749.pdf>.

The Harrison Narcotics Act of 1914 . . . among other things, required importers, manufacturers, and distributors of cocaine and opium to register with the U.S. Department of the Treasury (the Treasury), pay a special tax on these drugs, and keep records of each transaction. Under the Harrison Act, practitioners were authorized to prescribe opiates and cocaine; however, the law was subject to interpretation. . . . Ultimately, physicians stopped prescribing drugs covered under the Harrison Act, thereby sending users to the black market to seek out these substances.

*Id.* (citation omitted).

<sup>37</sup> *The Devil Weed and Harry Anslinger*, COMMON SENSE FOR DRUG POLICY, <http://www.csdp.org/publicservice/anslinger.htm> (last visited Oct. 11, 2017).

<sup>38</sup> *Id.*

<sup>39</sup> SACCO, *supra* note 36, at 3 (citing *Taxation of Marijuana: Hearing Before H. Comm. on Ways & Means*, 75th Cong., 7 (1937) (statement of Henry Anslinger, Comm'r, Federal Bureau of Narcotics)). See also Thompson, *supra* note 28. Further, in his testimony before Congress, Anslinger included a letter from a newspaper editor in Colorado, stating: "I wish I could show you what a small marijuana cigaret [sic] can do to one of our degenerate Spanish-speaking residents. . . . [O]ur population is composed of Spanish-speaking persons, most of who . . . are low mentally, because of social and racial conditions." *Id.*

<sup>40</sup> See Thompson, *supra* note 28.

<sup>41</sup> THE NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, NORML REPORT ON

Due to the efforts of Anslinger and other prohibition advocates the Marijuana Tax Act (MTA) was enacted in 1937.<sup>42</sup> The MTA did not explicitly place a ban on marijuana—instead it “imposed a strict regulation requiring a high-cost transfer tax stamp for every sale of marijuana, and these stamps were rarely issued by the federal government.<sup>43</sup> Shortly after the passage of the MTA, all states made the possession of marijuana illegal.<sup>44</sup>

New York City Mayor Fiorello LaGuardia questioned the federal government’s strict regulation of marijuana under the MTA, and as a result commissioned a study by the New York Academy of Medicine entitled *The Marihuana Problem in the City of New York: Sociological, Medical, Psychological and Pharmacological Studies* in 1938.<sup>45</sup> After the six-year study concluded, Mayor LaGuardia’s foreword in the report highlighted its findings:<sup>46</sup>

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SIXTY YEARS OF MARIJUANA PROHIBITION IN THE U.S. 3 (2003), [http://norml.org/pdf\\_files/NORML\\_Report\\_Sixty\\_Years\\_US\\_Prohibition.pdf](http://norml.org/pdf_files/NORML_Report_Sixty_Years_US_Prohibition.pdf).

<sup>42</sup> See Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551.

<sup>43</sup> See CHARLES F. LEVINTHAL, DRUGS, SOCIETY, AND CRIMINAL JUSTICE 58 (3rd ed. 2012).

<sup>44</sup> LISA N. SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R43164, STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT 3 (2014) (citing *Leary v. United States*, 395 U.S. 6 (1968) (declaring the MTA unconstitutional because it violated the Fifth Amendment privilege against self-incrimination)), <https://fas.org/sgp/crs/misc/R43164.pdf>. See also Laura Kriho, *Marihuana Tax Act of 1937 Rises from the Dead*, BOULDER WKLY. (Oct. 31, 2013), <http://www.boulderweekly.com/features/weed-between-the-lines/marihuana-tax-act-of-1937-rises-from-the-dead/>.

The Marihuana Tax Act of 1937 used a unique legal theory. Since Congress did not have the power to ban substances directly because of the 10th Amendment, they needed an indirect method of prohibition. They were inspired by the National Firearms Act of 1934, which effectively outlawed machine guns through the requirement of a ‘prohibitive’ tax. The Marihuana Tax Act adopted the ‘prohibition through taxation’ scheme. Rather than making marijuana possession illegal directly. . . . [T]he taxes were set prohibitively high, it discouraged compliance, creating de facto prohibition.

*Id.*

<sup>45</sup> Fiorello LaGuardia, *Foreword* to MAYOR’S COMM. ON MARIHUANA, THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK: SOCIOLOGICAL, MEDICAL, PSYCHOLOGICAL AND PHARMACOLOGICAL STUDIES (1944), <http://hempshare.org/pdfs/laguardia.pdf>.

<sup>46</sup> *Id.*

1. “Marihuana is used extensively in the Borough of Manhattan but the problem is not as acute as it is reported to be in other sections of the United States.
2. The introduction of marihuana into this area is recent as compared to other localities.

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I am glad that the sociological, psychological, and medical ills commonly attributed to marihuana have been found to be exaggerated insofar as the City of New York is concerned. I hasten to point out, however, that the findings are to be interpreted only as a reassuring report of progress and not as encouragement to indulgence. . . .<sup>47</sup>

In other words, marijuana was not the societal menace that Anslinger depicted it to be as LaGuardia's report found that marijuana is not a physically addictive gateway drug that increased crime.<sup>48</sup>

Despite the findings of LaGuardia's report, the federal government continued to pass legislation further criminalizing

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3. The cost of marihuana is low and therefore within the purchasing power of most persons.
4. The distribution and use of marihuana is centered in Harlem.
5. The majority of marihuana smokers are Negroes and Latin-Americans.
6. The consensus among marihuana smokers is that the use of the drug creates a definite feeling of adequacy.
7. The practice of smoking marihuana does not lead to addiction in the medical sense of the word.
8. The sale and distribution of marihuana is not under the control of any single organized group.
9. The use of marihuana does not lead to morphine or heroin or cocaine addiction and no effort is made to create a market for these narcotics by stimulating the practice of marihuana smoking.
10. Marihuana is not the determining factor in the commission of major crimes.
11. Marihuana smoking is not widespread among school children.
12. Juvenile delinquency is not associated with smoking marihuana.
13. The publicity over the catastrophic effects of marihuana smoking in New York City is unfounded.

MAYOR'S COMM. ON MARIHUANA, THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK: SOCIOLOGICAL, MEDICAL, PSYCHOLOGICAL AND PHARMACOLOGICAL STUDIES (1944), <http://hempshare.org/pdfs/laguardia.pdf>.

<sup>47</sup> LaGuardia, *supra* note 45.

<sup>48</sup> See David Downs, *The Science behind the DEA's Long War on Marijuana*, SCI. AM. (Apr. 19, 2016), <https://www.scientificamerican.com/article/the-science-behind-the-dea-s-long-war-on-marijuana/>. See also Fred Gardner, *LaGuardia and the Truth about Marijuana*, COUNTER PUNCH (Feb. 8, 2010), <https://www.counterpunch.org/2010/02/08/laguardia-and-the-truth-about-marijuana/>.

possession, use, and sale of marijuana. In 1951, Congress passed the Boggs Act,<sup>49</sup> providing for mandatory minimum prison sentencing.<sup>50</sup> To expand in its marijuana criminalization efforts, Congress passed the Narcotics Control Act<sup>51</sup> in 1956 implementing stricter penalties for drug offenders to deter their participation in the black market.<sup>52</sup> The 1956 Act continued the mandatory sentencing policy from the Boggs Act, as the 1956 Act provided that “judges could only sentence an offender to parole for first offenses. Second offenses, however, required mandatory minimums for prison sentences. Strikingly, anyone caught selling to a minor was eligible for the death penalty.”<sup>53</sup> Also, states began passing harsher marijuana laws than the federal government during the 1960s.<sup>54</sup>

During the 1960s, marijuana became popular among middle-class and college educated Americans. Moreover, studies conducted under the Kennedy and Johnson administrations rejected the “Marijuana Menace” theory endorsed by Anslinger disproving the “direct link” between marijuana use and criminality.<sup>55</sup> Likewise, societal attitudes toward marijuana relaxed as its use became ubiquitous among white college students, and marijuana.<sup>56</sup>

Under President Nixon, Congress passed the Comprehensive

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<sup>49</sup> Boggs Act, Pub. L. No. 82-255, 65 Stat. 767 (1951).

<sup>50</sup> SACCO, *supra* note 36, at 4.

<sup>51</sup> Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567.

<sup>52</sup> Christopher J. Frisina, *Let FDA Regulate its Own Drugs!: An Argument for Narcotic Control and Enforcement under the Risk Evaluation and Mitigation Strategies (REMS)*, 27 LOY. CONSUMER L. REV. 238, 252 (2015). See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200–01 (1993).

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

<sup>54</sup> Schlosser, *supra* note 28 (“In Louisiana sentences for simple possession ranged from five to ninety-nine years; in Missouri a second offense could result in a life sentence; and in Georgia a second conviction for selling marijuana to minors could bring the death penalty.”).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* Schlosser notes the evolution of societal attitudes toward marijuana use in the 1960s:

As marijuana use became widespread among white middle-class college students, there was a reappraisal of marijuana laws that for decades had imprisoned poor Mexicans and African-Americans without much public dissent. Drug-abuse policy shifted from a purely criminal-justice approach to one also motivated by the interests of public health, with more emphasis on treatment than on punishment.

*Id.*

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Drug Abuse Prevention and Control Act of 1970,<sup>57</sup> and upon its signing, Nixon maintained its necessity: “I sent an urgent request to the Congress for legislation in this field. I requested it because our survey of the problem of drugs indicated that it was a major cause of street crime in the United States. Those who have a drug habit find it necessary to steal, to commit crimes, in order to feed their habit.”<sup>58</sup>

Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 implemented the Controlled Substances Act (CSA) which further regulated and classified drugs:

The CSA established the statutory framework through which the federal government regulates the *lawful* production, possession, and distribution of controlled substances. This comprehensive drug law classified controlled substances under five schedules according to (1) how dangerous they are considered to be, (2) their potential for abuse and addiction, and (3) whether they have legitimate medical use.<sup>59</sup>

This act was unique as it rolled back the mandatory minimum sentencing provisions of the 1951 Boggs Act and the 1956 Narcotics

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<sup>57</sup> See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

<sup>58</sup> Richard Nixon, 37th President of the U.S., Remarks on Signing the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Oct. 27, 1970) (transcript available at: <http://www.presidency.ucsb.edu/ws/?pid=2767>).

<sup>59</sup> See SACCO, *supra* note 36, at 5–6.

Under the CSA, there are five schedules under which substances may be classified—Schedule I being the most restrictive. substances placed onto one of the five schedules are evaluated on

- Actual or relative potential for abuse;
- Known scientific evidence of pharmacological effects;
- Current scientific knowledge of the substance;
- History and current pattern of abuse;
- Scope, duration, and significance of abuse;
- Risk to public health;
- Psychic or physiological dependence liability; and
- Whether the substance is an immediate precursor of an already-scheduled substance.

Of the more well-known drugs of abuse, marijuana and heroin are both categorized as Schedule I drugs, while cocaine and methamphetamine have recognized medical use and are categorized as Schedule II.

*Id.*

Control Act.<sup>60</sup>

In 1972, President Nixon's National Commission on Marihuana and Drug Abuse (Shafer Commission)<sup>61</sup> further recommended that Congress decriminalize marijuana use and possession: “[that the] possession of marijuana for personal use no longer be an offense, [and that the] casual distribution of small amounts of marihuana for no remuneration, or insignificant remuneration, no longer be an offense.”<sup>62</sup> Despite the findings of the bipartisan Shafer Commission, President Nixon ignored its recommendation. However eleven states followed the Commission by either decriminalizing marijuana or weakening their existing laws.<sup>63</sup> President Nixon further pursued regulation of marijuana by establishing the Drug Enforcement Agency (DEA) in 1973.<sup>64</sup> Upon announcing the creation of the DEA, President Nixon “declared ‘an all-out global war on the drug menace.’”<sup>65</sup>

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<sup>60</sup> AM. CIV. LIBERTIES UNION, WRITTEN STATEMENT OF THE AM. CIV. LIBERTIES UNION BEFORE THE U.S. SENATE JUDICIARY COMMITTEE: HEARING ON “REEVALUATING THE EFFECTIVENESS OF FED. MANDATORY MINIMUM SENTENCES” (2013), [https://www.aclu.org/sites/default/files/assets/aclu\\_testimony\\_for\\_senate\\_mandatory\\_minimum\\_hearing-final.pdf](https://www.aclu.org/sites/default/files/assets/aclu_testimony_for_senate_mandatory_minimum_hearing-final.pdf) (“[T]he Comprehensive Drug Abuse Prevention and Control Act of 1970, supported by both Republicans and Democrats, which eliminated all mandatory minimum drug sentences except for offenders who participated in large-scale ongoing drug operations.”).

<sup>61</sup> Paul Armentano, *35 Years of Prohibition*, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, <http://norml.org/component/zoo/category/celebrating-35-years-of-failed-pot-policies> (last visited Nov. 8, 2017). The commission was also known as the Shafer Commission, under the leadership of former Pennsylvania Governor Raymond P. Shafer. *Id.*

<sup>62</sup> *Id.* See SACCO & FINKLEA, *supra* note 44, at 4.

<sup>63</sup> Schlosser, *supra* note 28.

<sup>64</sup> SACCO, *supra* note 36, at 6. See also EXECUTIVE ORDER 11727, 38 Fed. Reg. 18,357 (July 6, 1973).

Section 1. The Attorney General, to the extent permitted by law, is authorized to coordinate all activities of executive branch departments and agencies which are directly related to the enforcement of laws respecting narcotics and dangerous drugs. Each department and agency of the Federal Government shall, upon request and to the extent permitted by law, assist the Attorney General in the performance of functions assigned to him pursuant to this order, and the Attorney General may, in carrying out those functions, utilize the services of any other agencies, Federal and State, as may be available and appropriate.

*Id.*

<sup>65</sup> DRUG ENFORCEMENT ADMIN., THE DEA YEARS 34, <https://www.dea.gov/about/history.shtml> (last visited Nov. 8, 2017).

[T]he federal government is fighting the war on drug abuse under a distinct handicap, for its efforts are those of a loosely confederated alliance facing a resourceful, elusive, worldwide

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Like Nixon, President Reagan increased the authority of the federal government to combat drug abuse. The Comprehensive Crime Control Act of 1984<sup>66</sup> was passed by Congress increasing “penalties for CSA violations and amended the CSA to establish general criminal forfeiture provisions for certain felony drug violations.”<sup>67</sup> In 1986, President Reagan praised the DEA’s efforts in combating drugs and enforcement of marijuana prohibition policy: “From the beginning of our administration, we’ve taken strong steps to do something about this horror . . . Thirty-seven Federal agencies are working together in a vigorous national effort, and by next year our spending for drug enforcement will have more than tripled from its 1981 levels.”<sup>68</sup>

President Reagan also supported passage of the Anti-Drug Abuse Act of 1986<sup>69</sup> and the Anti-Drug Abuse Amendment Act of 1988<sup>70</sup> continuing the trend of increased criminalization for marijuana “possession, cultivation, and trafficking,” as these pieces of legislation imposed stricter punishments, as Schlosser noted: “‘conspiracies’ and ‘attempts’ were to be punished as severely as completed acts; and possession of a hundred marijuana plants now carried the same sentence as possession of a hundred grams of heroin.”<sup>71</sup>

For much of the twentieth century, states regulated marijuana much the same as did the federal government: they prohibited it.<sup>72</sup> In 1996, medical use of marijuana was legalized in California through Proposition 215, the Compassionate Use Act.<sup>73</sup> The Compassionate Use Act legalized the sale and use of medical

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enemy. Certainly, the cold-blooded underworld networks that funnel narcotics from suppliers all over the world are no respecters of the bureaucratic dividing lines that now complicate our anti-drug efforts.

*Id.*

<sup>66</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

<sup>67</sup> SACCO, *supra* note 36, at 8.

<sup>68</sup> *Id.* (quoting Ronald Reagan, 40th President of the U.S., Address to the Nation on the Campaign Against Drug Abuse (September 14, 1986) (transcript available in the Reagan Presidential Library)).

<sup>69</sup> Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

<sup>70</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

<sup>71</sup> Schlosser, *supra* note 28.

<sup>72</sup> See Robert A. Mikos, *On the Limits of Supremacy*, 62 VAND. L. REV. 1421, 1427 (2009).

<sup>73</sup> *Busted: American’s War on Marijuana*, *supra* note 15.

marijuana for patients with certain terminal health conditions, such as AIDS and cancer.<sup>74</sup> Furthermore, the Act aimed “[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.”<sup>75</sup> Moreover, the Compassionate Use Act provides that “patients and their primary caregivers<sup>76</sup> who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.”<sup>77</sup> Like California, Arizona provided for medical marijuana for patients with physician approval.<sup>78</sup> Under the Drug Medicalization, Prevention, and Control Act of 1996, physicians can prescribe Schedule I substance to treat patients with certain illnesses and terminal conditions.<sup>79</sup> However, the Arizona Act’s weakness was that it “was largely ineffective in shielding medical marijuana users from criminal prosecution due to a language technicality in the statute, which called for doctors to ‘prescribe,’ rather than recommend, the Schedule I drug.”<sup>80</sup>

However, these first steps in state legalization policy have clashed with existing federal law as marijuana is still classified as a Schedule I controlled substance under the CSA, banning “the unauthorized manufacture, distribution, dispensation, and possession of marijuana.”<sup>81</sup> There is an inherent conflict between federal and state marijuana law and policy, as more states move toward legalization and decriminalization of marijuana for medical

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<sup>74</sup> *Id.* See also CAL. HEALTH & SAFETY CODE §11362.5 (b)(1)(A) (West 1996). The Compassionate Use Act’s purpose is:

[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

*Id.*

<sup>75</sup> CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(C) (West 1996).

<sup>76</sup> CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(B) (West 1996). See also CAL. HEALTH & SAFETY CODE § 11362.5(e) (West 1996) (“For the purposes of this section, ‘primary caregiver’ means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.”).

<sup>77</sup> CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(B) (West 1996).

<sup>78</sup> ARIZ. REV. STAT. ANN. § 13-3412.01(A) (1996).

<sup>79</sup> ARIZ. REV. STAT. ANN. § 13-3412.01(A)–(B) (1996).

<sup>80</sup> Berkey, *supra* note 14, at 429.

<sup>81</sup> SACCO, *supra* note 36, at 14–15.

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and recreational use, “rais[ing] domestic law enforcement questions as to how marijuana can remain strictly prohibited under federal law (except for authorized scientific research).”<sup>82</sup>

### THE EMERGENCE OF MARIJUANA LAW PRACTICE

As more states and jurisdictions legalize the medical and recreational use of marijuana, marijuana law has become an increasingly popular field of legal specialization in recent years. Marijuana lawyers are needed to navigate various conflicting regulations imposed at the state and federal level.<sup>83</sup> For example, lawyers with expertise in marijuana law will be needed to ensure that the healthcare providers comply with state medical marijuana regulations. Firms specializing in marijuana law have been spreading in states with medical and recreational legalization. Founding president and executive director of the National Cannabis Bar Association, Shabnam Malek maintained: “As more and more states decriminalize or legalize cannabis—and set up their own regulatory structures—the legal conditions cannabis industry clients and their attorneys face are likely to get even more complex before they get simpler.”<sup>84</sup> Malek also describes the work of attorneys in this field:

Today cannabis industry attorneys are already busy helping their clients form new companies, negotiate agreements, complete license applications, comply with local and state laws, protect assets and more. Our members represent clients who are involved in a wide array of activities in the cannabis industry along with various ancillary products and services.<sup>85</sup>

A growing number of schools across the nation have begun to

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<sup>82</sup> *Id.* at 15. See SACCO & FINKLEA, *supra* note 44, at 4. See also TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES 10 (2014).

<sup>83</sup> Stephanie Francis Ward, *New bar association focuses on marijuana*, A.B.A. J. (June 10, 2015, 7:00 AM), [http://www.abajournal.com/news/article/new\\_bar\\_association\\_focuses\\_on\\_marijuana](http://www.abajournal.com/news/article/new_bar_association_focuses_on_marijuana).

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

<sup>85</sup> Ricardo Baca, *National Cannabis Bar Association: Weed Attorneys, Unite (Quite Literally)*, CANNABIST (June 10, 2015, 6:00 AM), <http://www.thecannabis.t.co/2015/06/10/national-cannabis-bar-association/35948/>.

offer courses in marijuana law.<sup>86</sup> Historically, marijuana law (and drug law more generally) was relegated to brief discussions in criminal law courses. But the diversity of legal issues spawned by changes to marijuana law has generated the need for more and broader coverage, to ensure that lawyers are fluent in this booming field of law.

### ***MARIJUANA LAW, POLICY, AND AUTHORITY***

*Marijuana Law, Policy, and Authority*<sup>87</sup> by Robert A. Mikos provides law students, professors, legal practitioners, non-law students, and scholars with the requisite knowledge and basis of law to navigate this new and emerging area of law. Mikos states that this is a “first-of-its-kind textbook” in that it provides readers with “the competing approaches to regulating marijuana, the policies behind those approaches, and the power of various federal, state, and local government actors to pursue them.”<sup>88</sup>

The textbook allows readers to analyze, evaluate, and critically think about the interplay between marijuana law, policy, and authority.<sup>89</sup> The substantive law chapters divides jurisdictions into two categories, which Mikos refers to as prohibition regimes<sup>90</sup> and legalization regimes.<sup>91</sup> The policy chapters address the objectives and theoretical background policymakers use in implementing either prohibition or legalization regulations.<sup>92</sup> The authority chapters examine the relationship between the branches of federal, state, and local government through legal doctrine and the regulatory power of these different governing structures.<sup>93</sup> The connection between law, policy, and authority is the overarching theme as it aids readers to better understand the nuances that

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<sup>86</sup> See David Migoya, *Marijuana Law 101: College Weed Classes a Hot Trend*, DENVER POST (Jan. 20, 2015, 9:47 AM), <http://www.denverpost.com/2015/01/20/marijuana-law-101-college-weed-classes-a-hot-trend/>.

<sup>87</sup> MIKOS, *supra* note 6.

<sup>88</sup> *Id.* at 4.

<sup>89</sup> *Id.* at 7.

<sup>90</sup> *Id.* at 8 (“Prohibition regimes are those that ban outright the possession, manufacture, and distribution of marijuana (and related activities); they include regimes that have decriminalized marijuana—i.e., those that have reduced the sanctions for but do not yet allow the possession of marijuana.”).

<sup>91</sup> *Id.* (“Legalization regimes, by contrast, are those that explicitly permit at least some people to possess, manufacture, and/or distribute marijuana for medical or other purposes without sanction.”).

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

<sup>93</sup> MIKOS, *supra* note 6, at 8.

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marijuana presents to legal practitioners.<sup>94</sup>

*Marijuana Law, Policy, and Authority* is divided into three parts, examining issues of law, policy, and authority pertinent to the following groups: “marijuana users, their suppliers, or the third parties who interact with users and suppliers.”<sup>95</sup> Part I of the book provides an introduction, as chapter two answers the question “What is Marijuana?,”<sup>96</sup> focusing on the controversy over the legal definition of marijuana.<sup>97</sup>

Part II, chapters three through six, focus on marijuana users.<sup>98</sup> Chapter three looks at law, policy, and authority regarding users and prohibition, expanding on such issues as prohibition of marijuana possession,<sup>99</sup> possible defenses users can raise against criminal and civil claims,<sup>100</sup> and applicable criminal and civil sanctions.<sup>101</sup> Chapter four explores laws governing marijuana users in different legalization regimes, categorizing states as medical marijuana states,<sup>102</sup> recreational marijuana states, or CBD states.<sup>103</sup> As Mikos notes, this chapter “explores who is

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

<sup>95</sup> *Id.* at 9.

<sup>96</sup> *Id.* at ix.

<sup>97</sup> See N.H. Hemp Council, Inc. v. Marshall, 203 F.3d 1, 6 (1st Cir. 2000) (holding that industrial hemp is “marijuana” even though hemp has a low concentration of the psychoactive chemical tetrahydrocannabinol (THC) since the definition of marijuana includes “all parts of the plant *Cannabis sativa*” under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802(16)).

<sup>98</sup> See MIKOS, *supra* note 6, at 9. See also *id.* at 12 fig.1.3.

<sup>99</sup> *Id.* at 9. See also State v. Paul, 436 S.W.3d 713, 713–15 (Mo. Ct. App. 2014) (holding that a defendant’s knowledge of the legality of synthetic marijuana does not have to be proved by the prosecution to sustain controlled substance conviction); Ervin v. Commonwealth, 704 S.E.2d 135, 139–40, 148–49 (Va. Ct. App. 2011) (examining criminal culpability of possession of marijuana with intent to distribute).

<sup>100</sup> See United States v. Oakland Cannabis Buyers’ Cooperative, 532 U.S. 483, 483 (2001) (holding that medical necessity is not an exception or defense to the federal prohibition on marijuana under the CSA).

<sup>101</sup> MIKOS, *supra* note 6, at 9.

<sup>102</sup> *Id.* See State v. Fry, 228 P.3d 1, 1 (Wash. 2010) (en banc) (holding that an individual must be a “qualified” patient under the Washington’s medical marijuana statute to avail himself or herself to the compassionate use affirmative defense). See also People v. Spark, 16 Cal. Rptr. 3d 840, 842 (Cal. Ct. App. 2004).

<sup>103</sup> MIKOS, *supra* note 6, at 9. See also Nick Jikomes, *CBD and the Brain: What Does it Do and What is it Good for?*, LEAFLY, <https://www.leafly.com/news/science-tech/what-does-cbd-do> (last visited Oct. 16, 2017).

Cannabidiol (CBD) is one of many cannabinoid molecules produced by *Cannabis*, second only to THC in abundance. . . .

allowed to use marijuana in each type of jurisdiction, the restrictions such jurisdictions commonly impose on lawful marijuana users . . . and the different levels of protection jurisdictions provide against search,<sup>104</sup> arrest, prosecution, and other government-imposed sanctions. . . .”<sup>105</sup> Next, chapter five focuses on the policy issues related to the regulation of marijuana use and possession by examining the debate over the health benefits and risks of marijuana use, and how these benefits and risks should influence policymaking.<sup>106</sup> Further, this chapter presents a social science framework to illustrate the effect of user regulation and the costs of regulatory policy.<sup>107</sup> Chapter six examines the influence of governmental actors in regulating marijuana users.<sup>108</sup> First, this chapter explores the federal government’s regulatory power over use and possession through constitutionally enumerated Congressional power and the protections of the Due Process Clause of the Fourteenth

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While THC is the principal psychoactive component of *Cannabis* and has certain medical uses, CBD stands out because it is both non-psychoactive and displays a broad range of potential medical applications.

*Id.*

<sup>104</sup> MIKOS, *supra* note 6, at 9. *See State v. Crocker*, 97 P.3d 93, 96 (Alaska Ct. App. 2004) (“Before a search warrant can lawfully issue, the government must establish probable cause to believe that the evidence being sought is connected to a crime. This same rule governs search warrants for all controlled substances, not just marijuana.”).

<sup>105</sup> MIKOS, *supra* note 6, at 9.

<sup>106</sup> *Id.* at 10. *See Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975).

However, given the relative insignificance of marijuana consumption as a health problem in our society at present, we do not believe that the potential harm generated by drivers under the influence of marijuana, standing alone, creates a close and substantial relationship between the public welfare and control of ingestion of marijuana or possession of it in the home for personal use. Thus we conclude that no adequate justification for the state’s intrusion into the citizen’s right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. The privacy of the individual’s home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion of a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.

*Id.*

<sup>107</sup> MIKOS, *supra* note 6, at 10.

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

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Amendment.<sup>109</sup> Next, the chapter focuses on state regulatory power over users and state authority to legalize marijuana.<sup>110</sup>

Part III, chapters seven through ten, directs its attention to marijuana suppliers, individuals that grow or distribute marijuana, and the issues of law,<sup>111</sup> policy,<sup>112</sup> and authority that arise.<sup>113</sup> Chapter seven provides the legal framework by denoting the elements and sanctions for marijuana crimes in prohibition jurisdictions, such as “the manufacture of marijuana,<sup>114</sup> distribution of marijuana,<sup>115</sup> and possession with the intent to distribute marijuana.”<sup>116</sup> Also discussed are the legal defenses available for suppliers when prosecuted for a marijuana crime.<sup>117</sup> Suppliers often face additional costs such deriving “from civil forfeiture actions,<sup>118</sup> special tax impositions, private RICO suits, and the inability to register trademarks at the federal level.”<sup>119</sup> Chapter eight focuses on suppliers in marijuana legalization

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<sup>109</sup> *Id.* (“At the federal level, the chapter focuses on the executive branch’s delegated authority to reschedule drugs under the federal Controlled Substances Act (CSA.”). *See* Gonzales v. Raich, 545 U.S. 1, 28 (2005) (“[T]he mere fact that marijuana-like virtually every other controlled substance regulated by the CSA-is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.”).

<sup>110</sup> MIKOS, *supra* note 6, at 10 (“For the states, the chapter focuses on the ability of citizens and local governments to influence state policy toward marijuana users.”). *See* City of North Charleston v. Harper, 410 S.E.2d 569, 571 (S.C. 1991) (holding that local city ordinance providing for thirty-day mandatory jail sentence for individuals guilty of simple possession violates state law and is unconstitutional as it “deprives municipal judges of discretionary authority” in sentencing).

<sup>111</sup> MIKOS, *supra* note 6, at 10. *See also id.* at 12 fig.1.3.

<sup>112</sup> *Id.* at 12 fig.1.3.

<sup>113</sup> *Id.* at 10. *See id.* at 12 fig.1.3.

<sup>114</sup> *Id.* at 10. *See* State v. Horsley, 596 P.2d 661, 662 (Utah 1979) ([“The] statutory definition of marijuana makes no distinction between ‘marijuana’ and a more potent extract from the plant. . . . Thus, under the act, marijuana was both the original substance and the substance to be manufactured, although ‘hash’ is clearly a more potent form of marijuana.”).

<sup>115</sup> MIKOS, *supra* note 6, at 10. *See also* United States v. Swiderski, 548 F.2d 445, 450 (2d Cir. 1977).

<sup>116</sup> MIKOS, *supra* note 6, at 10. *See also* State v. Kelly, 800 So. 2d 978, 982 (La. Ct. App. 2001).

<sup>117</sup> MIKOS, *supra* note 6, at 10. *See also* United States v. Rosenthal, 454 F.3d, 943, 943 (9th Cir. 2006) (holding that immunity under 21 U.S.C. § 885(d) does not apply to medical marijuana manufacturers despite California’s Compassionate Use Act).

<sup>118</sup> MIKOS, *supra* note 6, at 10. *See also* United States v. Levesque, 546 F.3d 78, 83 (1st Cir. 2008).

<sup>119</sup> MIKOS, *supra* note 6, at 10.

states, defining which actors are legally able to grow or distribute marijuana, such as users or their caregivers,<sup>120</sup> and the restrictions these jurisdictions place on marijuana growth and distribution.<sup>121</sup> Next, chapter nine focuses on marijuana suppliers, building on the foundation laid in chapter five “by exploring how various regulations directed at these suppliers are expected to affect marijuana use. The chapter also discusses the comparative costs of different supply regulations, including the net fiscal impact of state reforms.”<sup>122</sup> Finally, chapter ten examines the government’s authority over marijuana suppliers. Issues discussed in this chapter include: “the constitutionality of DOJ memoranda that discourage enforcement of the congressional marijuana ban against state-licensed marijuana suppliers”<sup>123</sup> and “the limited imposed on state authority over marijuana suppliers.”<sup>124</sup> The chapter ends discussing local government’s authority<sup>125</sup> “to resist state reforms, and in particular, to ban the local production or distribution of marijuana after a state has legalized those activities.”<sup>126</sup>

Part IV, chapters eleven through fourteen address the issues of law,<sup>127</sup> policy,<sup>128</sup> and authority<sup>129</sup> regarding third party interactions with users and suppliers.<sup>130</sup> Common third parties that interact with marijuana users and suppliers include health care professionals, lawyers, banks, school administrators, and law enforcement.<sup>131</sup> First, chapter eleven explores the potential regulations that all marijuana third parties face, such as “aiding and abetting, conspiracy, and money laundering offenses.”<sup>132</sup> The focus in chapter twelve moves to professionals, examining the law, policy, and authority issues facing physicians and attorneys.<sup>133</sup>

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<sup>120</sup> *Id.* at 10. See also *People v. Mentch*, 195 P.3d 1061, 1067 (Cal. 2008).

<sup>121</sup> MIKOS, *supra* note 6, at 10.

<sup>122</sup> *Id.*

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

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

<sup>125</sup> *Id.* at 11. See *City of Riverside v. Inland Empire Patients Health & Wellness Ctr. Inc.*, 300 P.3d 494 (Cal. 2013) (holding that city’s zoning ordinances prohibiting medical marijuana dispensaries are not preempted under California state law).

<sup>126</sup> MIKOS, *supra* note 6, at 11.

<sup>127</sup> *Id.* See *id.* at 12 fig.1.3.

<sup>128</sup> *Id.* at 11. See *id.* at 12 fig.1.3.

<sup>129</sup> *Id.* at 11. See *id.* at 12 fig.1.3.

<sup>130</sup> *Id.* at 11.

<sup>131</sup> *Id.* at 5.

<sup>132</sup> MIKOS, *supra* note 6, at 11.

<sup>133</sup> *Id.* See MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 1983).

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Physicians face issues such as the potential of being “sanctioned for recommending marijuana to their patients and how states have regulated physician recommendation practices.”<sup>134</sup> Attorneys face issues such as the type of services to provide to clients in light of marijuana’s prohibition at the federal level.<sup>135</sup> Next, chapter thirteen examines the relationship of marijuana law, policy, and authority issues surrounding business transactions.<sup>136</sup> Lastly, government officials are the focus of chapter fourteen as the law, policy, and authority issues are the subject of examination.<sup>137</sup> There is a dichotomy between the actions of federal and state government officials,<sup>138</sup> since marijuana laws differ between jurisdictions.<sup>139</sup> The federal government prohibits “possession, manufacture, and distribution of marijuana,”<sup>140</sup> whereas some states have more lenient policies regarding marijuana.<sup>141</sup> As states move toward legalization of medical and recreational use of marijuana, the following issues arise and will be addressed in the chapter:

Could state officials be prosecuted under the federal CSA for implementing state reform? Could they be held civilly liable if they *refuse* to implement such reforms? May state officials prevent federal law enforcement agents from obtaining sensitive information the states gather from marijuana users

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<sup>134</sup> MIKOS, *supra* note 6, at 11.

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

<sup>136</sup> *Id.* See *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200, 208 (Cal. 2008) (holding that California’s Compassionate Use Act “does not speak to employment law” as it provides no protection against discrimination by an employer).

<sup>137</sup> MIKOS, *supra* note 6, at 11.

<sup>138</sup> See *People v. Superior Court*, 79 Cal. Rptr. 904, 907–08 (Cal. Dist. Ct. App. 1969).

The thrust of the Fourth Amendment is not aimed solely at the police or law enforcement agencies of the government; it is a guaranty against invasion by any governmental agency of the right of privacy guaranteed therein.’ The court concluded that sound public policy requires holding that postal employees are included in the class intended to be included in the exclusionary rule insofar as they violate the law and postal regulations in opening first-class mail.

*Id.*

<sup>139</sup> MIKOS, *supra* note 6, at 11.

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

<sup>141</sup> *Id.*

and suppliers? Will state agencies lose federal funding by pursuing a softer approach toward marijuana?<sup>142</sup>

The textbook provides readers with unique features that foster class discussions and critical thinking.<sup>143</sup> The author summarizes statutes and regulations, and stresses distinctions and jurisdictional differences.<sup>144</sup> His original text also helps show the interrelation between the topics of law, policy, and authority regarding marijuana users, suppliers, and third parties because many of the topics overlap.<sup>145</sup> The inclusion of notes, questions, and excepts from primary sources, whether be it cases, governmental reports, regulations, and secondary sources prove useful for readers trying to sort through the maze of ambiguity between jurisdictional differences in marijuana law, policy, and authority, and the overarching theme of the conflict of federal and state law.<sup>146</sup>

## CONCLUSION

In light of the new Trump Administration, Mikos' *Marijuana Law, Policy, and Authority* proves to be a valuable contribution to legal scholarship as it timely coincides with the potential rollbacks of the Obama Administration's hands-off policy to state marijuana legalization as evidenced in the Cole Memo.<sup>147</sup> As Attorney General Jeff Sessions maintained: "I've never felt that we should legalize marijuana. . . . It doesn't strike me that the country would be better if it's being sold on every street corner. We do know that legalization results in greater use."<sup>148</sup> The federal public policy on marijuana prohibition enforcement remains murky as President Trump has spoken on the campaign trail to uphold state marijuana laws legalizing medical and recreational use.<sup>149</sup> The journal *Addiction* recently published a study stating that the increase in marijuana use is not caused by the expansion of medical and

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 13.

<sup>144</sup> *Id.*

<sup>145</sup> See MIKOS, *supra* note 6, at 13.

<sup>146</sup> *Id.* at 14.

<sup>147</sup> Tom Angell, Opinion, *Jeff Sessions Slams Marijuana Legalization (Again)*, FORBES (Sep. 20, 2017, 12:43 PM), <https://www.forbes.com/sites/tomangell/2017/09/20/jeff-sessions-slams-marijuana-legalization-again/#63a0076f27d1>.

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

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

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BY ROBERT A. MIKOS, PROFESSOR OF LAW, VANDERBILT  
UNIVERSITY SCHOOL OF LAW 103

recreational marijuana jurisdictions.<sup>150</sup> The study explained:

Medical and recreational marijuana policies did not have any significant association with increased marijuana use. . . . Marijuana policy liberalization over the past 20 years has certainly been associated with increased marijuana use; however, policy changes appear to have occurred in response to changing attitudes within states and to have effects on attitudes and behaviors more generally in the U.S.<sup>151</sup>

As marijuana continues to be studied and the number of legalization states rise, the future of marijuana law, policy, and authority proves to be a fascinating and evolving field of legal study. There is a demand for attorneys having requisite knowledge of the complex issues involved in marijuana law and Mikos' *Marijuana Law, Policy, and Authority* proves to be a helpful tool for practitioners to navigate the jurisdictional splits and for law students to get a practical exposure to federalism in action.

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<sup>150</sup> Tom Angell, *Study: Rise in Marijuana Use Not Caused by Legalization*, FORBES (Sep. 14, 2017, 12:07 PM), <https://www.forbes.com/sites/tomangell/2017/09/14/study-rise-in-marijuana-use-not-caused-by-legalization/#2d7301e551b7>.

<sup>151</sup> *Id.*