


5-24-2017

Taxing Marijuana: Earmarking Tax Revenue From Legalized Marijuana

Armikka R. Bryant
Washington State Office of the Attorney General

Follow this and additional works at: <http://readingroom.law.gsu.edu/gsulr>

 Part of the [Food and Drug Law Commons](#), [Fourteenth Amendment Commons](#), [Law and Economics Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [State and Local Government Law Commons](#), [Taxation-Federal Commons](#), [Taxation-State and Local Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Bryant, Armikka R. (2017) "Taxing Marijuana: Earmarking Tax Revenue From Legalized Marijuana," *Georgia State University Law Review*: Vol. 33 : Iss. 3 , Article 3.
Available at: <http://readingroom.law.gsu.edu/gsulr/vol33/iss3/3>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact jgermann@gsu.edu.

TAXING MARIJUANA: EARMARKING TAX REVENUE FROM LEGALIZED MARIJUANA

Armikka R. Bryant*

ABSTRACT

This Article provides an overview of the legal, political, and societal landscapes in states that have legalized marijuana and imposed taxes on its sale. The article begins by summarizing the War on Drugs' origins, its fiscal expenditures, and the social policies that ultimately led to its failure. Part I briefly details the history of marijuana regulation starting from the early twentieth century up to the Obama administration's decision to permit recreational marijuana laws to stand in Washington state and Colorado.¹ Part II dives deeper into the social costs of the War on Drugs and outlines the hardships faced by those who have lost specific liberties from engaging in activities that are now legal under state law. Part III explores the measures and means states have employed to bypass federal legislation to craft their own drug policies. Part IV reviews federal enforcement of existing drug policies as the states began adopting and implementing marijuana legalization legislation in what was formerly a distinctly federal field. Part V examines marijuana's potential as a viable and reliable revenue stream for states that abide

* Armikka R. Bryant, Assistant Attorney General, Washington State Office of the Attorney General, Seattle, Washington; J.D., 2001, The University of Iowa; LL.M. (Taxation), 2004, The University of Washington; B.A., 1997, The University of Michigan; 2004, Member, Washington State Bar Association. I would like to thank Fiona Ma, Chairwoman, California State Board of Equalization, for her direction and guidance with this article. I would also like to thank Alison Malsbury, Attorney at Harris Moure in Seattle, Washington, for her valuable input and feedback with the article. The article would not have been the same without their involvement.

1. See David Remnick, *Going the Distance, On and Off the Road with Barack Obama*, NEW YORKER (Jan. 27, 2014), http://www.newyorker.com/reporting/2014/01/27/140127fa_fact_remnick (“[President Obama] said of the legalization of marijuana in Colorado and Washington that ‘it’s important for it to go forward because it’s important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished.’”).

by guidelines enunciated by the federal government. The Article concludes in Part VI by proposing socially conscious, albeit politically sensitive, earmarks for marijuana state tax revenue for developing social programs to assist those disproportionately and adversely impacted by the War on Drugs.

INTRODUCTION

At a 1971 press conference, President Richard Nixon declared a federal “War on Drugs” and named illegal drug use “public enemy number one.”² A decade and a half later, in 1986, President Ronald Reagan upped the ante by signing the federal Anti-Drug Abuse Act into law and announced his administration was “taking down the surrender flag that has flown over so many drug efforts [and] running up a battle flag.”³ The Act dedicated 1.7 billion taxpayer dollars to fight the War on Drugs.⁴ Since then, the War on Drugs has cost the federal government an estimated \$1 trillion.⁵ Although the Obama administration ceremoniously waived a white flag to end the war in 2009,⁶ less than two years later his 2011 budget requested \$15.55 billion⁷ in additional spending to continue funding Nixon- and Reagan-era drug enforcement policies.⁸ This was a 17.1 percent increase from 2008⁹ and a 3.5 percent increase from 2010.¹⁰

2. *Thirty Years of America's Drug War: A Chronology*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited Jan. 26, 2017).

3. President Ronald Reagan, *Remarks on Signing Executive Order 12368, Concerning Federal Drug Abuse Policy Functions, June 24, 1982*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=42671&st=drug+abuse&st1> (last visited Jan. 26, 2017).

4. *Timeline: America's War on Drugs*, NPR (Apr. 2, 2007, 5:56 PM), <http://www.npr.org/templates/story/story.php?storyId=9252490>.

5. GREG CAMPBELL, POT, INC.: INSIDE MEDICAL MARIJUANA, AMERICA'S MOST OUTLAW INDUSTRY xxii (2012).

6. See Gary Fields, *White House Czar Calls for End to 'War on Drugs'*, WALL ST. J. (May 14, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB124225891527617397?mg=reno64>.

7. EXEC. OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY: FY 2011 BUDGET SUMMARY 1 (2010), <https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/fy11budget.pdf>. \$10 billion alone was earmarked for law enforcement. *Id.*

8. *See id.*

9. *Id.*; see EXEC. OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY: FY 2010 BUDGET SUMMARY 13 (2009) [hereinafter FY 2010 BUDGET SUMMARY], <http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy10budget.pdf>. Of note, however, is that the drug control budget in both 2008 and 2011 was lower—in nominal and real terms—than in 2000. *See* EXEC. OFFICE

Currently, enforcing the War on Drugs' laws against marijuana distribution, possession, and use accounts for \$13.7 billion of the United States' annual drug enforcement budget.¹¹ This total represents amounts expended by both state and federal jurisdictions on investigation, arrests, prosecution, and incarceration.¹²

The battlefield of the government's costly War on Drugs is evolving. Currently, twenty-three states and the District of Columbia have enacted laws legalizing marijuana.¹³ Additionally, some states, fueled by the lure of an untapped and lucrative tax base, have gone so far as to decriminalize marijuana and impose excise taxes and retail sales taxes on its sale.¹⁴ Federal laws that continue to conflict with state legalization are creating instability and uncertainty as these states begin to institute marijuana reform.¹⁵ The potential tax revenue is also a tantalizing subsidy to finance managing the casualties of the War on Drugs.¹⁶ However, operating within the confines of unyielding federal laws that continue to classify marijuana as a Schedule I narcotic threatens to create a dramatic backdrop for a federalist showdown. Although they are unified in their cause to protect their sovereignty, govern their citizens, and enforce their laws, the legalizing states must nevertheless navigate within the

OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY: FY 2001 BUDGET SUMMARY 2 (2000), <https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/fy10budget.pdf> (estimating the FY 2000 drug control budget at \$18.45 billion—\$24.29 billion in 2012 dollars).

10. See FY 2010 BUDGET SUMMARY, *supra* note 9, at 13.

11. CAMPBELL, *supra* note 5, at 188.

12. See *id.* at 109.

13. Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Washington D.C. See *infra* note 117.

14. Janel Greiman & Stephanie E. Slaughter, *Marijuana, State Taxation, and the Risks to Practitioners Serving the Pot Culture*, 24 J. OF MULTISTATE TAX'N AND INCENTIVES 24, 27 (2014). Legislative initiatives that may depart from federal marijuana policy are currently under way in several states. Anthony Martinelli, *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>.

15. See Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 6–7 (2013).

16. *Drug War Statistics*, DRUG POLICY ALL., <http://www.drugpolicy.org/drug-war-statistics> (last visited Jan. 26, 2017).

federal Controlled Substances Act (CSA).¹⁷ This continuing battle over marijuana regulation is shaping up to be one of the most important federalist conflicts of this millennium, overshadowed only by marriage and gender equality. In addition to the obvious and substantial legal hurdles that loom, the public policy and fiscal concerns of managing the continuing fallout of the War on Drugs and the untold millions of people left in its wake remain largely unaddressed.¹⁸

17. Some commentators have proposed amending federal law and rescheduling marijuana; meanwhile, others have proposed amending and easing the CSA's federal prohibition. *See, e.g.*, Respect States' and Citizens' Rights Act of 2013, H.R. Res. 964, 113th Cong. (2013) (amending the CSA to provide that no provision of the Act shall be construed as indicating congressional intent to occupy the field or preempt state law); MARK EDDY, CONG. RESEARCH SERV., RL 33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 9 (2010), <http://fas.org/sgp/crs/misc/RL33211.pdf> (noting that beginning in 1972 the National Organization for the Reform of Marijuana Laws has petitioned the Drug Enforcement Administration to reschedule marijuana); STUART TAYLOR, JR., BROOKINGS INST., MARIJUANA POLICY AND PRESIDENTIAL LEADERSHIP: HOW TO AVOID A FEDERAL-STATE TRAIN WRECK 12 (2013) (proposing that the President create clear contractual cooperative agreements permitting state-regulated marijuana businesses to operate legally while protecting federal interests); Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 DRUG POL'Y ANALYSIS 1, 6 (2013) (proposing a system of legislatively-authorized policy waivers or cooperative agreements authorized by the executive branch that would allow states to explore new policies within their own borders); Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029, 1031 (2013) (suggesting a model based on Netherlands' marijuana policy, which would require a Congressional amendment to the CSA that would allow retail marijuana sales but continue to ban all commercial manufacturing and wholesale distribution); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009) (noting that states possess legal authority to enact permissive laws despite contrary federal policy); Mikos, *supra* note 15, at 8 (proposing that courts and lawmakers employ a narrow direct conflict preemption rule that only permits state law to be preempted when state law requires a violation of the CSA).

18. Today, about 500,000 U.S. residents are serving prison sentences for drug offenses. *A Brief History of the Drug War*, DRUG POL'Y ALL., <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> (last visited Mar. 5, 2017). This represents an increase of 1,100 percent over the total when President Ronald Reagan signed the Anti-Abuse Drug Act in the mid-1980s. MICHAEL F. WALTHER, STRATEGIC STUDIES INST., INSANITY: FOUR DECADES OF U.S. COUNTERDRUG STRATEGY 12 (2012), <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB1143.pdf>. Most of the 31-million-plus drug arrests since the beginning of the War on Drugs were for mere possession rather than distribution; marijuana comprised almost 80% of the growth in 1990's drug arrests. RYAN S. KING & MARC MAUER, SENTENCING PROJECT, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990S, 1 (2005). For example, four of five drug arrests in 2005 were for possession. MARC MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 3 (2007); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2, 4 (2010) (contending that the current mass imprisonment of African Americans is the next phase in the U.S. history of oppression, control, and subordination of African Americans, following slavery and Jim Crow laws).

I. A BRIEF HISTORY OF MARIJUANA REGULATION

Marijuana is illegal to grow, possess, and consume under federal law.¹⁹ However, this was not always true. Marijuana was legal to grow and consume in the United States until the early twentieth century.²⁰ It was actually the states, not the federal government, in the 1910s that began enacting laws to criminalize the plant.²¹ Racism and xenophobia played a central role in marijuana's criminalization²² because it was associated with migrant workers of African and Latin descent.²³ The diaspora of these workers paralleled the swath of marijuana criminalization from the West to the Northeast.²⁴ The federal government followed the states' lead and began regulating marijuana in 1937 by passing the Marijuana Tax Act (MTA).²⁵

19. Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970).

20. EDDY, *supra* note 17, at 1 (“For most of American history, growing and using marijuana was legal under both federal law and the laws of the individual states.”).

21. *See, e.g.*, RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 51–52 (1974) (charting the path of marijuana prohibition in the states).

22. *See, e.g.*, Bonnie & Whitebread, *supra* note 19, at 1011 (“From a survey of contemporary newspaper and periodical commentary we have concluded that there were three major influences [on states’ decisions to criminalize marijuana]. The most prominent was racial prejudice.”); Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 325 (2011) (“U.S. marijuana prohibition has long been motivated largely by racism.”); Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J. L. REFORM 707, 749–51 (1998) (“In 1937, Harry J. Anslinger was serving as the United States Commissioner of Narcotics. He had served in the Treasury Department where he aggressively enforced the Harrison Act and headed the Federal Bureau of Narcotics in the Treasury Department. Anslinger’s appeal to racism and hysteria was unabashed. He and other proponents of the Marijuana Tax Act argued that marijuana caused criminal and violent behavior. During the brief hearings on the Act, Anslinger stated that, “[m]arihuana [was] an addictive drug which produce[d] in its users insanity, criminality, and death.”).

23. *See, e.g.*, NAT’L COMM’N ON MARIHUANA AND DRUG ABUSE, *MARIHUANA: A SIGNAL OF MISUNDERSTANDING* 16 (1972) (“As the Mexicans spread throughout the West and immigrated to the major cities, some of them carried the marihuana habit with them. The practice also became common among the same urban populations with whom opiate use was identified.”); *id.* at 7 (“For decades, its use was mainly confined to the underprivileged socioeconomic groups in our cities and to certain insulated social groups, such as jazz musicians and artists.”).

24. *See* BONNIE & WHITEBREAD, *supra* note 21, at 51–53 (mapping the progress of marijuana prohibition from the West, through the Midwest, and to the Northeast). Interestingly, the current policy trend toward decriminalization is following a similar geographical pattern by also starting in the West. *Marijuana Law Reform Timeline*, NORML, <http://norml.org/about/item/marijuana-law-reform-timeline> (last visited Jan. 26, 2017).

25. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1956); *see also*

Before the MTA, the government actually favored the drug, but soon after its passage, marijuana was removed from *The United States Pharmacopoeia*, the list of permissible medicines approved by the federal government.²⁶ The discriminatory laws originally intended to harass minorities ultimately triumphed on a national scale.²⁷

The 1970 CSA later solidified marijuana's legal status, classifying it as a Schedule I narcotic, alongside LSD, heroin, and other nefarious substances,²⁸ because it was deemed to have a high likelihood of addiction with no safe dosage.²⁹ The CSA prohibits the

LISA N. SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R43164, STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT 3 (2014), <https://www.fas.org/sgp/crs/misc/R43164.pdf> (“Until 1937, the growth and use of marijuana was legal under federal law. The federal government unofficially banned marijuana under the Marihuana Tax Act of 1937 . . .”).

26. EDDY, *supra* note 17, at 2–3.

27. *See id.*

28. Comprehensive Drug Abuse and Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. § 812 (2012)).

29. 21 U.S.C. § 812(b)(1), (c)(c)(10) (2012); *see also* All. for Cannabis Therapeutics v. Drug Enf't Admin., 15 F.3d 1131, 1133 (D.C. Cir. 1994) (“A drug is placed in Schedule I if (1) it ‘has a high potential for abuse,’ (2) it has ‘no currently accepted medical use in treatment in the United States,’ and (3) ‘there is a lack of accepted safety for use of the drug . . . under medical supervision.’”) (quoting 21 U.S.C. § 812(b)(1) (1988)). It is debatable whether marijuana actually meets these criteria:

Congress debated whether marijuana should even be included in Schedule I. The legislative history for the CSA notes that marijuana is not a narcotic, not addictive, and does not cause violence or crime. Marijuana was retained in Schedule I only because the U.S. Assistant Secretary of Health and Scientific Affairs recommended this classification “at least until the completion of certain studies now underway.”

K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 279 (2005). The “studies now underway” referred to studies by the Shafer Commission, established by Pub. Law No. 91-513, § 601(e) (1970). *See* United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1105 (N.D. Cal. 1998). The Shafer Commission recommended decriminalizing possession and distribution of small amounts of marijuana. *Id.* (citing NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 152 (1972)). Other commentators have noted that Congress's decision to place marijuana in Schedule I when enacting the Controlled Substances Act was not supported by the scientific and medical evidence available at the time. *See, e.g.,* Matthew A. Christiansen, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL'Y REV. 229, 235 (2010) (“[An] historical examination of marijuana prohibition shows the initial prohibition was largely a byproduct of social forces present in the 1930s and was not based on scientific research.”); Christiansen, *supra* (quoting BONNIE & WHITEBREAD, *supra* note 21, at 124, 148, 174) (“[S]ocial scientific evidence was not used or was ignored as ‘the federal narcotics bureaucracy made no serious effort before the decision to seek federal legislation to find out what the drug's effects really were.’ In addition, the chief architect of the 1937 marijuana bill ‘ignored the contrary findings of every scientific inquiry which had been conducted.’ As a result, this bill ‘was tied neither to scientific study nor to enforcement need.’”). Nonetheless, the federal courts have upheld numerous refusals by the Drug Enforcement Administration (DEA) to remove marijuana from

manufacture, distribution, and possession of Schedule I narcotics and imposes criminal sentences that can extend to life in prison.³⁰ A Schedule I classification also means that any doctor who prescribes marijuana puts their Drug Enforcement Agency (DEA) license in danger.³¹ The American Medical Association (AMA) voiced its opposition to the drug's reclassification³² because it obstructs a science-based determination of marijuana's effects and makes double-blind testing virtually impossible.³³ As a result, the AMA recommends revisiting marijuana's classification for the purpose of making clinical trials permissible.³⁴ But, the U.S. Court of Appeals for the District of Columbia Circuit recently declined such a review,³⁵ and the U.S. Supreme Court affirmed federal authority to regulate marijuana.³⁶

Schedule I, most recently in *Americans for Safe Access v. Drug Enforcement Administration*, 706 F.3d 438 (D.C. Cir. 2013).

30. 21 U.S.C. § 841(b) (2012).

31. *See* *Conant v. Walters*, 309 F.3d 629, 632, 638–39 (9th Cir. 2003). The Department of Justice (DOJ), under then President Bill Clinton, threatened to take disciplinary action against doctors who recommended marijuana to patients under Proposition 215. *See id.* But, a federal court enjoined the DOJ from doing so, clearing the path for the medical marijuana law to survive and flourish. *Id.* at 639.

32. BONNIE & WHITEBREAD, *supra* note 21, at 164 (“Dr. William C. Woodward . . . appeared on behalf of the AMA to oppose the [Marijuana Tax Act]. Dr. Woodward methodically challenged the validity of each of the assumptions upon which the legislation was based.”). For a thorough discussion of the long history of marijuana's medicinal use, see LESTER GRINSPOON & JAMES B. BAKALAR, *MARIJUANA: THE FORBIDDEN MEDICINE* 3 (rev. ed. 1997).

33. The term double blind refers to “an experimental procedure in which neither the subjects nor the experimenters know which subjects are in the test and control groups during the actual course of the experiments.” *Double-Blind*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/double-blind> (last visited Jan. 26, 2017).

34. *See* AM. MED. ASS'N, REPORT 3 OF THE COUNCIL ON SCIENCE AND PUBLIC HEALTH (I-09): USE OF CANNABIS FOR MEDICINAL PURPOSES 2 (2009) (“Our AMA urges that marijuana's status as a federal Schedule I controlled substance be reviewed with the goal of facilitating the conduct of clinical research and development of cannabinoid-based medicines, and alternate delivery methods.”). Clinical research necessary to move marijuana through the Food and Drug Administration (FDA) approval process, which is required to make it available as a prescription medicine, is further stymied by limited access to marijuana. *See generally* Lindsay Stafford, *The State of Clinical Cannabis Research in the United States*, 85 *HERBALGRAM* 64 (2010) (describing the National Institute on Drug Abuse (NIDA) and the DEA's obstruction of medical marijuana research and a proposed alternate marijuana production facility at the University of Massachusetts, Amherst). Unlike any other Schedule I drug, the only legal source of marijuana for researchers in the United States is NIDA, which has broad discretion to refuse to sell its marijuana to researchers. Stafford, *supra*, at 64.

35. *Ams. for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438, 440–41 (2013); *see also supra* note 29 (providing a more detailed history of federal courts upholding the DEA's classification of marijuana as a Schedule I drug).

36. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

II. THE IMPACT OF THE WAR ON DRUGS

President Reagan's Anti-Drug Abuse Act intensified the War on Drugs by increasing spending on enforcement, which in turn targeted disenfranchised minorities—the very group the original state laws sought to persecute.³⁷ These discriminatory enforcement policies eventually defined the United States as a nation of mass imprisonment that incarcerates its citizens at the highest rate in the world.³⁸ For example, drug convictions “account[ed] for two-thirds of the rise in the federal inmate population and more than half of the [soaring state prison population] between 1985 and 2000.”³⁹ Most of the increase in the current U.S. prison population, which jumped from 300,000 to more than 2 million in less than thirty years, came from drug convictions.⁴⁰ It is estimated, marijuana alone accounts for more than 693,000 annual U.S. arrests,⁴¹ most for possession.⁴² In

37. Press Release, Am. Civil Liberties Union, ACLU Releases Crack Cocaine Report, Anti-Drug Abuse Act of 1986 Deepened Racial Inequity in Sentencing (Oct. 26, 2006), <http://www.aclu.org/drug-law-reform/aclu-releases-crack-cocaine-report-anti-drug-abuse-act-1986-deepened-racial-inequity>. The Fair Sentencing Act of 2010, signed by President Obama, reduced the disparity to 18:1. Press Release, Am. Civil Liberties Union, President Obama Signs Bill Reducing Cocaine Sentencing Disparity (Aug. 3, 2010), <http://www.aclu.org/drug-law-reform/president-obama-signs-bill-reducing-cocaine-sentencing-disparity>.

38. ALEXANDER, *supra* note 18, at 6.

39. *Id.* at 59.

40. *Id.* at 6.

41. *About Marijuana*, NORML, <http://norml.org/marijuana> (last visited Jan. 26, 2017).

42. AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 8 (2013) [hereinafter *THE WAR ON MARIJUANA*], <https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report>. New York City notoriously targets blacks and Latinos who, despite constituting about half the city population, comprised 87.6% of the 40,383 arrested in 2008 for marijuana possession. HARRY G. LEVINE, *NEW YORK CITY'S MARIJUANA ARREST CRUSADE . . . CONTINUES* 6 (2009); *see also* Robert Weisberg, *Approaches to Assessing the Effects of Marijuana Criminal Law Repeal in California*, 43 *MCGEORGE L. REV.* 1, 16 (2012) (noting that the percentage of arrests for marijuana possession in New York rose from 34.5% in 1990 to 90% in 2002). Ongoing efforts to challenge certain stop-and-frisk practices of New York City police targeting black and Latino residents resulted in a preliminary injunction. *Ligon v. City of New York*, 925 F. Supp. 2d 478, 486 (S.D.N.Y. 2013). Police in the state of Washington also arrest blacks and Latinos for marijuana possession at disproportionate rates. HARRY G. LEVINE, JON B. GETTMAN, & LOREN SIEGEL, *240,000 MARIJUANA ARRESTS: COSTS, CONSEQUENCES, AND RACIAL DISPARITIES OF POSSESSION ARRESTS IN WASHINGTON, 1986–2010*, at 3 (2012) (finding that from 2001 to 2010, despite constituting just 14% of the state population and using marijuana at lower rates than white youth, blacks and Latinos comprised 25% of those arrested in Washington for marijuana possession); *see also* JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 44 (2012) (noting that in addition to the risk factor of race, most U.S. marijuana arrests are of males and youth).

2007, state and local police “arrested 872,721 people for marijuana offenses.”⁴³ State laws are responsible for nearly every marijuana arrest in the country.⁴⁴ For instance, the approximately 900,000 marijuana arrests made at the state and local level in 2010 outnumber those made by federal officials by a ratio of 109 to 1.⁴⁵

Meanwhile, opinions towards the possession and use of marijuana are softening,⁴⁶ but the consequences of marijuana convictions remain harsh, often depriving the convicted of basic rights and denying them access to essential resources.⁴⁷ For example, a marijuana conviction could make it difficult or impossible to vote, receive a federally insured student loan, find employment, obtain housing, or even adopt a child.⁴⁸ Other basic rights that a marijuana conviction can affect include the right to receive food stamps and other welfare benefits and the right to enter some foreign nations.⁴⁹ Additionally, a conviction for marijuana cultivation, purchase, or possession could influence the outcome of a child custody case in family court or deprive an offender of federally subsidized housing.⁵⁰

43. KAYLA MORGAN, LEGALIZING MARIJUANA 72 (2011).

44. See THE WAR ON MARIJUANA, *supra* note 42, at 8.

45. *Id.* at 37. In 2010, there were 889,133 marijuana arrests at the local level. *Id.* (citing NAT’L ARCHIVE OF CRIMINAL JUSTICE DATA, UNIFORM CRIME REPORTING PROGRAM DATA: COUNTY-LEVEL DETAILED ARREST AND OFFENSE DATA (2010)). In comparison, there were only 8,117 marijuana arrests at the federal level in 2010. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 239913, FEDERAL JUSTICE STATISTICS, 2010, 8 (2013).

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

47. See generally HUMAN RIGHTS WATCH, EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES (2016).

48. *Id.* at 2, 10–12, 145–59; David P. Baugh, *The Consequences of Criminal Convictions for Misdemeanor or Felony Offenses*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 55, 61 (2011).

49. HUMAN RIGHTS WATCH, *supra* note 47, at 145–48; Baugh, *supra* note 48, at 61; 12 *Little Known Consequences of a Marijuana Conviction or Arrest*, WASH. DRUG DEF., http://washington-drug-defense.com/Marijuana_Conviction_or_Arrest (last visited Jan. 26, 2017).

50. 12 *Little Known Consequences of a Marijuana Conviction or Arrest*, *supra* note 49; see also *Alexis E. v. Patrick E.*, 90 Cal. Rptr. 3d 44, 56 (Cal. Ct. App. 2009) (finding that while the “use of medical marijuana, without more, cannot . . . bring [] the minors within the jurisdiction of the dependency court,” further facts about the parent’s marijuana use justified restrictions on his parental rights); *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo. App. 2010) (“In the absence of an evidentiary hearing, which the district court could have held . . . the record does not show that father’s use of medical marijuana represented a threat to the physical and emotional health and safety of the child, or otherwise suggested any risk of harm. Thus, father’s use of medical marijuana cannot support the trial court’s restriction on his parenting time.”); David Malleis, *The High Price of Parenting High: Medical*

These offenses remain violations of federal law, so a court could quite easily conclude that a parent convicted of these crimes is not fit to parent without supervision or that a relationship with the parent is not in the child's best interest.⁵¹ As mentioned above, a marijuana arrest also makes financing an education more difficult. In the United States, over 200,000 students "lost federal financial aid eligibility due to drug convictions."⁵² Also, if the accused pleads to a drug offense while already receiving federal student loans, the loans may be cancelled for up to year.⁵³ Proponents of legalization see these consequences of marijuana-related crimes as disproportionate to the offense.⁵⁴

III. STATE LEGALIZATION

Marijuana policy at the state level began shifting towards legalization in the mid-1990s.⁵⁵ States began adopting their own marijuana regulations,⁵⁶ which unwound federal policies for a number of reasons including: increasing popular and political support for medical marijuana's use by seriously ill patients;⁵⁷ the palpable

Marijuana and Its Effects on Child Custody Matters, 33 U. LA VERNE L. REV. 357, 357 (2012) (collecting cases in which courts "have used legal parental marijuana use, in and of itself, as probative negative evidence when deciding child custody matters"). However, some courts have held that a parent's medical marijuana use alone cannot form the basis of diminishing her parenting rights. Malleis, *supra*, at 360.

51. See Malleis, *supra* note 50, at 377 ("Medical marijuana patients who are also full or part time custodial parents of minor children have reason to fear that their marijuana use may cause them to lose custody of their children."). This fear is likely grounded in the fact that marijuana use, even in states legalizing the drug for some purposes, still carries a significant stigma due to its illegality under federal law. See *id.*

52. *Drug War Statistics*, *supra* note 16.

53. OFFICE OF NAT'L DRUG CONTROL POLICY, U.S. DEP'T OF EDUC., FAFSA FACTS, <http://www.marshall.edu/educational-opportunity-center/files/FAFSA-Facts1.pdf> (last visited Jan. 26, 2017).

54. See, e.g., Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), <http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?r=0>.

55. See Compassionate Use Act of 1996, Cal. Legis. Serv. Prop. 215 (codified at CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996)).

56. See *Marijuana Law Reform Timeline*, *supra* note 24; see also David Lamb, *Other Emotional Issues on Ballots Nationwide: Five States Are Apparently Ready to Adopt Lotteries*, L.A. TIMES (Nov. 5, 1986), http://articles.latimes.com/1986-11-05/news/mn-15354_1_lottery-initiative (reporting that Oregon was the first state "to decriminalize possession of small quantities of marijuana").

57. See, e.g., PEW RESEARCH CTR., AMERICA'S NEW DRUG POLICY LANDSCAPE 3 (2014), <http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape> ("Majorities across

futility of outlawing a substance that continued to be relatively easy to acquire; the vast amount of resources spent on enforcement;⁵⁸ and the racially disparate impact of enforcement.⁵⁹

In 1996, California voters passed Proposition 215.⁶⁰ Proposition 215 allowed medicinal use of marijuana for patients with an oral or written “recommendation” from a licensed physician.⁶¹ California doctors could keep their DEA license by essentially recommending marijuana without prescribing it.⁶² The measure, which was the first of its kind, passed by a margin of 55.6 percent to 44.4 percent.⁶³ Proposition 215’s carefully drafted language drew from Supreme Court precedent and became the blueprint other states would follow.⁶⁴ The Supreme Court case established that doctors could “discuss” or “recommend” health care options to their patients.⁶⁵ In 1998, Washington, Alaska, and Oregon, legalized medicinal marijuana, with Hawaii, Colorado, and Nevada following in 2000.⁶⁶

nearly all demographic and partisan groups say the use of marijuana should be legal, at least for medicinal use.”); Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx> (“The increasing prevalence of medical marijuana as a socially acceptable way to alleviate symptoms of diseases such as arthritis, and as a way to mitigate side effects of chemotherapy, may have also contributed to Americans’ growing support.”).

58. See, e.g., KING & MAUER, *supra* note 18, at 9–10 (“[W]e estimate that \$2.1 billion, or 2.9% of the entire law enforcement budget nationally, is spent on marijuana arrests. Of this, approximately \$430 million is spent on marijuana trafficking and \$1.7 billion on marijuana possession arrests.”).

59. See THE WAR ON MARIJUANA, *supra* note 42, at 4 (“[O]n average, a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates. Such racial disparities in marijuana possession arrests exist in all regions of the country”).

60. BILL JONES, CAL. SEC’Y OF STATE, STATEMENT OF VOTE, at xiii (1996), <http://elections.cdn.sos.ca.gov/sov/1996-general/sov-complete.pdf>; see also Compassionate Use Act of 1996, Cal. Legis. Serv. Prop. 215 (codified at CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996)).

61. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 1996).

62. See *supra* note 31.

63. JONES, *supra* note 60, at xiii.

64. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (noting that regulations on physician speech may “impinge upon the doctor-patient relationship”); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (recognizing a physician’s First Amendment right not to speak).

65. *Rust*, 500 U.S. at 200.

66. COLO. CONST. art. XVIII, § 16 (2013); ALASKA STAT. §§ 17.37.010 to .080 (2013); HAW. REV. STAT. §§ 329-121 to -128 (2013); NEV. REV. STAT. §§ 453A.010 to .240 (2013); OR. REV. STAT. § 475B.433 (2007); WASH. REV. CODE § 69.51A.010 (2007).

IV. FEDERAL OVERSIGHT AND ENFORCEMENT OF STATE LEGISLATION

During his presidential campaign, Senator Barack Obama hinted that, if elected, he might relax the nation's marijuana laws.⁶⁷ President Obama's 2008 election would prove a turning point in the movement for marijuana law reform. When his administration began, thirteen states had passed medical marijuana legislation.⁶⁸ After President Obama took office, Attorney General Eric Holder confirmed the Administration's lenient stance on marijuana would soon become federal policy.⁶⁹ The policy became clearer when Deputy Attorney General David Ogden released an official memorandum (the Ogden Memo).⁷⁰ Ogden provided his fellow U.S. Attorneys with guidance on enforcement priorities in light of the states' evolving laws:

As a general matter, pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of

67. See, e.g., Bob Egelko, *Next President Might Be Gentler on Pot Clubs*, S.F. CHRON. (May 12, 2008, 4:00 AM), <http://www.sfgate.com/health/article/Next-president-might-be-gentler-on-pot-clubs-3284500.php>; John Tierney, *Obama to Stop Raids on Marijuana Clinics*, N.Y. TIMES (May 14, 2008, 12:14 PM), <http://tierneylab.blogs.nytimes.com/2008/05/14/obama-to-stop-raids-on-marijuana-clinics>.

68. See *Marijuana Law Reform Timeline*, *supra* note 24 (showing the following states had passed medical marijuana laws: California (1996), Alaska (1998), Oregon (1998), Washington (1998), Maine (1999), Nevada (2000), Colorado (2000), Hawaii (2000), Montana (2004), Vermont (2004), Rhode Island (2006), New Mexico (2007), and Michigan (2008)).

69. See, e.g., David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensaries*, N.Y. TIMES (Mar. 18, 2009), <http://www.nytimes.com/2009/03/19/us/19holder.html> ("Attorney General Eric H. Holder Jr. on Wednesday outlined a shift in the enforcement of federal drug laws, saying the administration would effectively end the Bush administration's frequent raids on distributors of medical marijuana."); Stu Woo & Justin Scheck, *California Marijuana Dispensaries Cheer U.S. Shift on Raids*, WALL ST. J. (Mar. 9, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB123656023550966719> ("The attorney general signaled recently that states will be able to set their own medical-marijuana laws, which President Barack Obama said during his campaign that he supported. What Mr. Obama said then 'is now American policy,' Mr. Holder said.")

70. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Attorneys, Re: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

marijuana.⁷¹

The Ogden Memo contained both permissive and cautionary language.⁷² Nevertheless, many readily interpreted it as the federal government announcing a *laissez faire* enforcement policy of the CSA in states that legalized marijuana. For example, in Colorado, the number of marijuana dispensaries, which were not specifically authorized by state law, grew from a few dozen to almost a thousand.⁷³ California's largely unregulated medical marijuana industry expanded just as quickly.⁷⁴ In 2010, Attorney General Holder weighed in on California's proposed initiative, Proposition 19, which would legalize marijuana for recreational use.⁷⁵ With

71. *Id.*

72. The memorandum specifically states the following:

Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Id.

73. See, e.g., Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 89 DENV. U. L. REV. 977, 981 (2012) (citation omitted) ("While there were press reports that famously blared that there were more dispensaries than Starbucks in Denver and that there were more than 1,000 stores open state-wide, the truth is that no one knew for sure.").

74. See, e.g., John Hoeffel, *Cities, Counties No Longer Mellow About Pot Dispensaries*, L.A. TIMES (Nov. 10, 2009), <http://articles.latimes.com/2009/nov/10/local/me-pot-bans10> ("[H]undreds of medical marijuana dispensaries have opened this year in a startling rollout across California . . ."); Karl Vick, *In California, Medical Marijuana Laws Are Moving Pot into the Mainstream*, WASH. POST (Apr. 12, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/11/AR2009041100767.html> ("Los Angeles officials say applications for retail outlets surged after Feb. 26, when U.S. Attorney General Eric H. Holder Jr. announced that the Drug Enforcement Administration will no longer raid such stores.").

75. John Hoeffel, *Holder Vows Fight over Prop 19*, L.A. TIMES (Oct. 16, 2010), <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016>; see also *Feds Warn, Indict California Medical Marijuana Dispensary Operators*, KABC-TV (Oct. 7, 2011, 12:00 AM) [hereinafter *Feds Warn*], <http://abclocal.go.com/kabc/story?section=news/state&id=8383655>.

Proposition 19 leading in the polls, Holder cautioned the nation in general, and Californians specifically, that the federal government would not ignore legalized recreational marijuana in the manner in which it had tacitly permitted medical marijuana.⁷⁶ Holder's statements resulted in public support for Proposition 19 precipitously dropping and ultimately failing by a vote of 53.5 percent to 46.5 percent.⁷⁷ The following year the Department of Justice (DOJ) released a new memorandum (the Cole Memo) to the U.S. Attorneys.⁷⁸ The Cole Memo clarified that those who understood the Ogden Memo as permitting marijuana use had misread it; the memo stated in part that:

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with the resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil enforcement of federal law with respect to such conduct, including enforcement of the CSA.⁷⁹

In the fall of 2011, federal enforcement actions reinforced the administration's statements.⁸⁰ By the end of 2011, the federal

76. Hoeffel, *supra* note 75.

77. DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE 7 (2011), <http://elections.cdn.sos.ca.gov/sov/2010-general/complete-sov.pdf>.

78. Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to U.S. Attorneys, Re: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, at 2 (June 29, 2011), <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.

79. *Id.* at 2.

80. California's four U.S. Attorneys combined forces in a concerted action against California's medical marijuana industry, Montana's industry was essentially shut down by law enforcement actions,

government's reaction to the states legalizing marijuana for medical use shifted from permissive to intolerant.⁸¹ In 2012 Washington, Colorado, and Oregon responded by putting recreational use initiatives on their November ballots; two of them, Colorado's and Washington's, passed.⁸² These two states became the first to legalize marijuana for recreational use⁸³ and impose taxes on its sale.⁸⁴ The

and Colorado dispensaries within a thousand feet of a school were told they must either relocate or close their doors. *See Feds Warn, supra* note 75 (describing recent federal law enforcement actions against California marijuana dispensaries); Jamie Kelly, *Former Grizzly Pleads Not Guilty to Federal Drug Charges*, MISSOULIAN (Jan. 19, 2012), http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guilty-to-federal-drug-charges/article_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdfT4 (describing a federal raid of businesses, homes, and warehouses in Montana); *Medical Marijuana: Federal Crackdown, Similar to That in California, Begins in Colorado*, HUFFINGTON POST (Jan. 12, 2012, 4:28 PM), http://www.huffingtonpost.com/2012/01/12/medical-marijuana-federal_n_1202725.html (recounting a crackdown on medical marijuana businesses located within 1,000 feet of schools).

81. *See supra* note 80 and accompanying text.

82. SCOTT GESSLER, COLO. SEC'Y OF STATE, 2012 ABSTRACT OF VOTES CAST 145 (2012), <https://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/2000-2099/2012AbstractBook.pdf> (showing Colorado's Amendment 64 passed by a vote of 1,383,140 to 1,116,894); OR. SEC'Y OF STATE, OFFICIAL RESULTS GENERAL ELECTION (2012), <http://sos.oregon.gov/elections/Documents/results/results-11-2012.pdf> (showing Oregon's Measure 80 failed by a vote of 810,538 to 923,071); *November 06, 2012 General Election Results*, WASH. SEC'Y OF STATE, http://results.vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana_ByCounty.html (last updated Nov. 27, 2012, 4:55 PM) (showing Washington's Measure No. 502 passed by a vote of 1,724,209 to 1,371,235).

83. *See, e.g.*, Keith Coffman & Nicole Neroulias, *Colorado, Washington First States to Legalize Recreational Pot*, REUTERS (Nov. 7, 2012, 4:43 AM), <http://www.reuters.com/article/2012/11/07/us-usa-marijuana-legalization-idUSBRE8A602D20121107>; *see also* GESSLER, *supra* note 82, at 145; *November 06, 2012 General Election Results, supra* note 82. According to constitutional law scholar Erwin Chemerinsky, "In contrast to 2010, the Department of Justice made no effort to prevent the passage of the legalization initiatives considered by the states in 2012." Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 88 n.53 (2015).

84. Chemerinsky described the two initiatives as "similar; they immediately repealed criminal penalties for possession of small amounts of marijuana and instructed their legislatures to implement a regulatory scheme for the taxation and regulation of recreational marijuana production and sale." Chemerinsky, *supra* note 83, at 88–89. He explains the provisions of the newly adopted initiatives in detail:

Colorado's Amendment 64 amends the state constitution to allow adults older than twenty-one years of age to possess, use, display, purchase, and transport up to one ounce of marijuana; however, the use of marijuana in public remains prohibited. The measure allows adults to grow their own marijuana, to share marijuana with other adults over twenty-one years old, and to purchase marijuana from a licensed retail marijuana store. It permits adults twenty-one years of age and older to grow up to six marijuana plants, of which three or fewer are mature, flowering plants, and to harvest the marijuana from the plants, provided they adhere to strict home cultivation requirements. Amendment 64 also requires the Colorado Department of Revenue (DOR) to adopt regulations concerning licensing and security requirements for marijuana establishments, the prevention of marijuana sales to underage persons, labeling requirements for marijuana

nation's collective attention immediately turned towards the DOJ, anticipating a swift response.⁸⁵ After a prolonged period of silence, the response that came surprised many.⁸⁶ The DOJ allowed Colorado and Washington State to implement their newly passed initiatives.⁸⁷ And, in late 2013, Deputy Attorney James M. Cole issued another memorandum (Cole Memo II) on behalf of the DOJ.⁸⁸ Cole Memo II identified eight enforcement priorities to help state policymakers stay off the federal government's radar.⁸⁹ In effect, Cole Memo II announced that the DOJ would not prioritize federal marijuana law enforcement in states that passed their own marijuana laws.⁹⁰ This

products, health and safety standards for marijuana manufacturing, advertising restrictions, and civil penalties for violations. The DOR is required to issue licenses and renewals for marijuana cultivation, product manufacturing, testing facilities, and retail stores. In addition, this measure requires an excise tax on marijuana, which will generally be collected at the wholesale level and passed on to consumers in the retail price. Marijuana cultivation facilities will pay the excise tax when selling marijuana to either marijuana product manufacturing facilities or to retail marijuana stores. Similarly, Washington's I-502 removed state civil and criminal prohibitions against persons over twenty-one years of age who grow, manufacture, and distribute marijuana in a manner consistent with the state marijuana licensing and regulatory system. It legalizes, under state law, the purchase and possession of limited amounts of marijuana by persons over twenty-one years old. However, it remains illegal for persons under twenty-one years old to grow, sell, or possess marijuana, and for anyone to sell products containing marijuana to a person under twenty-one years old. Proper licenses are necessary in order to legally grow and distribute marijuana under state law. Separate licenses are available for production/cultivation, wholesale distribution, and retail sales. I-502 also places limits on marijuana advertising and mandates regular quality testing of marijuana products. An excise tax is placed on all sales of marijuana in the amount of 25 percent of the selling price, which is collected at each level of production and distribution. In addition, the measure specifies how the state may spend these tax revenues. Finally, the measure amends the law to prohibit driving under the influence of marijuana.

Id. at 89 n.54 (citations omitted).

85. See Jacob Sullum, *Colorado and Washington Have Legalized Marijuana. What Now?*, REASON.COM (Nov. 7, 2012, 12:52 AM), <http://reason.com/blog/2012/11/07/colorado-and-washington-have-legalized-m>.

86. See 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-bdc09410972_story.html?utm_term=.e2cbc5d827ef.

87. See Remnick, *supra* note 1.

88. Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to all U.S. Attorneys, Re: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) [hereinafter Cole Memo II], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

89. *Id.* at 1–2.

90. See *id.* at 2–3.

pronouncement implied that the DOJ would forego enforcing its stricter marijuana laws against those states that complied with the DOJ's priorities.⁹¹ This new memorandum stressed eight priorities that drive federal marijuana enforcement policy.⁹² Those priorities are:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and

91. See Chemerinsky, *supra* note 83, at 77–78; see also Dennis, *supra* note 86; John Ingold, *Federal Government Won't Block Colorado Marijuana Legalization*, DENVER POST (Aug. 29, 2013, 5:33 AM), <http://www.denverpost.com/2013/08/29/federal-government-wont-block-colorado-marijuana-legalization/>; Steven Nelson, *DOJ: Marijuana Stores Can Open in Colorado and Washington*, U.S. NEWS (Aug. 29, 2013, 9:08 AM), <https://www.usnews.com/news/newsgram/articles/2013/08/29/doj-marijuana-stores-can-open-in-colorado-and-washington>; Ashley Southall & Jack Healy, *U.S. Won't Sue to Reverse States' Legalization of Marijuana*, N.Y. TIMES (Aug. 29, 2013), <http://www.nytimes.com/2013/08/30/us/politics/us-says-it-wont-sue-to-undo-state-marijuana-laws.html>. Cole Memo II warns that the federal government will enforce the CSA in those states that do not create a strict regulatory framework. Cole Memo II, *supra* note 88, at 2. California came under scrutiny due to its lack of a statewide regulatory framework. Timothy M. Phelps, *California Needs Stronger Marijuana Regulation, Federal Official Says*, L.A. TIMES (Oct. 16, 2014, 7:10 PM), <http://www.latimes.com/local/la-me-attorney-general-marijuana-20141017-story.html>. Because California had not enacted statewide regulations “leaving counties and cities to create a hodgepodge of rules and protections,” Deputy Attorney Cole warned, “If you don’t want us prosecuting [marijuana users] in your state, then get your regulatory act together.” *Id.*

92. See Cole Memo II, *supra* note 88, at 1–2.

8. Preventing marijuana possession or use on federal property.⁹³

The memorandum went on to affirm that states that established strict compliance with the eight priorities would not face federal interference.⁹⁴ This position leaves the states free to raise revenue by imposing taxes on marijuana sold for both medicinal and recreational use.⁹⁵ The punishments discussed above in Part III now appear even less logical given that Colorado, Washington, and Alaska are embracing marijuana as a mainstream commodity to boost their respective general funds. It would seem that the consequences for purchasing, possessing, and using the drug should be lessened considerably or removed altogether. Indeed, the City of Philadelphia decriminalized recreational marijuana while reducing the penalty for possession of thirty grams or less to a civil offense.⁹⁶ Through this policy, Philadelphia citizens arrested under these laws can avoid a criminal record, leave their job prospects unencumbered, obtain student loans, and even join the armed forces.⁹⁷

V. MARIJUANA AS A SOURCE OF STATE TAX REVENUE

A. Excise Taxes Imposed on Marijuana

Marijuana has been the most valuable cash crop in the United States for quite some time.⁹⁸ Its value is worth an estimated \$35 billion, which is more than hay, soybeans, and corn.⁹⁹ It has immense

93. *Id.*

94. TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES 25 (2014), <http://www.fas.org/sgp/crs/misc/R43034.pdf>.

95. *See supra* note 84.

96. *Relaxed Marijuana Law in Effect in Philly*, NBC10 NEWS (Oct. 20, 2014), <http://www.nbcphiladelphia.com/news/politics/Relaxed-Marijuana-Law-in-Effect-in-Philly-Monday-279703742.html>. Although Philadelphia did not legalize marijuana, it downgraded offenses to a civil infraction. *See id.*

97. *Id.*

98. CAMPBELL, *supra* note 5, at xxiii.

99. *Id.* Some argue that legalizing and taxing cannabis may not generate enough revenue to cover greater social costs, including increased health care, lost work productivity, crime, and other expenditures. *See id.* at 188. It is claimed that total illicit drug use already accounts for \$180 billion in social costs, and that alcohol and tobacco do not generate enough revenue to offset their social costs. *Id.*

revenue potential for enterprising business owners and state and local governments. To that end, in 2012, Colorado and Washington both passed initiatives that impose taxes on recreational marijuana.¹⁰⁰ Colorado imposes a 2.9% sales tax on all retail and medical marijuana sales and a 10% retail marijuana special sales tax.¹⁰¹ During the 2014–2015 fiscal year, the taxes imposed on recreational and medical marijuana sales in Colorado raised more than \$43 million in retail sales tax and excise tax revenue.¹⁰²

Alaska, Colorado, Oregon, and Washington currently impose excise taxes on the sale of recreational marijuana.¹⁰³ Only Colorado, Oregon, and Washington earmark taxes for allocation to specific dedicated funds.¹⁰⁴ In 2014, Colorado Governor John Hickenlooper stated that “combined sales from both legal medical and recreational marijuana in the state will [approach] one billion dollars in the next fiscal year” and projected sales will result in an estimated \$134 million in taxes and fees.¹⁰⁵ Washington imposes an excise tax of 37% on all taxable sales of marijuana, marijuana concentrates, useable marijuana, and marijuana-infused products.¹⁰⁶ For fiscal year 2016, sales in the state grossed over \$970 million, resulting in over \$185 million in tax revenue.¹⁰⁷

100. COLO. CONST. art. XVIII, § 16 (2012); WASH. REV. CODE § 69.50.345 (West 2013).

101. *Marijuana Tax Data*, COLO. DEP’T OF REVENUE, <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> (last visited Mar. 3, 2017).

102. Tanya Basu, *Colorado Raised More Tax Revenue from Marijuana Than from Alcohol*, TIME (Sept. 16, 2015), <http://time.com/4037604/colorado-marijuana-tax-revenue>; see also *Marijuana Tax Data*, *supra* note 101.

103. JOSEPH HENCHMAN & MORGAN SCARBORO, TAX FOUND., MARIJUANA LEGALIZATION AND TAXES: LESSONS FOR OTHER STATES FROM COLORADO AND WASHINGTON 2, 3 (2016), <http://taxfoundation.org/article/marijuana-legalization-and-taxes-lessons-other-states-colorado-and-washington>.

104. See *supra* notes 140–158 and accompanying text; see also *Marijuana Tax*, OR. DEP’T OF REVENUE, https://www.oregon.gov/DOR/press/Documents/marijuana_fact_sheet.pdf (last visited Mar. 3, 2017); Alicia Wallace, *Everybody Wants a Piece of the Pot Tax Pie. What’s Plan for State Spending?*, CANNABIST (Nov. 8, 2016, 6:13 AM), <http://www.thecannabist.co/2016/11/08/pot-tax-election-2016-spend-marijuana-revenue/66902/>.

105. Matt Ferner, *Colorado Recreational Weed Sales Top \$14 Million in First Month*, HUFFINGTON POST: BUSINESS (Mar. 10, 2014, 6:03 PM), http://www.huffingtonpost.com/2014/03/10/colorado-marijuana-tax-revenue_n_4936223.html.

106. WASH. STATE DEP’T. OF REVENUE, MARIJUANA PRODUCERS FACT SHEET (2016), http://dor.wa.gov/docs/pubs/marijuana/fs_i-502_marijuanaproducers.pdf.

107. See WASH. STATE LIQUOR AND CANNABIS BD., WEEKLY MARIJUANA REPORT, <http://lcb.wa.gov/marj/dashboard> (last visited Jan. 26, 2017).

Medical marijuana businesses are also subject to fees and excise taxes in Washington, D.C. and in the states of New York, Illinois, Nevada, and Rhode Island. New York imposes a seven percent excise tax on the gross receipts from the sale of medical marijuana by a registered medical marijuana organization to a certified patient or caregiver.¹⁰⁸ Illinois imposes a seven percent cultivation privilege tax that is measured by the weight of marijuana sold,¹⁰⁹ and dispensaries are also subject to a gross receipts tax.¹¹⁰ Nevada's two percent excise tax¹¹¹ is imposed on wholesale sales and retail sales of medical marijuana.¹¹² Rhode Island imposes a four percent "Compassion Center Surcharge" on marijuana dispensary profits.¹¹³ Last, the District of Columbia imposes a six percent gross receipts, or "excise" tax on all medical marijuana businesses.¹¹⁴

B. Retail Sales Tax and Use Tax Revenue from Medical Marijuana

The tax rates imposed on medical marijuana sales are not as burdensome as the excise taxes imposed on recreational marijuana.¹¹⁵ However, unless specifically exempt, medical marijuana is usually subject to retail sales tax.¹¹⁶ Currently, twenty-three states, the District of Columbia, and Guam regulate the use of marijuana for medical purposes.¹¹⁷ Of the twenty-three states that permit medical

108. N.Y. TAX LAW § 490(2) (McKinney 2014). Businesses subject to the tax are explicitly prohibited from identifying this charge as a separate line item on receipts provided to their customers, presumably in an attempt to force marijuana sellers to bear the burden of the tax. *Id.*

109. 410 ILL. COMP. STAT. ANN. 130/200(a) (West 2014).

110. 35 ILL. COMP. STAT. ANN. 120/2-10 (West 2015).

111. NEV. REV. STAT. ANN. § 372A.290(1)-(2) (West 2014).

112. *Id.* at § 372A.290(3); *see also Medical Marijuana Tax*, STATE OF NEV. DEP'T OF TAXATION, <https://tax.nv.gov/Forms/MMT/> (last visited Jan. 27, 2017).

113. 44 R.I. GEN. LAWS ANN. § 44-67-3 (West 2016).

114. D.C. Code Ann. § 47-2002(a)(7)(A) (West 2017).

115. HENCHMAN & SCARBORO, *supra* note 103, at 1.

116. *See, e.g., Greiman & Slaughter, supra* note 14, at 30.

117. ALASKA STAT. §§ 17.37.010 to .080 (2015); ARIZ. ADMIN. CODE §§ R9-17-101 to -323 (2016); CAL. HEALTH & SAFETY CODE §§ 11362.7 to .83 (West 2016); COLO. CONST. art. XVIII, § 14; CONN. GEN. STAT. ANN. §§ 21a-408 to -408(q) (West 2016); DEL. CODE ANN. tit. 16, §§ 4901A-4928A (2016); D.C. Code Ann. §§ 7-1671.01 to .13 (West 2017); 10 GUAM CODE ANN. §§ 122501-122507 (2016); HAW. REV. STAT. §§ 329-121 to -131 (2014); 410 ILL. COMP. STAT. ANN. 130/1 to 130/999 (West 2017); ME. STAT. tit. 22, § 2421 (2016); MD. CODE ANN., HEALTH-GEN. §§ 13-3301 to -3316 (West 2015); MASS. GEN. LAWS ANN. ch. 94C App., § 1-1 (West 2016); MICH. COMP. LAWS §§ 333.26421 to .26430 (2016); MINN. STAT. ANN. § 152.21 (West 2016); MONT. CODE ANN.

marijuana, fourteen of them impose some form of retail sales tax.¹¹⁸ In addition to retail taxes, medical marijuana patients pay registration fees.¹¹⁹ Generally, after paying a registration fee, registrants receive a card permitting them to purchase medical marijuana at retail.¹²⁰ In addition to fees and taxes from registered buyers, medical marijuana dispensaries must typically pay annual fees to register with the state.¹²¹ The fees vary drastically from state to state; for example, the

§ 50-46-301 (West 2016); NEV. REV. STAT. ANN. § 372A.290 (West 2015); N.H. REV. STAT. ANN. §§ 126-X:2 to -X:11 (2016), N.J. STAT. ANN. §§ 24:6I-1 to -16 (West 2016); N.M. CODE R. § 7.34.3.2 (2016); N.Y. PUB. HEALTH LAW § 3362 (McKinney 2014); OR. REV. STAT. ANN. §§ 475B.400 to .525 (West 2016); 21 R.I. GEN. LAWS ANN. §§ 21-28.6-1 to -17 (West 2016); VT. STAT. ANN. tit 18, §§ 4472–4474m (2016); WASH. REV. CODE ANN. § 69.51A.005 (2015).

118. CAL. BUS. & PROF. CODE § 19348 (West 2016); COLO. REV. STAT. ANN. §§ 39-28.8-301 to -308 (West 2016); CONN. GEN. STAT. ANN. § 12-651 (West 2016); HAW. REV. STAT. § 329-123(b) (2014); 410 ILL. COMP. STAT. ANN. 130/200 (West 2016); ME. REV. STAT. ANN. tit. 36, § 1760(5) (2016); MASS. GEN. LAWS ANN. ch. 64N, § 3 (West 2016); MICH. COMP. LAWS ANN. § 333.27601 (West 2016); MINN. STAT. ANN. § 297D.08 (West 2016); NEV. REV. STAT. ANN. § 372A.290 (West 2015); N.J. STAT. ANN. § 54:32B-3 (West 2016); N.Y. TAX LAW § 490(2) (McKinney 2016); 21 R.I. GEN. LAWS § 21-28.6-4 (2016); VT. STAT. ANN. Tit 18, § 4474(k) (2016); Transaction Privilege Tax Upon Medical Marijuana Sales, Op. Ariz. Att’y Gen. No. I11-004 (July 7, 2011), 2011 WL 2940584.

119. ARIZ. ADMIN. CODE § R9-17-102(A)–(B) (2016); COLO. CODE REGS. § 1006-2:7 (2016); CONN. AGENCIES REGS. § 21a-408-28(1) (2016); D.C. Mun. Regs. tit. 22-C, §§ 1300.1–1300.2 (2016); 16 DEL. ADMIN. CODE § 4470-3.1 (2016); Guam Pub. L. 32-134, § 122407(a)(9) (2016); ILL. ADMIN. CODE tit. 77, § 946.210 (2016); 801 MASS. CODE REGS. 4.02 (2016); MICH. ADMIN. CODE r. 333.111 (2016); MINN. STAT. ANN. § 152.35 (West 2016); NEV. ADMIN. CODE § 453A.140 (2016); N.H. REV. STAT. ANN. § 126-X:4(I)(b) (2016); N.J. ADMIN. CODE § 8:64-2.1 (2016); N.M. CODE R. § 7.34.4.8(V)(4) (LexisNexis 2016); N.Y. PUB. HEALTH LAW § 3363(2)(f) (McKinney 2016); OR. ADMIN. R. 333-008-0021 (2016); VT. STAT. ANN. tit. 18, § 4474a (West 2016); WASH. REV. CODE ANN. § 69.51A.230(10)(a) (2015).

120. CONN. GEN. STAT. ANN. § 21a-408d (West 2016); D.C. Code Ann. § 7-1671.05(1)(A) (West 2017); DEL. CODE ANN. tit. 16, § 4903A (West 2015); Guam Pub. L. 32-134, § 122407 (2014); 410 ILL. COMP. STAT. ANN. 130/55 (West 2016); ME. REV. STAT. ANN. tit. 22, § 2425 (2016); MD. CODE ANN., HEALTH–GEN. § 13-3313 (West 2016); MINN. STAT. ANN. § 152.30 (West 2016); N.H. REV. STAT. ANN. § 126-X:2 (2016); N.J. STAT. ANN. § 24:6I-4 (West 2016); N.M. STAT. ANN. § 26-2B-4 (West 2016); N.Y. PUB. HEALTH LAW § 3362(1) (McKinney 2016); WASH. REV. CODE § 69.51A.040 (2016). Although, some patients are permitted to grow marijuana consumed for medical use in a home or collective garden. See ARIZ. REV. STAT. ANN. § 36-2804.02(f) (2016); COLO. REV. STAT. ANN. § 25-1.5-106(8.5) (West 2016); MASS. GEN. LAWS ANN. ch. 94C, § 1-11 (West 2016); NEV. REV. STAT. ANN. § 453A.200(6) (West 2015); OR. REV. STAT. ANN. § 475B.428 (West 2016); 21 R.I. GEN. LAWS ANN. § 21-28.6-4 (West 2016); VT. STAT. ANN. tit. 18, § 4474e(a)(2) (2014).

121. ARIZ. ADMIN. CODE § R9-17-102(A) (2016); COLO. CODE REGS. §§ 212-1:1.203, .209 (2016); CONN. AGENCIES REGS. § 21a-408-28(4)–(7) (2016); D.C. MUN. REGS. tit. 22-C, § 5104.3 (2017); 16 DEL. ADMIN. CODE § 4470-7.10.2.1 (2016); Guam Pub. L. 32-134, § 122407(a)(5) (2014); ILL. ADMIN. CODE tit. 68, § 1290.80(b)(1) (2014); MD. CODE ANN., HEALTH–GEN. § 13-3307(b)(1), (d) (West 2015); 105 MASS. CODE REGS. 725.100(E)(1) (2013); NEV. REV. STAT. ANN. § 453A.344 (West 2015); N.H. REV. STAT. ANN. § 126-X:7(IV), (V) (2016); N.J. ADMIN. CODE § 8:64-7.10 (2016) (describing \$20,000 application fee); N.M. CODE R. § 7.34.4.8(V)(2) (LexisNexis 2016); N.Y. PUB. HEALTH LAW § 3365(3)(c) (West 2016); OR. ADMIN. R. 333-008-1030(2) (2016); 21 R.I. GEN. LAWS

yearly dispensary registration fee in Arizona is \$1,000, but in Massachusetts, the fee can be up to \$50,000.¹²² Some states also impose fees when a dispensary moves locations,¹²³ expands, changes its name, conducts mandated background checks,¹²⁴ or registers employees related to the dispensary.¹²⁵ In addition to fees, revenue also comes in from fines.¹²⁶ For example, Colorado dispensaries are subject to a ten percent penalty for failure to electronically pay federal withholding taxes.¹²⁷

C. States that do not Impose Taxes on Marijuana Sales

Not all states are interested in raising revenue from taxing marijuana sales. Some states even limit the number of dispensaries operating within the state,¹²⁸ restrict their choice of entity, or require

§ 21-28.6-12(d)(2)(1) (West 2016); VT. STAT. ANN. tit. 18, § 4474f(g)(4) (West 2016); WASH. ADMIN. CODE § 314-55-079(5) (2016).

122. Compare ARIZ. ADMIN. CODE § R9-17-102(A)(2) (2016), with 801 MASS. CODE REGS. 4.02 (2016).

123. See *supra* note 121.

124. COLO. CODE REGS. § 212-1:1.210 (2016); 410 ILL. COMP. STAT. ANN. 130/95 (West 2016); ME. REV. STAT. ANN. tit. 22, § 2425(12)(F) (2016); MD. CODE REGS. 10.62.25.09 (2016); MD. CODE REGS. 10.62.35.01 (2016); 801 MASS. CODE REGS. 4.02 (2016); MINN. STAT. ANN. § 152.29 (West 2016) (medical cannabis manufacturers' employees must submit to a background check); N.J. ADMIN. CODE § 8:64-7.1(b)(2)(viii) (2016); N.M. CODE R. § 7.34.4.8(H)(1) (LexisNexis 2016); 21 R.I. GEN. LAWS ANN. § 21-28.6-12(c)(6) (West 2016); WASH. ADMIN. CODE § 314-55-020(6)(A) (2016).

125. ARIZ. REV. STAT. ANN. § 36-2804.01(B) (2016); COLO. REV. STAT. ANN. § 12-43.3-307(1)(a) (West 2016); 16-4000-4470 DEL. ADMIN. CODE § 7.5.2.1.7 (2014); D.C. Mun. Regs. tit. 22-C, § 5103.7 (2017); 410 ILL. COMP. STAT. 130/100, /120, /165 (West 2016); ME. REV. STAT. ANN. tit. 22, § 2428(2)(C) (2015); 801 MASS. CODE REGS. 4.02 (2016); 105 MASS. CODE REGS. 725.030 (2016); NEV. REV. STAT. ANN. §§ 453A.332(2)(e), .344(1) (West 2015); 21 R.I. GEN. LAWS § 21-28.6-12(c)(6) (West 2016); 161-300 R.I. CODE R. § 1.3 (LexisNexis 2016); VT. STAT. ANN. tit. 18, § 4474g(a) (West 2016).

126. See, e.g., Shannon L. McCarthy & Dawn Newton, *Franchising a Marijuana Business: It's Not Quite Mission Impossible*, 35 FRANCHISE L. J. 357, 375 (2015).

127. *Id.*

128. ARIZ. REV. STAT. ANN. § 36-2804(C) (2016) (no more than one dispensary per every ten pharmacies); CONN. AGENCIES REGS. § 21a-408-13(b) (2016) (no set limit on the number of dispensaries; number based on need of patients); CONN. AGENCIES REGS. § 21a-408-19(a) (2016) (three to ten producer licenses to be issued); D.C. Code Ann. § 7-1671.06(d)(2)(A) (West 2016) (five to eight dispensaries permitted); 410 ILL. COMP. STAT. ANN. 130/115(a) (West 2016) (maximum of 60 dispensaries); 410 ILL. COMP. STAT. ANN. 130/85(a) (West 2016) (maximum 22 cultivation centers); ME. REV. STAT. ANN. tit. 22, § 2428(11) (2015); MASS. GEN. LAWS ANN. ch. 94C App., § 1-9(C) (West 2016); 105 MASS. CODE REGS. 725.100(A)(4) (2016); MINN. STAT. ANN. § 152.25(a) (West 2016) (limit of two marijuana manufacturers); MINN. STAT. ANN. § 152.29(a) (West 2016) (a manufacturer shall operate four distribution facilities); NEV. REV. STAT. ANN. § 453A.324(1)(a)–(d) (West 2015) (forty certificates allowed in counties with population over 700,000; ten certificates allowed in counties

them to operate as a nonprofit.¹²⁹ Six states do not permit dispensaries to sell medical marijuana, but only allow personal use by qualified consumers.¹³⁰ In states that tax dispensary sales, consumers must obtain a registration card¹³¹ by filing the application and paying the registration fee.¹³² In general, in states that do not tax marijuana, fees are typically imposed on the dispensary's cultivation and processing activity because the state either explicitly or implicitly prohibits the sale of marijuana.¹³³

between 100,000 and 700,000; two certificates allowed in counties between 55,000 and 100,000; one certificate allowed in all other counties); N.H. REV. STAT. ANN. § 126 X:7(III) (2016) (limit to four alternative treatment centers); N.J. STAT. ANN. § 24:6I-7 (West 2016) (at least two centers in northern, central, and southern part of the state); N.M. CODE R. § 7.34.4.8(C)(2) (2016) (at discretion of Dep't of Health); N.Y. PUB. HEALTH LAW § 3365(9) (McKinney 2016) (limit of five manufacturers and four dispensaries); R.I. GEN. LAWS ANN. § 21-28.6-12(b)(8) (West 2016) (limit of three); WASH. ADMIN. CODE § 314-55-081 (2016).

129. ARIZ. REV. STAT. ANN. § 36-2806(A) (2016) (nonprofit only); D.C. Code Ann. § 7-1671.06(h) (West 2016) (can be operated for profit or non-profit); DEL. CODE ANN. tit. 16, § 4919A(a) (2015) (nonprofit only); ME. REV. STAT. ANN. tit. 22, § 2428(6) (2016) (nonprofit only); MASS. GEN. LAWS ANN. ch. 94C app., § 1-9(C) (West 2016); 105 MASS. CODE REGS. 725.100(A)(1) (LexisNexis 2013) (nonprofit only); N.H. REV. STAT. ANN. § 126-X:8(I) (2016) (nonprofit only); N.J. STAT. ANN. § 24:6I-7(a) (West 2016) (may be for profit or nonprofit); N.M. CODE R. § 7.34.4.8(C)(2) (LexisNexis 2016) (nonprofit only); N.Y. PUB. HEALTH LAW § 3364(1) (McKinney 2016) (registered organization can be for-profit or not-for-profit); R.I. GEN. LAWS ANN. § 21-28.6-12(f)(1) (West 2016) (not-for-profit only); VT. STAT. ANN. tit. 18, § 4474e(b)(1) (2016) (nonprofit).

130. See ALASKA STAT. § 17.37.030(a)-(b) (2015); CAL. HEALTH & SAFETY CODE § 11362.77 (West 2016), *invalidated by* People v. Phomphakdy, 81 Cal. Rptr. 3d 443 (Cal. Ct. App. 2008); HAW. REV. STAT. ANN. § 329-122(a) (LexisNexis 2014); MICH. COMP. LAWS SERV. § 333.26424(a) (2016); MONT. CODE ANN. § 50-46-307(1) (West 2015); WASH. REV. CODE ANN. § 69.51A.040(1)(a) (2016).

131. See ALASKA STAT. § 17.37.010 (2014); CAL. HEALTH & SAFETY CODE § 11362.71 (West 2016); HAW. REV. STAT. ANN. § 329-123 (West 2016); MICH. COMP. LAWS SERV. § 333.26424 (West 2016); MONT. CODE ANN. § 50-46-303 (West 2015).

132. See ALASKA ADMIN. CODE tit. 7, § 34.080 (2016) (\$25 registration fee; \$20 annual renewal fee); CAL. HEALTH & SAFETY CODE § 11362.755 (West 2016), *amended by* 2016 Cal. Stat. Prop. 64 (fees set by state with additional fees set by county; Medi-Cal recipients may receive card at reduced rate); HAW. REV. STAT. ANN. § 329-123(b) (West 2016) (\$35 annual registration fee); MICH. ADMIN. CODE r. 333.103, .111 (2016) (\$60 registration/renewal fee; \$25 additional fee each time the department is required to secure the primary caregiver's criminal conviction history or verify eligibility to be a primary caregiver; \$10 duplication of card fee); MONT. ADMIN. R. 37.107.117 (2016) (\$75 application fee; \$75 annual renewal fee).

133. COLO. REV. STAT. §§ 12-43.3-103(1), -401(2) (2016); CONN. GEN. STAT. ANN. § 21a-408i(b) (West 2016) (registration of marijuana producers); D.C. Code Ann. § 7-1671.05(9) (West 2016); 410 ILL. COMP. STAT. ANN. 130/85(c) (West 2016) (cultivation center); MINN. STAT. ANN. § 152.35 (West 2016); NEV. REV. STAT. ANN. § 453A.344(1) (West 2015).

VI. EARMARKING MARIJUANA TAX REVENUE

A. Current Marijuana Tax Earmarks

In states without laws specifically allocating revenue from marijuana sales to dedicated funds, taxes and fees collected are typically earmarked to fund the state's medical marijuana program,¹³⁴ law enforcement, or health services related to drug addiction.¹³⁵ If the revenue is not earmarked it typically goes to the state's general fund. For example, Nevada¹³⁶ and Rhode Island¹³⁷ deposit marijuana tax revenue into the states' general funds.

134. See ARIZ. REV. STAT. ANN. § 36-2817(A)–(C) (2016) (money used only to administer act, no money goes to general fund); COLO. REV. STAT. ANN. § 12-43.3-501 (West 2016) (fees collected and placed in Marijuana Cash Fund to be used for administration of medical marijuana program; money does not remit to general fund); CONN. GEN. STAT. ANN. § 21a-408i(c) (West 2016) (all fees collected are credited to the General Fund); D.C. CODE ANN. § 7-1671.10(b) (West 2017) (monies collected from program must first be applied to the administration of program); DEL. CODE ANN. tit. 16, § 4923A(5)(a) (2016) (fees used to offset all expense of implementing and administering program); 410 ILL. COMP. STAT. ANN. 130/20(a) (West 2016) (money received from act first used to offset cost of act; excess funds used for crime prevention programs); ME. REV. STAT. ANN. tit. 22, § 2430(3) (2016) (monies used to pay the administrative costs of the program); MD. CODE ANN., HEALTH–GEN. § 13-3303(h) (West 2015) (money placed in fund cannot be used by the general fund or any other special fund); MASS. GEN. LAWS ch. 94C App., § 1-13 (West 2016) (monies used to pay the administrative costs of the program); MICH. COMP. LAWS ANN. § 333.27602 (West 2016) (medical marijuana excise fund, funded by fees and used to offset administrative costs of the program as well as to support county sheriffs and law enforcement); MINN. STAT. ANN. § 152.35 (West 2016) (fees collected deposited in “state government special revenue fund”); MONT. CODE ANN. § 50-46-345 (West 2015) (monies to be used for the purpose of administering the program); NEV. REV. STAT. ANN. § 453A.344(3) (West 2015) (no specific fund; fees collected go first to recoup cost of administration of the act, and any excess goes to school fund); N.J. STAT. ANN. § 24:61-11 (West 2016) (all monies collected pursuant to the act must be used to offset the costs of the administration of the medical marijuana act; no specific fund); N.Y. STATE FIN. LAW § 89-h (McKinney 2016) (money in fund must be kept separate from Gen. fund; 22.5% allocated by gross sales to counties where marijuana was manufactured; 22.5% allocated by gross sales to counties where marijuana was sold; 5% for alcohol and substance abuse prevention; 5% transferred to Division of Criminal Justice to dole out to local police forces as needed to combat illegal drugs); VT. STAT. ANN. tit. 18, § 4474k (West 2016).

135. N.Y. STATE FIN. LAW § 89-h (McKinney 2016) (5% of money in fund for alcohol and substance abuse prevention); Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 44, 2015 Or. Laws 9.

136. NEV. REV. STAT. ANN. § 372A.110 (West 2015).

137. R.I. GEN. LAWS § 44-67-11 (2016); Jennifer Bogdan, *Medical Marijuana Sales Boost R.I. Coffers*, PROVIDENCE J. (Aug. 10, 2015, 11:15 PM), <http://www.providencejournal.com/article/20150810/NEWS/150819907> (noting that the amount Rhode Island collects “in registration revenue goes into the state's general fund”).

Taxes collected from the District of Columbia's six percent gross receipts tax¹³⁸ fund the District's health programs.¹³⁹ By comparison, Colorado's marijuana tax revenue has several earmarks. In that state, the first \$40 million in marijuana excise tax revenue is dedicated to the Public School Capital Construction Assistance Fund.¹⁴⁰ Fifteen percent of the marijuana retail sales tax is dedicated to the implementation and enforcement costs associated with regulating the marijuana industry.¹⁴¹ The rationale for this structure is to ensure the state has the resources to fund a robust regulatory and enforcement system, as well as revenue to fund "an effective education and prevention program to protect youth . . . and for the health and public safety costs associated with the retail marijuana industry."¹⁴² Funds collected are also distributed, based on sales, to local taxing jurisdictions containing retail marijuana stores within their boundaries.¹⁴³ The remaining revenue may be distributed to the state's general fund.¹⁴⁴

In Oregon, every penny of revenue is earmarked for distribution to dedicated funds.¹⁴⁵ Forty percent is distributed to the Common School Fund;¹⁴⁶ thirty-five percent goes to state and local law enforcement;¹⁴⁷ twenty percent is spent on mental health, alcohol, and drug services;¹⁴⁸ the last five percent is allocated to the Oregon Health Authority.¹⁴⁹

The State of Washington's earmarks are the most expansive.¹⁵⁰ Washington spends \$125,000 on data collection and analysis, and the

138. D.C. Code Ann. § 47-2002(a)(7)(A) (West 2017).

139. *Id.* § 47-2002(a)(7)(B).

140. COLO. REV. STAT. § 39-28.8-305(1)(a) (2016).

141. *Id.* § 39-28.8-203(1)(b)(I); David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 373 (2014).

142. Blake & Finlaw, *supra* note 141, at 373.

143. *Id.*

144. *Id.*

145. Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, ch. 1, § 43(1), 2015 Or. Laws 9.

146. *Id.* § 44(2)(a).

147. *Id.* § 44(2)(c)-(d).

148. *Id.* § 44(2)(b).

149. *Id.* § 44(2)(f).

150. *See* WASH. REV. CODE ANN. § 69.50.540(1) (West 2016) (Washington's Department of Social and Health Services is provided \$125,000 for data collection and analysis); *Id.* § 69.50.540(2) (the state

Liquor and Cannabis Board receives at least \$1,250,000 to administer the legalization laws.¹⁵¹ The remainder is distributed as follows: fifty percent to a statewide basic health plan trust account;¹⁵² fifteen percent for implementing and maintaining programs and practices aimed at preventing or reducing substance abuse among young people;¹⁵³ ten percent to create, implement, operate, and manage a marijuana education and public health program;¹⁵⁴ five percent to fund health and dental care;¹⁵⁵ one percent to the University of Washington and Washington State University (0.6% and 0.4% respectively) to research the short and long term effects of marijuana use;¹⁵⁶ and 0.3% to fund grants to “Building Bridges” programs.¹⁵⁷ The remainder goes to the general fund.¹⁵⁸

B. Proposed Earmarks

This Article proposes that states with tax revenue from legalized marijuana sales should earmark funds to support programs for those adversely impacted by the War on Drugs—not everyone agrees with this approach. Richard Philips of the Institution of Taxation & Economic Policy writes:

While earmarking marijuana funds to popular spending

institute for public policy receives \$50,000 to conduct a cost-benefit evaluation of the marijuana legalization and taxation regime); *Id.* § 69.50.540(3) (the University of Washington’s alcohol and drug abuse institute is provided \$5,000 for web based public education materials); *Id.* § 69.50.540(4) (a cap of \$1,250,000 is to be spent on the state liquor control board); *Id.* § 69.50.540(5) (in the event that Washington’s marijuana tax revenue exceeds the cost of these programs, the balance must be allocated such that: 15% goes to the Department of Social and Health Services for programs aimed at preventing youth abuse; 10% goes to the creation of a marijuana education and public health program; 0.6% goes to the University of Washington and 0.4% to Washington State University for research concerning the long-term health effect of marijuana use; 5% goes to contracts with community health centers for primary health and dental services to the public; 0.3% is allocated to the Dropout Prevention, Intervention, and Retrieval System; and 18.7% is distributed to the general fund); *Id.* § 69.50.540(5)(d) (the remaining 50% excess revenue is allocated to the state’s basic health plan trust account).

151. WASH. REV. CODE ANN. § 69.50.540(1); *Id.* § 69.50.540(4).

152. *Id.* § 69.50.540(5)(d).

153. *Id.* § 69.50.540(5)(a).

154. *Id.* § 69.50.540(5)(b).

155. *Id.* § 69.50.540(5)(e).

156. WASH. REV. CODE ANN. § 69.50.540(5)(c).

157. *Id.* § 69.50.540(5)(f).

158. *Id.* § 69.50.540(5)(g).

initiatives may make political sense, it is not necessarily effective budget policy. One inherent problem with earmarking is that state revenue is typically fungible between different spending areas. Lawmakers can shift other revenues away from the earmarked fund, leaving the overall amount of money spent on that area unchanged. Additionally, earmarking excise tax revenue can be counterproductive if it creates a substantial incentive for lawmakers to promote the activity that the tax was initially intended to discourage.¹⁵⁹

However, he does continue by stating:

While most marijuana tax earmarking proposals are made for political reasons, there is a case to be made for directing some revenues toward programs that offset negative externalities created by marijuana consumption. These could include, for instance, treatment programs and state drug public education programs. Excise taxes could also potentially be directed toward the enforcement and oversight of marijuana production, though much of this is already funded through licensing fees on marijuana producers and sellers.¹⁶⁰

So, clearly there is some merit to the proposal advocated herein. As Graham Boyd explains:

Unlike other crimes, drug offenses do not have complaining witnesses—people who come forward to request police assistance. All parties are consenting participants who likely wish to hide their drug activity. In order to unearth drug crimes, the police engage in

159. RICHARD PHILLIPS, INST. ON TAXATION & ECON. POLICY, ISSUES WITH TAXING MARIJUANA AT THE STATE LEVEL 6 (2015), <http://www.itep.org/pdf/marijuanaissuesreport.pdf>.

160. *Id.*

wiretapping, surveillance, undercover operations, paying informants, entrapment by offering to buy or sell drugs, and countless other questionable police practices.¹⁶¹

Boyd argues there are tangible fiscal expenditures associated with enforcing marijuana use.¹⁶² So, it would seem to follow that funds allocated towards enforcement efforts should be balanced with funds reserved for treatment and rehabilitation, especially in light of the disproportionately severe punishments for marijuana convictions now that marijuana use is legalized in almost half of the states. Accordingly, jurisdictions where it is now legal to grow, process, distribute, sell, and use marijuana have an ethical obligation to allocate funds to repair the War on Drugs' collateral damage. Surely, a percentage of the tax revenue collected can go towards making the lives of those negatively impacted whole again. In addition to the earmarks currently in place, funding can also be dedicated towards the following: psychological and family counseling services for families separated due to incarceration; career development programs for those seeking work; educational loans for those denied federal financial aid; expungement of *de minimis* criminal charges thereby restoring voting rights and child custody and visitation rights; and anti-drug public service announcements. To this end, proponents of taxing legalized marijuana agree that:

Setting the tax rate high enough to generate significant revenue (though not so high as to leave a large black market intact) would allow for robust investments in marijuana regulation and substance abuse treatment, as well as for additional funding of other public services that could improve the wellbeing of . . . residents.¹⁶³

161. Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 842 (2002).

162. *See id.*

163. CARL DAVIS & RICHARD PHILLIPS, INST. ON TAXATION & ECON. POLICY, TAX POLICY ISSUES ASSOCIATED WITH LEGALIZED RETAIL MARIJUANA: TESTIMONY BEFORE THE VERMONT SENATE COMMITTEE ON FINANCE 6 (2016), http://itep.org/itep_reports/pdf/vt_marijuanatestimony_0116.pdf.

The table below details the states that currently permit adults to possess marijuana for medicinal or recreational purposes, the year the drug was legalized, the state taxes imposed, and the annual revenue generated from marijuana sales.¹⁶⁴

Table 1: Marijuana, State Taxes, and Revenue

State	Year Legalized	Retail Sales Taxes Imposed	Excise Taxes Imposed	Annual Revenue
Alaska	1998	No statewide sales tax; Localities will have the option of applying local sales taxes (0-7.5%)	\$50 per ounce of marijuana sold at the wholesale level; the Department of Revenue has the power to set a lower rate on certain parts of the marijuana plant.	
Arizona	2010	6.6% RST	N/A	\$40M ¹⁶⁵
California	1996	8.9% State sales tax	N/A	\$58-105M

164. These states no longer impose criminal penalties for the cultivation, possession, and use of marijuana in instances where a medical doctor has recommended its use. Eddy, *supra* note 17, at 18. These states have also introduced programs to regulate approved patients' use of medical marijuana. *Id.* Additionally, physicians in these states are not subject to criminal prosecution for discussing or recommending medical cannabis to patients. *Id.* Caregivers may also assist approved patients grow, acquire, and use marijuana (except in New Mexico and New Jersey). *Id.*

165. JOINT FISCAL OFFICE OF VT. LEGISLATURE, MEDICAL MARIJUANA FEE AND TAX REPORT 2 (2012), <http://www.leg.state.vt.us/jfo/reports/2012-02%20Medical%20Marijuana%20Fee%20and%20Tax%20Report.pdf>.

State	Year Legalized	Retail Sales Taxes Imposed	Excise Taxes Imposed	Annual Revenue
		not imposed		
Colorado	2000	5% state sales tax (+) local sales taxes (0 – 7.5%)	15% tax on average market sale rate (+) 10% retail sales tax (+) optional local marijuana sales tax	\$5M
Connecticut	2012	N/A	N/A	N/A
Delaware	2011	No sales tax; gross receipts tax (first \$1.2 million of gross receipts exempt from tax)	N/A	None.
District of Columbia ¹⁶⁶	2010	State sales tax not imposed	6% Sales Tax; District of Columbia	\$400,000 sales tax estimate

166. Although voters originally approved medicinal marijuana in 1998, the District of Columbia did not pass a medical marijuana law until 2010. Congress's attaching riders to the appropriations act delayed the Act for 12 years. See D.C. Code Ann. § 7-1671.02 (West 2017); Consolidated Appropriations Act 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009); D.C. Bd. of Elections & Ethics, Nov. 3, 1998 General Election Results Initiative Measure #59: Legalization of Marijuana for Medical Treatment Act of 1998, https://www.dcboec.org/election_info/election_results/elec_1998/ini59_98.htm (last visited Mar. 4, 2017); Eddy, *supra* note 17, at 23–24; 25 *Legal Medical Marijuana States and DC*, PROCON.ORG,

State	Year Legalized	Retail Sales Taxes Imposed	Excise Taxes Imposed	Annual Revenue
			City Council included sales tax in budget - June 15, 2010	over 4 years
Hawaii	2000	State sales tax not imposed	N/A	N/A
Illinois	2013	N/A	N/A	N/A
Maine	1999	5% RST	N/A	\$640K
Maryland	2014	N/A	N/A	N/A
Massachusetts	2012	N/A	N/A	N/A
Michigan	2008	State sales tax not imposed	N/A	N/A
Minnesota	2014	N/A	N/A	N/A
Montana	2004	State sales tax not imposed	N/A	N/A
Nevada	2000	N/A	N/A	N/A
New Hampshire	2013	N/A	N/A	N/A
New Jersey	2010	7% RST	N/A	None
New Mexico	2007	5-8.9% RST	N/A	\$650,400 ¹⁶⁷
New York	2014	N/A	N/A	N/A

<http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Mar. 2, 2017).

167. Ted Hesson, *How Much Do States Make from Medical Marijuana*, FUSION (Mar. 25, 2014, 12:59 PM), <https://fusion.net/story/5106/how-much-do-states-make-from-medical-marijuana/>.

State	Year Legalized	Retail Sales Taxes Imposed	Excise Taxes Imposed	Annual Revenue
Oregon	1998	No statewide sales tax	\$35 per ounce of marijuana sold at the wholesale level. Marijuana leaves are taxed at \$10 per ounce and immature marijuana plants are taxed at \$5 per plant. All adjusted for inflation.	
Rhode Island	2006	7% RST	Compassion Center Surcharge - 4% of net patient revenue, paid monthly (RIGL Chapter 44-67-12)	No taxes collected yet. \$700K NPR estimate
Vermont	2004	Tax treatment not explicit under	N/A	N/A

State	Year Legalized	Retail Sales Taxes Imposed	Excise Taxes Imposed	Annual Revenue
		current law		
Washington	1998	6.5% state sales tax (+) local sales taxes (0.5-3.1%)	37% state excise tax (+) Business & Occupation (B&O) gross receipts tax (0.484%)	

In addition to the above states with legalized marijuana, the citizens of California, Maine, Massachusetts, and Nevada voted to legalize marijuana by ballot initiative in November 2016.¹⁶⁸ The table below shows the possible tax revenue from legalized marijuana if all 50 states removed prohibitions and imposed taxes similar to those currently imposed on tobacco and alcohol products:

Table 2: Possible Tax Revenues From Legalized Marijuana¹⁶⁹

	Proportion of Population	Population Method in Millions of 2008 Dollars	Consumption Method in Millions of 2008 Dollars	Tax Revenue in Millions of 2008 Dollars
All States	100.00%	2,138.47	100%	2,138.47
Alabama	1.54%	32.85	1.2	25.59
Alaska	0.23%	4.84	0.31	6.53
Arizona	2.14%	45.81	1.96	41.91
Arkansas	0.94%	20.12	0.93	19.87
California	12.11%	259.02	9.43	201.74
Colorado	1.63%	34.81	2.2	46.97

168. *Election 2016: Ballot Measures*, CNN: POLITICS, <http://www.cnn.com/election/results/ballot-measures> (last visited Feb. 1, 2017). Arizona citizens voted against legalizing marijuana on its November 2016 ballot initiative. *Id.*

169. JEFFERY A. MIRON, CANNABIS COMMERCE, THE BUDGETARY IMPLICATION OF MARIJUANA PROHIBITION (2005), http://www.cannabis-commerce.com/library/Miron_Report_2005.pdf.

	Proportion of Population	Population Method in Millions of 2008 Dollars	Consumption Method in Millions of 2008 Dollars	Tax Revenue in Millions of 2008 Dollars
Connecticut	1.15%	24.67	1.06	22.57
Delaware	0.29%	6.15	0.28	6.07
Florida	6.04%	129.16	6.64	142.05
Georgia	3.19%	68.25	4.06	86.75
Hawaii	0.42%	9.08	0.47	10.09
Idaho	0.50%	10.74	0.55	11.73
Illinois	4.25%	90.91	3.93	83.98
Indiana	2.10%	44.94	2.03	43.44
Iowa	0.99%	21.16	0.88	18.72
Kansas	0.92%	19.75	0.78	16.69
Kentucky	1.41%	30.08	1.31	28.05
Louisiana	1.45%	31.08	1.4	30.02
Maine	0.43%	9.28	0.31	6.64
Maryland	1.86%	39.7	1.76	37.68
Massachusetts	2.14%	45.79	2.1	44.94
Michigan	3.30%	70.49	3.23	69.04
Minnesota	1.72%	36.79	2.12	45.43
Mississippi	0.97%	20.71	0.92	19.67
Missouri	1.95%	41.66	2.57	54.99
Montana	0.32%	6.82	0.37	7.94
Nebraska	0.59%	12.57	0.65	13.87
Nevada	0.86%	18.32	0.65	13.97
New Hampshire	0.43%	9.27	0.42	9.03
New Jersey	2.86%	61.18	3.49	74.6
New Mexico	0.65%	13.98	0.56	11.92
New York	6.42%	137.34	6.4	136.81
North Carolina	3.04%	64.99	4.11	87.88
North Dakota	0.21%	4.52	0.19	4.02

	Proportion of Population	Population Method in Millions of 2008 Dollars	Consumption Method in Millions of 2008 Dollars	Tax Revenue in Millions of 2008 Dollars
Ohio	3.78%	80.94	4.15	88.7
Oklahoma	1.20%	25.67	1.37	29.23
Oregon	1.25%	26.71	1.13	24.09
Pennsylvania	4.10%	87.72	3.45	73.73
Rhode Island	0.35%	7.4	0.36	7.75
South Carolina	1.48%	31.57	1.23	26.29
South Dakota	0.27%	5.67	0.34	7.28
Tennessee	2.05%	43.79	1.87	39.94
Texas	8.02%	171.43	12.64	270.39
Utah	0.90%	19.28	0.76	16.34
Vermont	0.20%	4.38	0.17	3.67
Virginia	2.56%	54.75	2.49	53.35
Washington	2.16%	46.15	1.67	35.76
West Virginia	0.60%	12.79	0.42	8.97
Wisconsin	1.85%	39.66	2.86	61.12
Wyoming	0.18%	3.75	0.17	3.72
D.C.	0.20%	4.17	0.23	4.82

CONCLUSION

It is all too easy to sweep aside the ugly ramifications of marijuana use during the War on Drugs, even though those affected likely knowingly violated federal laws. Now that state laws have changed, the time has finally come to have a reasoned discussion about what comes next. In a September 2013 Judicial Committee hearing, Sheriff John Urquhart of King County, Washington testified that, “the War on Drugs has been a failure” and welcomed a new approach to drug

enforcement.¹⁷⁰ He undoubtedly feels this way from decades of enforcing Nixon- and Reagan-era policies with little to no impact on improving the quality of the lives he swore to protect and serve.

This Article does not purport to present the entire continuum of concerns created in the last forty-five years; nor does it assert that the myriad of issues above are purely fiscal. Indeed, this Article merely invites state lawmakers to be mindful of the unique issues facing a multitude of their constituents, and challenges them to consider additional earmarks to address those issues. The War on Drugs took on many forms, on many fronts, and impacted many people from all walks of life. The systems adopted to implement the reforms necessary to effect an economic and social recovery need to be just as proactive, robust, and comprehensive.

170. *Hearing on Conflicts Between State and Federal Marijuana Laws Before the S. Comm. on the Judiciary*, 113th Cong. 1 (2013) (statement of John Urquhart, Sheriff, King County, Washington).