

CURIOUS CONSEQUENCES OF CANNABIS PROHIBITION

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INTRODUCTION

Despite compelling feelings to the contrary, humans are notoriously bad at explaining why we behave in the ways that we do. Contingencies often control human behavior outside of our awareness.¹ Essentially, our actions can lead to outcomes that maintain our behavior even when we do not know it.² The behavioral sciences have revealed that rewards of many types can alter the way that individuals behave regardless of whether they can explain that a behavior leads to a specific reward.³ These rewards consistently alter behavior in those who claim no knowledge of their existence.⁴ The way that outcomes control behavior in individuals might generalize well to the behavior of groups, and the potential for a society to hold to a policy because of rewards that the society does not articulate are worth entertaining.

Three-quarters of a century of cannabis prohibition might be one policy controlled by outcomes either that we have failed to process or that we remain unwilling to discuss. Making cannabis illegal does not appear to have achieved some of its stated goals with resounding success, especially those related to decreasing use of the plant or minimizing potential problems associated with its use.⁵ Explaining over seventy years of any behavior that has received such little obvious positive reinforcement, so few tangible rewards, seems impossible. Nevertheless, other outcomes of cannabis prohibition, particularly those that remain unstated or frequently outside of awareness, appear to reinforce the policy. These unacknowledged outcomes of prohibition might explain its persistence. These potentially rewarding results include: 1) maintaining a police presence in the lives of teens and people of color, 2) increasing the potency of the plant for those who are unlikely to suffer serious legal consequences for possessing it, and 3) ensuring opportunities for generating income

¹ Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 246–47 (1977).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ KATHERINE BECKETT & STEVE HERBERT, *THE CONSEQUENCES AND COSTS OF MARIJUANA PROHIBITION* 11 (2009), http://www.aclu-wa.org/library_files/BeckettandHerbert.pdf.

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through asset forfeiture.⁶

Cannabis prohibition has been enormously successful at achieving these unstated goals, offering a rationale for why it has endured.⁷ Increasing awareness about these potentially reinforcing outcomes can help us become more conscious about decisions related to cannabis policy. Articulating unspoken goals like these might help buttress arguments for returning decisions about cannabis policy to local jurisdictions rather than resting them in federal laws. This localized approach has several advantages: it might allow for better tailoring of laws to local conditions, provide meaningful laboratories for testing innovative ideas that might later lend themselves to adoption by other jurisdictions, and encourage policies that closely mirror the values of those smaller communities governed by the laws.

An aphorism suggests that we can all choose our own opinions but not our own facts.⁸ But attention to facts often varies with opinions. Behavioral psychology has developed a tradition of examining actions rather than words.⁹ Focusing on what people do, rather than on what they say that they do, or their reported rationales for why they do it, has helped the field progress.¹⁰ A comparable approach to analyses of cannabis policy might prove beneficial. Cannabis remains the most widely used illicit substance in the United States today.¹¹ Nearly half of all Americans report having tried the drug at least once.¹² And yet, possession and use of the drug is illegal under federal law.¹³ Few behaviors that are so ubiquitous have federal penalties.

Although the stated rationales for different cannabis policies are interesting, they often distract from clear examinations of current enforcement practices and their measured results. Indeed, the notion of measured results is worthy of examination. Unbiased summaries of these policies are probably impossible.

⁶ *Id.* at 13, 18, 29–30.

⁷ *Id.*

⁸ Margaret Sullivan, Op-Ed., *He Said, She Said, and the Truth*, N.Y. TIMES, Sept. 16, 2012, at SR12.

⁹ See Nisbett & Wilson, *supra* note 1, at 233.

¹⁰ See *id.* at 231–32.

¹¹ SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T HEALTH & HUMAN SERVS., RESULTS FROM THE 2011 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (2012), available at <http://www.samhsa.gov/data/nsduh/2k11results/nsduhresults2011.htm#5.2> [hereinafter SAMHSA].

¹² See Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use*, 5 PLoS MED. 1053, 1056 (2008).

¹³ 21 U.S.C. § 812 (2006).

Any author's choice of facts to emphasize in a summary rests on an opinion about their import. Authors with identical knowledge of identical facts could summarize them differently simply because of different estimates of their impact and relevance. This predicament has led to policy debates where each side frequently talks past the other rather than addressing comparable issues. We will argue that the variation in the perceptions of import is so vast that a single policy solution for the entire United States has become untenable. Fortunately, the framers of the Constitution foresaw that different locales might hold different values, allowing individual states to fashion their own laws and policies.¹⁴ Jurisdictions might make educated decisions about policies when they are most aware of the outcomes associated with current prohibitions.

I. OUTCOMES OF CANNABIS PROHIBITION

Opponents of prohibition frequently claim that the policy has been largely unsuccessful.¹⁵ Arguing that prohibition has decreased use of the plant meaningfully seems difficult given data from national surveys.¹⁶ Marijuana remains the most widely used illicit substance in the United States today; half of US citizens have tried it at least once.¹⁷ Prohibition also seems to have done little to keep the plant out of the hands of teens.¹⁸ The underground market is notoriously bad at requiring proof of age before purchases, even with stiff penalties for underage sales.¹⁹ High school students report that marijuana is easier to obtain than legally available alcohol.²⁰ Nevertheless, prohibition could decrease problem use even if it did not minimize availability of the plant.

Prohibition-related decreases in potential problems associated with cannabis use are difficult to measure. Few national surveys address cannabis-related problems, perhaps because of their

¹⁴ See U.S. CONST. amend. X.

¹⁵ *E.g.*, Beckett & Herbert, *supra* note 5, at 11.

¹⁶ See SAMHSA, *supra* note 11; Degenhardt et al., *supra* note 12.

¹⁷ See SAMHSA, *supra* note 11; Degenhardt et al., *supra* note 12.

¹⁸ THE NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUM. UNIV., NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE XIII: TEENS AND PARENTS (2008), <http://www.casacolumbia.org/articlefiles/380-2008%20Teen%20Survey%20Report.pdf>.

¹⁹ See *id.*

²⁰ *Id.*

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rarity in the population. Even among frequent cannabis users, the rates of problems rarely exceed 10%.²¹ The seriousness of these problems often pales in comparison to problems associated with hard drugs or licit substances like alcohol and tobacco.²² For example, recent work on marijuana problems reveals that the most prevalent troubles involved procrastination and a loss of energy.²³ Alcoholics and heroin addicts would likely look upon these problems with laughter or scorn. Notably, despite alcohol's legendary sedative effects, the most popular assessments of alcohol-related problems do not ask about procrastination or loss of energy.²⁴ Indeed, let those who have never struggled with procrastination or a loss of energy cast the first stone.

Attempts to assess problems indirectly often rely on rates of treatment for cannabis-related diagnoses, usually abuse or dependence.²⁵ But legal practices confound the idea that treatment rates serve as an index of problems, making them difficult to interpret. Some court systems provide those arrested for possession with a chance to escape other legal sanctions by entering treatment.²⁶ Thus, cannabis users who experience no negative consequences (other than a possession arrest), might find themselves in a treatment program to avoid harsher penalties.²⁷ This approach certainly seems more humane than imprisoning them, but potentially steals a treatment opportunity from someone with genuine drug problems. It also inflates any estimate of cannabis-related drug problems that relies on treatment admissions.²⁸

²¹ MITCH EARLEYWINE, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE 231 (2002).

²² *Id.*

²³ Anne M. Day et al., *Working Memory and Impulsivity Predict Marijuana-Related Problems Among Frequent Users*, 2013 DRUG & ALCOHOL DEPENDENCE 2 (2013).

²⁴ See Michael J. Bohn et al., *The Alcohol Use Disorders Identification Test (AUDIT)*, 56 J. STUD. ALCOHOL 423, 423 (1995); Melvin L. Selzer, *The Michigan Alcoholism Screening Test*, 127 AM. J. PSYCHIATRY 1653, 1653–54 (1971).

²⁵ See Alan J. Budney et al., *Marijuana Dependence and Its Treatment*, 4 ADDICTION SCI. & CLINICAL PRAC. 4, 4 (2007).

²⁶ CTR. FOR BEHAVIORAL HEALTH STATISTICS & QUALITY, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., MARIJUANA ADMISSIONS REPORTING DAILY USE AT TREATMENT ENTRY 4 (2012), http://www.samhsa.gov/data/2k12/TEDS_SR_029_Marijuana_2012/TEDS_Short_Report_029_Marijuana_2012.pdf.

²⁷ *Treatment for Marijuana Problems*, MARIJUANA POLY PROJECT FOUND., <http://www.mpp.org/assets/pdfs/library/L411-MJ-one-pager.pdf> (last visited Apr. 9, 2012).

²⁸ *Id.*

Even without altering rates of use meaningfully, prohibition might alter the price of cannabis or the size of its associated market. Fear of legal sanctions certainly appears to increase the price of the plant, though few users claim it is too expensive to obtain.²⁹ Estimating prohibition's impact on the size of the underground cannabis business is fraught with difficulty. The market is clearly large. Data from a national survey suggest that there were over 400 million purchases in 2001.³⁰ An alternative approach suggests that production in the United States that same year was somewhere between 5,000 and 16,000 metric tons or from 11,023,113 to potentially over 35,264,000 pounds.³¹ Each of these estimates rests on assumptions that could inspire arguments in many an economist or policy wonk. An intriguing set of estimates of the size of the 2009 cannabis market revealed that credible alternative assumptions could lead to estimates varying between 3,039,491,282 grams (6,700,931 pounds) and as much as 5,028,571,980 grams (11,086,103 pounds).³² Note that none of these estimates include zero.

Nevertheless, in the absence of prohibition, few would argue that these numbers would shrink. Some data suggest that decriminalization increases the chances of use,³³ other studies show mixed results.³⁴ These results include an unexpected increase in price.³⁵ A taxed and regulated market that permitted advertising would likely increase availability and use. Attempts at estimating how large the market would become, or how many Americans would become casual or problematic users, would require a crystal ball. Problems with prediction like this one usually inspire a turn to comparable changes with other drugs or close examinations of data from other countries.³⁶ But

²⁹ MERT DARYAL, PRICES, LEGALISATION AND MARIJUANA CONSUMPTION 2 (1999), <http://www.drugpolicy.org/docUploads/MDPap.pdf>.

³⁰ Jonathan P. Caulkins & Rosalie Liccario Pacula, *Marijuana Markets*, 36 J. DRUG ISSUES 173, 190 (2006).

³¹ Beau Kilmer et al., *Bringing Perspective to Illicit Markets*, 119 DRUG & ALCOHOL DEPENDENCE 153, 154 (2011).

³² *Id.* at 158.

³³ E.g., Kannika Damrongplasit et al., *Decriminalization and Marijuana Smoking Prevalence: Evidence From Australia*, 28 J. BUS. ECON. STAT. 344, 355 (2010) [hereinafter *Evidence*].

³⁴ *See id.* at 345.

³⁵ Kannika Damrongplasit & Cheng Hsiao, *Decriminalization Policy and Marijuana Smoking Prevalence*, 54 SINGAPORE ECON. REV. 621, 641 (2009) [hereinafter *Decriminalization Policy*].

³⁶ *Id.* at 622; see generally *Evidence*, *supra* note 33, at 344 (drawing inferences from the decriminalization of marijuana in Australia and how

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generalizing from data from alcohol prohibition is extremely difficult, in part because of different substances and different eras.³⁷ It is also unclear how relevant the data from other countries are, though decriminalizing amounts appropriate for personal use has created successes in the Netherlands and Portugal.³⁸ No country currently has a national, open, taxed and regulated market.³⁹ Taxes that kept the plant's price at current levels might limit increases in use, but they also have the potential to keep an underground market profitable. (Excessive taxes inspire more cheaters to try to avoid paying them.) Dramatic declines in price could increase use, but predicting the magnitude of the increase is remarkably difficult. Different assumptions, all defensible, lead to wildly different forecasts on how use would increase with a meaningful drop in price. Predictions under legalization include estimates as high as 300% increases for adults.⁴⁰ The shrinking of the cannabis market seems to be one of prohibition's touted successes, though rates of use in the United States have remained essentially unchanged over the last couple of decades.⁴¹ A couple other "successes" are worthy of examination despite their associated controversy.

II. CANNABIS ARRESTS INCREASE THE PRESENCE OF LAW ENFORCEMENT IN THE LIVES OF PEOPLE OF COLOR AND TEENS

Arrests related to cannabis use currently make up the bulk of drug-related charges in the United States. Of the 1,531,251 drug abuse violations cited in the United States in 2011, nearly one-half (757,969) were for marijuana-related crimes.⁴² Over 43% of all drug crimes that year were for marijuana possession alone (*n*

decriminalization may affect the United States).

³⁷ See *Decriminalization Policy*, *supra* note 35, at 638.

³⁸ GLENN GREENWALD, *DRUG DECRIMINALIZATION IN PORTUGAL 2* (2009).

³⁹ See *id.*

⁴⁰ *Legalization*, SMART APPROACHES TO MARIJUANA, <http://learnaboutsam.com/the-issues/legalization/> (last visited June 2, 2013).

⁴¹ Holly Nguyen & Peter Reuter, *How Risky is Marijuana Possession? Considering the Role of Age, Race, and Gender*, 58 *CRIME & DELINQ.* 879, 879 (2012).

⁴² FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, *UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES 2011* (2012), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/arrestmain_final.pdf; *Marijuana*, *DRUG WAR FACTS*, 43 n.128, <http://www.drugwarfacts.org/cms/Marijuana#Total> (last visited June 2, 2013) [hereinafter *DRUG WAR FACTS*].

= 663,032).⁴³ Most marijuana arrests stem from possession of the plant; the majority of those arrested for marijuana-related charges do not receive citations for crimes related to growing, trafficking, or distribution.⁴⁴ Moreover, the number of marijuana possession arrests in 2011 is nearly double the number of possession-related charges made in 1980, and currently exceeds the number of arrests made for violent crimes.⁴⁵ Longitudinal examinations suggest that arrests have tripled in the last twenty years while rates of cannabis use have remained essentially unchanged.⁴⁶

These numbers highlight the obvious priority that the United States places on marijuana-related violations. Cannabis remains a Schedule I controlled substance under Federal Law.⁴⁷ Placing a substance in Schedule I suggests that it has a high addictive potential and no approved medical uses.⁴⁸ These two points remain controversial. Expert ratings of cannabis's potential for addictiveness tend to rank it near caffeine's, and well below that of alcohol or tobacco.⁴⁹ Nevertheless, the argument that cannabis should be legal, simply because alcohol and tobacco are also legal, rarely receives much support. Policy analysts have made compelling and interesting arguments that alcohol is actually under-regulated,⁵⁰ emphasizing that the availability of alcohol to people who use it problematically might be curtailed. The notion that cannabis has no medical use also contradicts empirical work on its efficacy for treating nausea, loss of appetite, and pain.⁵¹ These data have inspired multiple petitions for rescheduling, including one filed in 2012; all have failed.⁵²

⁴³ DRUG WAR FACTS, *supra* note 42, at 43 n.128.

⁴⁴ *Id.* at 45 n.129.

⁴⁵ *Id.* at 43 n.128.

⁴⁶ See Nguyen & Reuter, *supra* note 41.

⁴⁷ 21 U.S.C. § 812 (2012).

⁴⁸ *Id.*

⁴⁹ Robert Gore & Mitch Earleywine, *Marijuana's Perceived Addictiveness*, in POT POLITICS 176, 176–77, 179 (Mitch Earleywine ed., 2007); David Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 LANCET 1047, 1048 (2007), available at <http://dobrochan.ru/src/pdf/1109/lancetnorway.pdf>; see also Philip J. Hilt, *Is Nicotine Addictive? It Depends on Whose Criteria You Use*, N.Y. TIMES, Aug. 2, 1994, at C (discussing the addictiveness of nicotine in relation to heroin and cocaine).

⁵⁰ MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 19, 238 (1992).

⁵¹ See EARLEYWINE, *supra* note 21, at 174–85 (discussing numerous works evaluating the effects of marijuana on pain, nausea, and loss of appetite).

⁵² See *id.* at 229–30; see, e.g., *Americans for Safe Access v. DEA*, 706 F.3d

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Given the Schedule I designation, almost anything involving marijuana carries penalties in the United States.⁵³ Possession, transportation, cultivation, sales, offering to sell, and driving under the influence all qualify.⁵⁴ Paraphernalia laws make possession of many materials associated with consumption illegal as well.⁵⁵ Enforcing these laws has costs. “Broken window”⁵⁶ style reasoning would suggest that keeping a handle on these small, cannabis-related violations should decrease the rates of more serious crimes. Data suggest otherwise, at least for laws related to cannabis prohibition.⁵⁷ Those guilty of misdemeanor possession do not appear to be the source of extensive violent acts.⁵⁸ In addition, law enforcement officers handling cannabis-related arrests can rarely fight other crimes simultaneously.⁵⁹

A classic study on this topic reveals that increases in arrests for possession actually lead to increased rates of other crimes, particularly larceny and motor vehicle theft, even when controlling for unemployment rate as an index of economic conditions.⁶⁰ Comparable results in other data sets support the idea that law enforcement resources are limited.⁶¹ Increased arrests for manufacture or sale of cannabis predict an increase in larceny in one study, even when obvious confounders like unemployment rate and population density are controlled.⁶² A broader look at drug and alcohol prohibition and homicide rates since 1900 suggests that prohibition increases murders even after consideration of potential confounders like rates of incarceration, the availability of firearms, the age composition of the population,

438, 439–40 (D.C. Cir. 2013) (arguing that marijuana be reclassified).

⁵³ EARLEYWINE, *supra* note 21, at 225.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC, Mar. 1, 1982, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> (theorizing that if a neighborhood does not fix its broken windows, the surrounding environment will continue to descend into crime, chaos, and violence).

⁵⁷ *Editorial: Why Does Research Have So Little Impact on American Drug Policy?*, 96 ADDICTION 373, 374 (2001) [hereinafter *Editorial*].

⁵⁸ *Id.*

⁵⁹ Edward M. Shepard & Paul R. Blackley, *The Impact of Marijuana Law Enforcement in an Economic Model of Crime*, 37 J. DRUG ISS. 403, 415 (2007).

⁶⁰ *Id.* at 403, 410, 411.

⁶¹ Edward M. Shepard & Paul R. Blackley, *Drug Enforcement and Crime: Recent Evidence from New York State*, 86 SOC. SCI. Q. 323, 339 (2005).

⁶² *Id.* at 331, 336.

economic circumstances, and the death penalty.⁶³ Underground markets cannot rely on law enforcement for protection, so participants might turn to homicide to protect turf. Any cop busy fingerprinting a possessor of marijuana cannot simultaneously catch a car thief or murderer.

One potential correlate of current cannabis policies involves arrest rates for possession. Although cannabis arrests are numerous, the chances of arrest for any one user per year are remarkably small, ranging from approximately 0.8% to 1.8% of users.⁶⁴ These arrests are not randomly distributed. Arrest rates in decriminalization states do not appear to be lower per capita than in areas where penalties are stiffer.⁶⁵ Arrest data from Colorado and Washington, the lone states where cannabis possession is actually legal for adults, are not yet available to assess changes since cannabis received this new legal status.⁶⁶ After these laws passed, prosecutors in both states released literally hundreds of people with misdemeanor offences.⁶⁷ Thus, legalization appears to have already helped unclog the justice system in these states. The financial benefit of this unclogging could remain hard to estimate for quite some time. They are undoubtedly more than zero.

People of color and teens are overrepresented in these arrests.⁶⁸ Assertions that the enforcement of cannabis laws are racist and ageist generally rest on data showing that the police arrest people of color and teens for cannabis possession at rates far beyond what one would predict from their rates of cannabis use.⁶⁹ That

⁶³ Jeffrey A. Miron, *Violence and U.S. Prohibitions of Drugs and Alcohol* (Nat'l Bureau of Econ. Research, Working Paper No. 6950, 1999), available at http://www.nber.org/papers/w6950.pdf?new_window=1.

⁶⁴ Nguyen & Reuter, *supra* note 41, at 879.

⁶⁵ See Rosalie L. Pacula et al., *Marijuana Decriminalization: What Does it Mean in the United States?* 4, 10, 11 (Nat'l Bureau of Econ. Research, Working Paper No. 9690, 2003), available at <http://www.nber.org/papers/w9690> (explaining the lack of differences between decriminalized and criminalized states).

⁶⁶ Adam Cohen, *Will States Lead the Way to Legalizing Marijuana Nationwide?*, TIME, Jan. 28, 2013, <http://ideas.time.com/2013/01/28/will-states-lead-the-way-to-legalizing-marijuana-nationwide/>.

⁶⁷ Jonathan Martin, *220 Marijuana Cases Dismissed in King, Pierce Counties*, SEATTLE TIMES (Nov. 9, 2012, 1:51 PM), <http://blogs.seattletimes.com/politicsnorthwest/2012/11/09/175-marijuana-prosecutions-in-king-county-dismissed-because-of-initiative-502/>.

⁶⁸ See HARRY G. LEVINE & DEBORAH PETERSON SMALL, MARIJUANA ARREST CRUSADE 4, 6, 19, 84, 104 (2008).

⁶⁹ *Id.* at 4.

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is, the groups who use the most cannabis are not the groups arrested most. For example, Levine & Small⁷⁰ emphasize the skewed nature of cannabis possession arrests in New York City. They stress several key points. Over a third of New York City's population consists of non-Hispanic Whites.⁷¹ National surveys consistently suggest that rates of cannabis use are higher among Whites than among other groups.⁷² Nevertheless, non-Hispanic Whites account for only 15% of cannabis possession arrests in New York City, with Blacks accounting for 52% (twice their presence in the population).⁷³ These rates of arrest seem obviously at odds with rates of use. New York is not alone in showing these disparities. Blacks are overrepresented among arrestees in California,⁷⁴ and Maryland.⁷⁵ Comparable findings appear in national data, where Black adolescent males are particularly overrepresented in arrests.⁷⁶

Many authors appeal to survey data related to purchases in an attempt to explain these disparate arrest rates, often in an effort to temper the suggestion of police racism.⁷⁷ Critics of the accusation of racism emphasize that these ethnic groups purchase cannabis in different locations, partially accounting for some of the variance in arrest rates.⁷⁸ People of African and Caribbean descent are more likely to buy cannabis outdoors than Caucasians (by a factor of two) or from strangers (by a factor of three).⁷⁹ They are also significantly more likely to purchase away from home.⁸⁰ Each of these practices could elevate the probability of arrest.⁸¹ Nevertheless, these data do not fully account for the racial disparity in arrests, implying that some bias might contribute to enforcement.⁸²

Arrests also co-vary with age. Citizens of New York City in their late teens and early twenties are arrested for using

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ HARRY G. LEVINE ET AL., TARGETING BLACKS FOR MARIJUANA 4, 6 (2010).

⁷⁵ Nguyen & Reuter, *supra* note 41, at 883.

⁷⁶ *Id.* at 890.

⁷⁷ Rajeev Ramchand et al., *Racial Differences in Marijuana-users' Risk of Arrest in the United States*, 84 DRUG & ALCOHOL DEPENDENCE 264, 264 (2006).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Caulkins & Pacula, *supra* note 30, at 43–45.

marijuana in public view more than their prevalence would predict.⁸³ Adolescents in Maryland are also overrepresented.⁸⁴ National data echo these findings, with fifteen to nineteen year-olds showing double the probability of arrest found in twenty to twenty-nine year-olds, despite essentially equivalent rates of use.⁸⁵ The tendency to arrest teens might seem a desirable outcome for those who hope that such an arrest might decrease the chance of problems. Nevertheless, an arrest at a young age can have particularly devastating consequences that include subsequent troubles finding employment, obtaining student loans, and other disadvantages.⁸⁶ In addition, it is unclear if minimizing experimentation with cannabis at this age decreases other problems.

National surveys of high school students assess drug use and other problem behaviors regularly.⁸⁷ Unexpected negative correlations between drug involvement and other problems appear consistently.⁸⁸ Those years when teens were most involved with drugs were the ones when they experienced fewer other problems.⁸⁹ Years with more drug involvement revealed lower rates of self-reported crimes, violent acts, property crime arrests, suicides, firearm deaths, and homicides.⁹⁰ Students also reported that they were less likely to be victims of crimes in the years when they reported more drug use.⁹¹ It is difficult to know the mechanism that might underlie these inverse relations, but eliminating drug use appears unlikely to decrease other teen problems.⁹²

⁸³ Andrew Golub et al., *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 147 (2007).

⁸⁴ See Nguyen & Reuter, *supra* note 41, at 883–84.

⁸⁵ *Id.* at 887–88 (discussing the prevalence among males).

⁸⁶ LEVINE ET AL., *supra* note 74, at 10.

⁸⁷ Mike A. Males, *What Do Student Drug Use Surveys Really Mean?*, EARTHLINK.NET (Jan. 2005), <http://home.earthlink.net/~mmales/jschlth.htm>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

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III. ARRESTS CORRELATE WITH INCREASED CANNABIS POTENCY⁹³

An additional impact of the current prohibition against cannabis involves gradual increases in its potency.⁹⁴ We do not claim that citizens have supported cannabis prohibition in a conscious and concerted effort to make the plant stronger, even if a subset of voters have both noticed and appreciated this trend. Nevertheless, concentrations of THC (tetrahydrocannabinol—the primary psychoactive component of the plant) have increased in the last forty years with arrests.⁹⁵ This increase parallels the surges in potency of alcoholic beverages under the Volstead Act,⁹⁶ and deserves special attention as an outcome of prohibition during considerations of cannabis policy.

People hide prohibited products in an effort to avoid legal sanctions. Smaller psychoactive products generally are easier to hide than larger ones. We see from the alcohol literature how prohibition laws can heighten the potency of a substance.⁹⁷ Estimates of the prevalence of alcohol use by volume and per individual during the years that the 18th Amendment was in effect in the United States remain equivocal.⁹⁸ Nevertheless, the alcohol content (i.e. potency) in an average drink likely increased significantly from pre- to post- prohibition.⁹⁹ Beer consumption was cut by two-thirds, despite a general agreement that use of alcohol remained nearly constant over the same period.¹⁰⁰ The risks inherent in both going to and owning a speakeasy meant that bootleggers were less likely to spend their efforts producing

⁹³ Portions of the following text are reprinted from the author's recent publication, EARLEYWINE, *supra* note 21.

⁹⁴ Zlatko Mehmedic et al., *Potency Trends of Δ^9 -THC and Other Cannabinoids in Confiscated Cannabis Preparations from 1993 to 2008*, 55 J. FORENSIC SCI. 1209, 1216 (2010).

⁹⁵ *Id.*; *Marijuana More Potent Than Ever*, L.A. TIMES BLOG (June 12, 2008, 5:24 PM), http://latimesblogs.latimes.com/booster_shots/2008/06/marijuana-more.html.

⁹⁶ See MARK THORNTON, CATO INST., ALCOHOL PROHIBITION WAS A FAILURE (1991), <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf>; *Volstead Act*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/632412/Volstead-Act> (last visited Apr. 10, 2013).

⁹⁷ See Thornton, *supra* note 96.

⁹⁸ See *id.*; Mark H. Moore, *Actually, Prohibition Was a Success*, N.Y. TIMES, Oct. 16, 1989, at A21.

⁹⁹ See Thornton, *supra* note 96.

¹⁰⁰ Rufus S. Lusk, *The Drinking Habit*, 163 AM. ACAD. POL. & SOC. SCI. 46, 46 (1932).

beverages with lower alcohol content, such as beer.¹⁰¹ In addition, patrons of illegal alcohol establishments, who were also risking arrest with their presence, more likely came through the doors to get intoxicated rather than for a “casual drink.”¹⁰²

Even the distribution of bootlegged alcohol promoted the production of substances with the highest potency possible.¹⁰³ Distributors needed to transport the smallest possible volume to reduce the likelihood that they would attract police. This era also saw the emergence of an interest in cocktails and mixed drinks made from hard liquor, at least in part out of a necessity to serve drinks with high alcohol content in a way that would still be palatable.¹⁰⁴ The environment of prohibition promoted heavy and rapid consumption, and a shift in preference from lighter beer to hard liquor, like whisky.¹⁰⁵ Beverages with higher alcohol content pose a greater overall risk for ill effects of use,¹⁰⁶ and the prohibition of alcohol might have increased the risk of alcohol-related problems through the unintended promotion of higher potency liquor.

Despite all these efforts during alcohol prohibition, it clearly failed to eliminate drinking. Estimates of alcohol’s negative consequences during the era of prohibition also suggest that its impact was modest at best.¹⁰⁷ Decreases in consumption might have contributed to reports of declining cirrhosis, admissions to mental hospitals for alcohol psychosis, and arrests for public intoxication,¹⁰⁸ but each of these could have declined because of simple stigmatization of alcohol. A friendly physician, coroner, or law enforcement officer might complete relevant forms with no mention of alcohol even when alcohol was involved. A forbidden-fruit effect, where prohibition essentially made alcohol consumption more desirable simply because of its illegality, might have countered any prohibition-related increases in price or decreases in availability. The tacit assumption that prohibition increased the price of alcohol also remains questionable. Bootleggers sidestepped taxes, labor laws, health and safety

¹⁰¹ See, e.g., Thornton, *supra* note 96.

¹⁰² See, e.g., *id.*

¹⁰³ *Id.*

¹⁰⁴ See Lusk, *supra* note 100, at 46–47.

¹⁰⁵ See Thornton, *supra* note 96.

¹⁰⁶ See David S. Segal & Tim Stockwell, *Low Alcohol Alternatives*, 20 INT. J. DRUG. POL. 183, 183 (2009).

¹⁰⁷ See Thornton, *supra* note 96.

¹⁰⁸ See Moore, *supra* note 98.

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regulations, and other potential contributors to expenses, potentially leaving alcohol's price unchanged.¹⁰⁹

Comparable forces might act in the cannabis market. The plant is invariably bulky.¹¹⁰ Consumers would need less of a more potent strain than a less potent strain, and less of the plant would be easier to hide. Some varieties of plants contain more THC than others.¹¹¹

For example, cannabis sativa used for industrial hemp often contains less than 1% THC.¹¹² Smoking marijuana this low in potency does not change subjective experience.¹¹³ Cannabis with less than 1% THC has the same effects as a placebo.¹¹⁴ Thus, hemp products are not psychoactive. No one will grow intoxicated from smoking the various shampoos, soaps, or clothes currently manufactured from these plants. Psychoactive strains of marijuana typically contain 2 to 5% THC, but concentrations as high as 22% have been documented.¹¹⁵ The moisture and temperature of the growing season can alter potency. Storage in hot environments can degrade the cannabinoids and lower THC content.¹¹⁶ Exposure to light also accelerates the breakdown of THC. A year of storage in a bright place can produce nearly three times the decrease in THC as a year of storage in a dark place.¹¹⁷

Many media reports suggest that cannabis has increased in potency quite dramatically in recent years.¹¹⁸ These reports have generated considerable debate. Yet, the magnitude of the increase is difficult to pinpoint. In addition, the tacit assumption that increased potency translates into greater danger from the drug may not be true. People often smoke less cannabis that is higher in potency, either by altering the size of their inhalations

¹⁰⁹ See, e.g., *id.*

¹¹⁰ *America's Habit: Drug Abuse, Drug Trafficking, & Organized Crime*, DRUGLIBRARY.ORG, <http://www.druglibrary.org/schaffer/govpubs/amhab/ahmenu.htm> (last visited Apr. 10, 2013).

¹¹¹ *Factsheets, Potency of Marijuana*, UNIV. OF WASH. ALCOHOL & DRUG ABUSE INST., <http://adai.uw.edu/marijuana/factsheets/potency.htm> (last visited Apr. 10, 2013).

¹¹² EARLEYWINE, *supra* note 21, at 128.

¹¹³ *Id.*

¹¹⁴ LYNNE ZIMMER & JOHN P. MORGAN, *MARIJUANA MYTHS, MARIJUANA FACTS* 137 (1997).

¹¹⁵ EARLEYWINE, *supra* note 21, at 128.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Roni Caryn Rabin, *Legalizing Marijuana Raises Health Concerns*, N.Y. TIMES BLOG (Jan. 7, 2013, 5:08 PM), <http://well.blogs.nytimes.com/2013/01/07/legalizing-of-marijuana-raises-health-concerns/>.

and the duration they are held¹¹⁹ or by stopping earlier in a session of ingestion.¹²⁰ Reports of a stronger plant actually began over forty years ago.¹²¹ By the middle of the 1980s, some authors suggested that marijuana's potency had increased by a factor of 100.¹²² These claims clearly suffered from exaggeration or misinformation.¹²³ Other arguments about increased potency arose from the University of Mississippi's Potency Monitoring Project.¹²⁴ This program reports the average THC content of cannabis taken in drug arrests.¹²⁵ Estimates were extremely low in the 1970s, sometimes below 1%.¹²⁶ As discussed above, cannabis with this little THC has no impact on subjective experience. The idea that a drug with no effects would increase in popularity over the years makes little sense. Thus, these estimates from the 1970s were probably poor reflections of the amount of THC in marijuana available at the time.

Investigators hypothesize that the data from the Potency Monitoring Project underestimate the true amount of THC in marijuana from the 1970s. First, the estimates arose from very few samples of seized cannabis. In some years, there were no more than fifty samples to analyze.¹²⁷ In addition, police may have stored the marijuana in hot lockers that allowed the THC to degrade rapidly.¹²⁸ Despite the small samples and poor storage, the average THC content in 1976 was 2%.¹²⁹

An alternative source of potency information, an independent

¹¹⁹ See, e.g., *NORML'S Marijuana Health Mythology*, NORML.ORG, <http://norml.org/library/health-reports/item/norml-s-marijuana-health-mythology> (last visited Apr. 16, 2013).

¹²⁰ *Id.*

¹²¹ *Factsheets, Potency of Marijuana*, *supra* note 111.

¹²² DONALD IAN MACDONALD, *DRUGS, DRINKING, AND ADOLESCENTS* 53 (2d ed. 1989).

¹²³ EARLEYWINE, *supra* note 21, at 128; see also Mehmedic et al., *supra* note 94, at 1216. "The question over the increase in potency of cannabis is complex and has evoked many opinions. The issue has been clouded somewhat by reports of 10- and 30-fold increases in cannabis potency since the 1970s." *Id.*

¹²⁴ Mehmedic et al., *supra* note 94, at 1209.

¹²⁵ *Id.*

¹²⁶ EARLEYWINE, *supra* note 21, at 128.

¹²⁷ *Id.* at 129.

¹²⁸ *Id.* (citing Tod H. Mikuriya & Michael R. Aldrich, *Cannabis 1988: Old Drug, New Dangers, the Potency Question*, 20 J. PSYCHOACTIVE DRUGS 47, 51 (1988)).

¹²⁹ EARLEYWINE, *supra* note 21, at 129 (citing M. A. ElSohly et al., *Constituents of Cannabis Sativa L. XXVI. The Delta-9-Tetrahydrocannabinol Content of Confiscated Marijuana, 1974-1983*, in MARIJUANA '84: PROCEEDINGS OF THE OXFORD SYMPOSIUM ON CANNABIS 37, 40 fig. 1 (D. J. Harvey ed., 1985)).

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laboratory in California, analyzed many more samples than the Potency Monitoring Project¹³⁰ and found a large range in THC concentration. In 1973, this laboratory tested over one hundred samples and found that marijuana had an average THC content of 1.6%.¹³¹ Later analyses ranged up to almost 8% THC.¹³² Thus, the idea that all cannabis of the 1970s had less than 1% THC seems unlikely. Ratcliffe's estimate of 1.6% may be conservative but credible;¹³³ the 1976 estimate of 2% may be closer to the truth.

Potency data from the 1980s through the middle of the 1990s suggest that THC content continued to vary dramatically from strain to strain and sample to sample.¹³⁴ With improved storage techniques and much larger samples, the Potency Monitoring Project found THC concentrations varied from 2% to almost 4%.¹³⁵ Average concentrations approached 4% THC in 1984, 1988, 1990, and 1991.¹³⁶ Trends in the rest of the 1990s showed comparable THC content, with a peak around 4.5% THC in 1997.¹³⁷ Other cannabinoids like cannabitol and cannabidiol have increased little over the years,¹³⁸ although new findings related to cannabidiol's medical uses have inspired growers to develop strains with increased concentrations of this specific cannabinoid.¹³⁹ Thus, claims of 1,000%¹⁴⁰ or 10,000%¹⁴¹ increases in marijuana potency are clearly inaccurate. A threefold elevation from approximately 1.5% in the early 1970s to 4.5% in the late 1990s may be closer to the truth. A simple doubling from an average of 2% to an average of 4% also seems plausible. Subsequent increases in the current century, however, are dramatic. An eleven-fold increase from 2% to 22% is conceivable.

¹³⁰ EARLEYWINE, *supra* note 21, at 129.

¹³¹ *Id.* at 129 (citing Bruce E. Ratcliffe, *Summary of Street Drug Results-1973*, 3 PHARMCHEM NEWSL., Mar. 1974, at 1).

¹³² *Id.* (citing D. Perry, *Street Drug Analysis and Drug Use Trends, Part II, 1969-1976*, 6 PharmChem News. 4 (1977)).

¹³³ *Id.*; see Ratcliffe, *supra* note 131 (discussing the shortcomings of the study that would suggest a conservative conclusion).

¹³⁴ EARLEYWINE, *supra* note 21, at 129.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Cf. Jared Robert Senseman, *Ole Miss Home to Medical Marijuana Lab*, USA TODAY (Dec. 28, 2012), <http://www.usatoday.com/story/news/nation/2012/12/28/medical-marijuana-lab-in-mississippi/1796475/> (discussing the availability of high-potency marijuana to medicinal users).

¹⁴⁰ EARLEYWINE, *supra* note 21, at 129.

¹⁴¹ *Id.*

Although many media reports warn that increased potency translates into greater danger, data suggest otherwise.¹⁴² The implications of a two or threefold increase in THC concentration are likely minimal. The eleven-fold increase related to current estimates would certainly mean that smaller doses are necessary to achieve desired effects. Nevertheless, cannabis with greater amounts of THC may not prove more hazardous than weaker cannabis. First, acute administration of the drug is essentially non-toxic.¹⁴³ No one has ever died from THC poisoning.¹⁴⁴ Smoking enough cannabis to ingest a lethal amount of THC may be physically, if not financially, difficult.

Estimates of a fatal dose of any drug arise from some rather gruesome animal research. Different groups of animals receive large amounts of a drug until a particular dosage kills 50% of them.¹⁴⁵ Researchers refer to the dose that is lethal for 50% of the animals as the LD 50.¹⁴⁶ Investigators then extrapolate from these data to estimate a lethal dose for humans.¹⁴⁷ The LD 50 for THC is approximately 125 milligrams for every kilogram of body weight.¹⁴⁸ Thus, a 160-pound (approximately 73-kilogram) person would need 9,125 milligrams of THC to have a 50% chance of dying. A typical marijuana cigarette weighs about one gram.¹⁴⁹ If it contains the notorious strain that is 22% THC, it would contain 220 milligrams of the cannabinoid. The smoking process eliminates at least 50% of the THC; it is lost to combustion or side stream smoke.¹⁵⁰ Thus, the 160-pound person must smoke approximately eighty-three joints to have a 50% chance of dying. Although experienced users tell many exaggerated tales about smoking large amounts of cannabis, this dosage exceeds 100 times the quantity typically consumed by the heaviest users.¹⁵¹

Given the limited fear of lethal overdose, cannabis with larger percentages of THC may actually have some benefits. Stronger cannabis may lead to smoking smaller amounts in order to

¹⁴² *Id.*

¹⁴³ *Id.* at 130.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing Gabriel G. Nahas, *Cannabis: Toxicological Properties and Epidemiological Aspects*, 145 MED. J. AUSTL. 82, 82 (1986)).

¹⁴⁹ EARLEYWINE, *supra* note 21, at 130.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 129.

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achieve desired effects. Smoking smaller quantities could provide some protection against the health problems normally associated with inhaling smoke. Smokers may take smaller, shorter puffs when using more potent marijuana.¹⁵² In turn, smoking less may decrease the amount of tars and noxious gases inhaled, limiting the risk for mouth, throat, and lung damage.¹⁵³ Obviously, avoiding smoking marijuana completely would eliminate these problems, and so eating cannabis products may have fewer negative consequences than smoking them.

The question remains: what is the impact of arrests on potency? Available arrest data from the Federal Bureau of Investigation¹⁵⁴ that also overlapped with potency data from the University of Mississippi's Potency Monitoring Project¹⁵⁵ appear in Figure 1. A lagged correlation where arrests in one year served as a predictor of potency in the next was a statistically significant $r = 0.897$, $p < .001$.¹⁵⁶ This result supports the idea that arrests in one year are associated with stronger cannabis in the next. The association alone is hardly proof of a causal link, but its large size is staggering. The result is certainly consistent with the idea that arrests motivate growers to turn to the strongest strains available. Consumers in the United States might also prefer stronger strains for multiple reasons, including the chance to keep less plant on hand. (Penalties vary with amounts.) Coincidentally, users in San Francisco prefer stronger cannabis than comparable users in Amsterdam, where possession of small amounts is decriminalized.¹⁵⁷ Thus, arrests and policy see an intriguing correlation to stronger cannabis.

¹⁵² Stephen J. Heishman et al., *Effects of Tetrahydrocannabinol Content on Marijuana Smoking Behavior, Subjective Reports, and Performance*, 34 PHARMACOLOGY BIOCHEMISTRY & BEHAV. 173, 176, 178 (1989).

¹⁵³ See Peter Matthias et al., *Effects of Varying Marijuana Potency on Deposition of Tar and Δ^9 -THC in the Lung During Smoking*, 58 PHARMACOLOGY BIOCHEMISTRY & BEHAV. 1145, 1147, 1149–50 (1997) (discussing inhalation of tar and the toxic ingredients in marijuana).

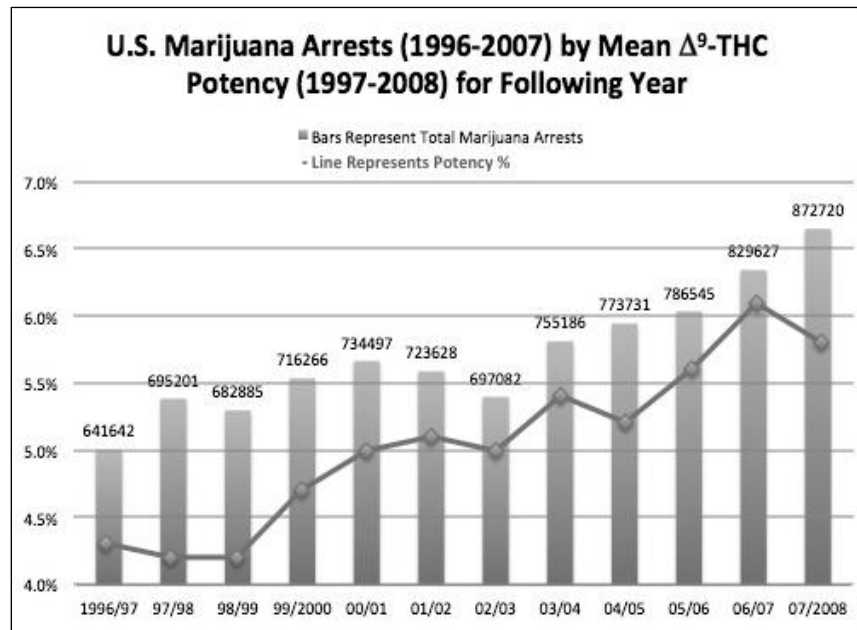
¹⁵⁴ DRUG WAR FACTS, *supra* note 42, at n.128.

¹⁵⁵ *Id.* at n.127; Mehmedic et al., *supra* note 94, at 1209, 1211.

¹⁵⁶ See DRUG WAR FACTS, *supra* note 42, at n.127–28; Mehmedic et al., *supra* note 94, at 1211.

¹⁵⁷ Craig Reinerman, *Cannabis Policies and User Practices*, 20 INT. J. DRUG POL. 28, 34 (2009).

Figure 1: Overlay Graph of U.S. Marijuana Arrests with Corresponding Subsequent Year Average THC Content of Seized Cannabis¹⁵⁸



IV. ARRESTS CONTRIBUTE TO FORFEITURE FUNDS FOR POLICE DEPARTMENTS

In addition to increasing cannabis' potency, prohibition likely contributes to opportunities for law enforcement agencies to obtain funding. In 2010, the US attorney's offices across all federal districts seized \$1,786,567,692 in assets.¹⁵⁹ Under asset forfeiture laws, prosecutors file to seize the property of accused criminals.¹⁶⁰ Any object perceived as an ill-gotten gain or a

¹⁵⁸ Bars represent total marijuana arrests for first year listed on X-axis. Total yearly arrests listed above bars. Line represents average potency of U.S. flower cannabis seized during second year listed on X-axis. Mean potency represented on Y-axis.

¹⁵⁹ U.S. DEPT OF JUSTICE, U.S. ATTORNEY'S ANNUAL STATISTICAL REPORT 31 (2010).

¹⁶⁰ *Caswell Motel Case Marks a Victory Against Federal Forfeiture Abuse*, STOPTHEDRUGWAR.ORG (Jan. 31, 2013, 9:34 AM), http://stopthedrugwar.org/chronicle/2013/jan/31/caswell_motel_case_marks_victory.

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facilitator of crime has the potential for forfeiture.¹⁶¹ Details of asset forfeiture law grow abstruse rapidly. It is difficult for the nonprofessional to glean which crimes might qualify property for forfeiture or which assets might be at risk for a given crime. For drug crimes, the sky appears to be the limit. Portions of the Controlled Substance Act emphasize that forfeiture can apply to anything of value that was exchanged, or intended to be exchanged, for controlled substances.¹⁶² In addition, property that might have facilitated an exchange, or any proceeds traceable to such an exchange, is subject to forfeiture.¹⁶³ Anything that could have been part of a drug deal or bought with associated profits can qualify.

The government can confiscate assets without any court procedures.¹⁶⁴ As one citizen involved in a traffic stop in Georgia said about his seized \$5,581, “[t]hey had guns and badges and they just took it.”¹⁶⁵ If the owner fails to contest the forfeiture, it stands.¹⁶⁶ The government can obtain the assets through a number of procedures, including civil forfeiture.¹⁶⁷ In civil forfeiture, the government asserts that the property, rather than a citizen, is guilty because of connection with a crime.¹⁶⁸ This predicament can lead to cases with odd names that involve state agencies versus amounts of cash, for example.¹⁶⁹ Parties with an interest in the property can move to defend it, but the verdict against the property can be independent of any criminal activity on the part of any person. Property stands trial on its own.¹⁷⁰ Proponents of this process might use the example of confiscating stolen artwork to return it to a museum. Proponents argue that the museum should receive its property regardless of the details of any criminal case against alleged thieves. One might hate to think that The Mona Lisa could leave The Louvre because of a

¹⁶¹ 21 U.S.C. § 881 (2006).

¹⁶² 21 U.S.C. § 881(a)(6) (2006).

¹⁶³ *Id.*

¹⁶⁴ Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment*, 38 AM. J. CRIM. L. 181, 189 (2011).

¹⁶⁵ MARIAN R. WILLIAMS ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 36 (2010).

¹⁶⁶ *Id.* at 13.

¹⁶⁷ *Id.* at 15.

¹⁶⁸ *Id.* at 9.

¹⁶⁹ *A Truck in the Dock: How the Police Can Seize Your Stuff When You Have Not Been Proven Guilty of Anything*, ECONOMIST (May 27, 2010), <http://www.economist.com/node/16219747>.

¹⁷⁰ McCaw, *supra* note 164, at 196.

botched criminal proceeding. The frequency of these types of cases involving property that obviously belongs to a given institution is difficult to guess, but the number of cases involving cash dwarfs them.¹⁷¹

This predicament, where a person's property goes on trial instead of a person, might sound quite counter to due process. These are not criminal cases, however, but civil ones. The rationale behind asset forfeiture concerns removing capital, rather than only citizens, from the underground markets associated with organized crime, money laundering, and drug sales.¹⁷² New participants easily replace imprisoned citizens involved in these markets, but generating more capital remains more difficult. Asset forfeiture allows investigators to focus on the relevant property, which does not have the rights that citizens have. Constitutional protections afforded criminal defendants do not apply to cash, cars, drugs, or houses. The standard of proof for forfeiting property is much lower. In some states, forfeiture is considered justified with only probable cause as the standard.¹⁷³ Others require a preponderance of evidence that links the property to the crime, even if the evidence is not beyond a reasonable doubt.¹⁷⁴ The property also has no right to an attorney.¹⁷⁵ Contesting asset forfeiture has the potential to link a citizen to a crime. Contesting also might prove too expensive to justify, depending on the value of the property. No one wants to spend tens of thousands of dollars to defend a couple thousand. Some citizens simply lack the funds to hire an attorney to contest the forfeiture.¹⁷⁶ Thus, approximately 80% of government forfeitures go uncontested.¹⁷⁷

Opponents of these laws emphasize that they can deprive some citizens of property without a conviction or even an arrest.¹⁷⁸ Current forfeiture laws can create curious, unspoken agreements where police confiscate property but withhold criminal charges if

¹⁷¹ WILLIAMS ET AL., *supra* note 165, at 31.

¹⁷² Alice S. Fisher, *Foreword* to U.S. DEPT OF JUSTICE, NATIONAL ASSET FORFEITURE STRATEGIC PLAN 2008–2012, at 3 (2008).

¹⁷³ WILLIAMS ET AL., *supra* note 165, at 22.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 116.

¹⁷⁶ *Id.* at 13.

¹⁷⁷ McCaw, *supra* note 164, at 190.

¹⁷⁸ *Why Do We Fear Asset Forfeiture?*, FORFEITURE ENDANGERS AM. RIGHTS FOUND., <http://www.fear.org/FEARintro.html> (last visited Apr. 6, 2013).

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a citizen does not contest the confiscation.¹⁷⁹ Citizens who actually have committed crimes might prefer losing property to a legal battle, but those who are innocent might not have the knowledge or resources to fight for their property's return. A series of flagrant cases involved police in Tenaha, Texas, where officers took motorists to jail and threatened to place their children in foster care or file criminal charges unless they relinquished all claims to their property.¹⁸⁰ Police seized property of many types, including cash and shoes, without arresting, let alone convicting, people of any crimes.¹⁸¹ The majority of the citizens who lost property appear to be people of color who did not live in the area.¹⁸² Murphy suggests that forfeitures might show racial biases comparable to those found with cannabis arrests.¹⁸³ She emphasizes that these biases need not arise from racism on the part of law enforcement officers in the field.¹⁸⁴ Some official training on the detection of suspicious behavior could lead to an overrepresentation of minorities.

Nevertheless, the relevant data on civil forfeiture are not available.¹⁸⁵ Because property, not a person, is on trial in civil asset forfeiture, there is technically no ethnicity to record. Thus, determining if some ethnic groups are overrepresented becomes impossible.

A cumbersome aspect of forfeiture laws concerns the distribution of proceeds. Proceeds from these forfeitures often go to the confiscating police stations.¹⁸⁶ Although in 2010 eight states distributed none of the forfeiture proceeds to law enforcement agencies, the remaining forty-two provided police with at least 50% of takings.¹⁸⁷ A surprising twenty-six states handed over 100% of the profits.¹⁸⁸ Even in states that do not distribute proceeds, police can obtain some of the forfeited funds. Law enforcement agencies can sidestep these state laws, especially if they are not particularly profitable, by collaborating

¹⁷⁹ McCaw, *supra* note 164, at 196.

¹⁸⁰ WILLIAMS ET AL., *supra* note 165, at 16.

¹⁸¹ WILLIAMS ET AL., *supra* note 165, at 16.

¹⁸² *Id.*

¹⁸³ Mary Murphy, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. C.L. & C.R. 77, 92–93 (2010).

¹⁸⁴ *Id.* at 93.

¹⁸⁵ *Id.* at 89.

¹⁸⁶ WILLIAMS ET AL., *supra* note 165, at 17.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

with federal agents in a program known by the curious name “equitable sharing.”¹⁸⁹ Equitable sharing arrangements allow state police to turn forfeitures over to federal law enforcement or make joint seizures with federal officers.¹⁹⁰ Federal and state agencies then share the proceeds, with up to 80% of the profits going to the state and local police.¹⁹¹ Data suggest that those states with more difficult standards of proof or lower rates of sending forfeiture profits to local police end up turning to federal sharing more often or in greater amounts.¹⁹² These funds have apparently become critical to most state enforcement budgets as well as the federal one.¹⁹³ Proponents of forfeiture emphasize that this arrangement enhances motivation and allows agencies to reinforce their own accomplishments with revenue¹⁹⁴—a point that can be particularly important, especially in difficult economic times. Critics of the approach have coined the expression “policing for profit,” and emphasize that providing perks of any kind for asset forfeiture can interfere with just and peaceful law enforcement.¹⁹⁵ These rewards can alter priorities, making proceeds more important than deterring crime. If this arrangement is a priority of the electorate, prohibition appears to have succeeded. It is difficult to estimate how much asset forfeiture money arises from marijuana-related activity alone. Illustrative data from Oregon in 2011 reveal that the state raised approximately \$1.8 million that year.¹⁹⁶ Cannabis was the most common drug involved in forfeitures in general, but no reports give monetary estimates broken down by individual drugs.¹⁹⁷

SUMMARY AND CONCLUSIONS

Over seventy-five years of cannabis prohibition have led to numerous arrests at considerable expense, but the impact on the number of users appears minimal. The total size of the

¹⁸⁹ *Id.* at 23.

¹⁹⁰ *Id.* at 25.

¹⁹¹ *Id.*

¹⁹² *Id.* at 25, 26–27.

¹⁹³ *Id.* at 26.

¹⁹⁴ *Id.* at 15, 17.

¹⁹⁵ *Id.* at 40.

¹⁹⁶ CRIMINAL JUSTICE COMM’N, ASSET FORFEITURE IN OREGON 2011: REPORT FROM THE ASSET FORFEITURE OVERSIGHT ADVISORY COMMITTEE TO THE OREGON LEGISLATURE 2 (2012), http://www.oregon.gov/CJC/docs/asset_forfeiture_in_oregon_2011.pdf.

¹⁹⁷ *Id.* at 13.

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underground cannabis market is likely smaller than it would be under other policies, but remains tremendously large, with estimates of production exceeding thirty-five million pounds.¹⁹⁸ Prohibition appears to have increased police presence in the lives of people of color and teens,¹⁹⁹ which some might view as a success while others see as a mask for racism and ageism. Prohibition has co-varied with increases in cannabis potency, much as alcohol prohibition led to a switch from lower to higher proof beverages.²⁰⁰ Prohibition has also created odd situations related to asset forfeiture, many of which involve cannabis. The way that data are gathered prevents ideal estimates of the impact of cannabis prohibition on civil asset forfeiture or potential biases related to the practice.

Recommendations based on these findings include altering approaches to gathering data on civil asset forfeiture and returning decisions about cannabis policy to local jurisdictions rather than resting them in Federal laws. Strategies for recording potential owners of property that is subject to civil forfeiture all have pros and cons. A straightforward approach might require the recording of likely owners of all such assets. Including names, gender, ethnicity and age in these records might require little time. Biases could potentially creep into this process, but it might be a reasonable start.

Several models for other laws that vary across states or local municipalities already exist. Issues as diverse as open-container laws, state monopolies for alcohol distribution, varied penalties for drunk driving, and even turning right at a red light have all varied across municipalities. Some states have sacrificed federal highway money in an effort to maintain their own policies on some of these issues.²⁰¹ The enforcement of cannabis prohibition also varies by area. Some states have essentially decriminalized possession of less than an ounce or so.²⁰² At least eighteen states and the District of Columbia have medical marijuana laws on the books, with varied availability and distribution.²⁰³ Few of these

¹⁹⁸ Kilmer et al., *supra* note 31, at 155.

¹⁹⁹ LEVINE & SMALL, *supra* note 68, at 4.

²⁰⁰ See Thornton, *supra* note 96.

²⁰¹ See Pat Oglesby, *Laws to Tax Marijuana* (June 7, 2012), <http://newtax.files.wordpress.com/2011/01/8-june-2012-taxing-marijuana.pdf>.

²⁰² *40% of U.S. to Have Decriminalized Marijuana Possession by 2014*, JOINT BLOG (Apr. 14, 2013), <http://thejointblog.com/40-of-u-s-to-have-decriminalized-or-legalized-marijuana-possession-by-2014/>.

²⁰³ *18 Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medical>

states have seen dramatic changes in negative consequences related to cannabis.²⁰⁴ Many cities and at least two counties have made possession of small amounts of marijuana a lowest law enforcement priority.²⁰⁵ Two states (Washington and Colorado) have passed laws legalizing possession for adults.²⁰⁶ These areas appear to view these laws as most appropriate for their local conditions and values. They have the potential to serve as laboratories that could generate data for other municipalities to consider as they reassess their own cannabis policies. From a combination of economic incentives and a sense of justice, the world has slouched toward progress in appreciating diversity. People are starting to respect each other a little more, regardless of age, ethnicity, gender, occupation, sexual orientation, religion, political affiliation, or education. Many argue that this greater respect benefits everyone. We approach a point where people might tolerate others who think differently. Perhaps we could tolerate people who want to use marijuana without causing harm to themselves or others. Only time will tell. The chance to let local communities make this decision themselves has meaningful advantages worthy of serious consideration.

marijuana.procon.org/view.resource.php?resourceID=000881 (last visited Apr. 10, 2013).

²⁰⁴ GLORIAM V. GUENZBURGER & SCOTT V. MASTEN, CHANGES IN DRIVER CANNABINOID PREVALENCE ASSOCIATED WITH IMPLEMENTING MEDICAL MARIJUANA LAWS IN 14 U.S. STATES 23 (2013), http://apps.dmv.ca.gov/about/profile/rd/r_d_report/Section_6/S6-242.pdf.

²⁰⁵ Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. POL'Y REV. 307, 313 (2009).

²⁰⁶ Sydney Sarachan, *Legalizing Marijuana*, PBS.ORG (Nov. 19, 2012), <http://www.pbs.org/wnet/need-to-know/ask-the-experts/ask-the-experts-legalizing-marijuana/15474/>.