

THE LURE OF TAX REVENUE FROM RECREATIONAL MARIJUANA: AT WHAT PRICE?

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ABSTRACT

On National Weed Day, proponents of legalized marijuana gathered in cities throughout the country with much to celebrate. Great strides had been made in the past twenty plus years in getting states to relax marijuana restrictions, and momentum in the crowds was high to continue the push to bring marijuana legalization to all fifty states. In Alaska, Colorado, Oregon, Washington, and Washington D.C. the recreational use of marijuana has been legalized, paving the way for new commercial markets that are expected to fill state coffers with revenue. In the coming year, several states are expected to follow suit. This paper looks beyond the lure of tax revenue to consider legalization's real costs: sin taxes that regulate behavior, confusion as federal and state authorities seek to reconcile conflicting classifications of marijuana, the social costs of increased use, and the potential impact to America's standing in the global community. Amidst the ever burgeoning levels of public support and outcry for the legalization of recreational marijuana, this paper is intended to serve as a voice for those issues that are sometimes overlooked in the public arena.

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I. INTRODUCTION

On National Weed Day¹ proponents of legalized marijuana gathered in cities throughout the country with much to celebrate. Great strides had been made in the past twenty-plus years in getting states to relax marijuana restrictions, and momentum in the crowds was high to continue the push to bring marijuana legalization to all fifty states. At present, 17 states, plus the District of Columbia, have decriminalized the possession of minimal amounts of marijuana up to a

¹ Since 1991, National Weed Day has been celebrated on April 20 as a celebration of cannabis. See Ryan Grim, *420 Meaning: The True Story of How April 20 Became ‘Weed Day.’* THE HUFFINGTON POST (Apr. 20, 2010), http://www.huffingtonpost.com/2010/04/20/420-meaning-the-true-stor_n_543854.html.

certain threshold,² 23 states plus the District of Columbia, have legalized medical marijuana,³ and four states, Alaska, Colorado, Oregon, and Washington, have gone much further by legalizing the production, sale, and use of recreational marijuana.⁴ As shown in Figure 1, as of March 2015, 30 states are considering some form of marijuana law reform, including decriminalization and legalization for medical or recreational purposes.⁵ Of these, 20 states are seeking to legalize recreational marijuana.⁶

Figure 1. Breakdown of Reform Efforts Underway:⁷

20 states considering legalization of recreational marijuana:
Arizona, Connecticut, Florida, Georgia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, Texas, Vermont, and Wisconsin.
10 states, plus the District of Columbia, considering decriminalization:
Delaware, Hawaii, Illinois, Nebraska, New Hampshire, New Mexico, North Dakota, South Carolina, Tennessee, and Texas.
13 states considering establishing medical marijuana programs: ⁸
Florida, Georgia, Indiana, Kansas, Kentucky, Missouri, Nebraska, North Carolina, Pennsylvania, South Carolina, Tennessee, Utah, and West Virginia.

² The seventeen states include Alaska, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, and Vermont. *See States That Have Decriminalized*, NORML, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited Mar. 23, 2015).

³ The twenty-three states include 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, and Washington. *See Medical Marijuana*, NORML, <http://norml.org/legal/medical-marijuana-2> (last visited Mar. 23, 2015).

⁴ *See United States*, NORML, <http://norml.org/states> (last visited Mar. 23, 2015).

⁵ *Working to Reform Marijuana Laws*, NORML, <http://norml.org/act> (last visited Mar. 23, 2015).

⁶ *Id.*

⁷ *Id.*

⁸ *9 States with Pending Legislation to Legalize Medical Marijuana (as of Mar. 24, 2015)*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481> (last visited Mar. 26, 2015).

This country has witnessed decades of debate over the legalization of marijuana, the essence of which is often over-simplified as a debate between those who view the drug as a “harmless weed” and those who see it as a “gateway drug,” leading the user down a very dark and dangerous path in life.⁹ For some, this is an ideological debate over states’ rights.¹⁰ For others, however, the legalization question is driven by another sentiment - the lure of the almighty dollar.¹¹ As states continue to feel the effects of the 2006 economic crisis, the notion of legalized marijuana as a potential revenue stream to aid ailing state coffers has gained prominence.¹² “For marijuana advocates, taxes were one of the major selling points of legalization. Advocates argue that expanding the market for the federally prohibited plant could give states money for school construction, health care, substance abuse programs, and public health.”¹³ In Northglenn, Colorado, for example, there are tentative plans for a senior center and improvements to traffic safety funded by marijuana sales tax revenue.¹⁴

Colorado received approximately \$2 million from taxes on recreational marijuana in January, the first month that sales of recreational marijuana were permitted.¹⁵ By June 2014, those figures more than doubled with the state

⁹ See *Arguments For and Against the Legalization of Marijuana*, LEGALIZATION OF MARIJUANA, <http://legalizationofmarijuana.com/arguments-for-and-against-the-legalization-of-marijuana> (last visited Aug. 1, 2014).

¹⁰ See TODD GARVEY AND BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES (2014), available at <http://www.fas.org/sgp/crs/misc/R43034.pdf>.

¹¹ Bruce Bartlett, *Why Legalizing Marijuana Is a Smart Fiscal Move*, THE FISCAL TIMES (Jan. 3, 2014), <http://www.thefiscaltimes.com/Columns/2014/01/03/Why-Legalizing-Marijuana-Smart-Fiscal-Move>.

¹² See, e.g., John Poltonowicz, *Marijuana Sales in Colorado to Reach \$1 Billion*, GUARDIAN LIBERTY VOICE (Mar. 9, 2014), <http://guardianlv.com/2014/03/marijuana-sales-in-colorado-to-reach-1-billion/>.

¹³ Jack Healy, *Colorado Expects to Reap Tax Bonanza From Legal Marijuana Sales*, N.Y. TIMES, Feb. 20, 2014, at A12, available at http://www.nytimes.com/2014/02/21/us/colorado-expects-to-reap-tax-bonanza-from-legal-marijuana-sales.html?_r=0.

¹⁴ John Ingold, *Marijuana Tax Windfall from Proposition AA Unclear for Colorado Cities*, THE DENVER POST (Nov. 4, 2013), http://www.denverpost.com/ci_24447584/marijuana-tax-windfall-from-proposition-aa-unclear-colorado; see Brett M. Kelman & Dave Nyczepir, *How to Fund Cops? Town Considers Marijuana Tax*, USA TODAY (July 5, 2014), available at <http://www.usatoday.com/story/news/nation/2014/07/05/how-to-fund-cops-marijuana-tax/12253001/> for a discussion on the situation in Desert Hot Springs, California. That city banned medicinal marijuana dispensaries in 2007. However, due to dire financial circumstances and a need for adequate funds to maintain its police force, the City Council is considering lifting the ban and imposing a 10% sales tax and/or a 5% cultivation tax on medicinal marijuana as a means of generating much needed funds.

¹⁵ *Colorado gets \$2 million from marijuana taxes*, CNN WIRE (Mar. 10, 2014, 7:41 PM), <http://money.cnn.com/2014/03/10/news/marijuana-tax-revenue/>.

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collecting \$4,775,679 in tax revenue that month.¹⁶ In total, Colorado brought in tax revenue of approximately \$76 million from recreational and medical marijuana sales in 2014.¹⁷ In Washington, sales of recreational marijuana did not begin until June 2014, so tax revenue data is not yet available, but “Washington predict[s] a ‘fully functioning’ market could bring in \$1.9 billion in five years, although the state isn’t counting on those dollars in future budgets.”¹⁸

The potential tax revenue stream that would come with legalized recreational marijuana use is not without a price. The purpose of this paper is to help define that “price.” All eyes are on Colorado and Washington as they engage in this recreational use “experiment”. This is not surprising as states are often considered laboratories of social and economic experiment.¹⁹ However, a true experiment requires data and analysis to reach a conclusion.²⁰ Recreational marijuana dispensaries opened in Colorado in January 2014, and in Washington in June 2014. As a result, it is simply too early to know and appreciate the short or long term effects of mainstream marijuana. Unlike decriminalization and medical marijuana authorization, which provide limited categories of permissible cultivation, possession, and use, the legalization of recreational marijuana brings the drug into the mainstream economy.

Part I of this paper explores the nature of the revenue stream from recreational marijuana sales, which is primarily derived from the imposition of “sin taxes”, and considers the appropriateness of using sin taxes as a way of generating revenue and attempting to regulate behavior. Part II addresses the current dichotomy between federal and state treatment of marijuana and argues that such a position is untenable, leading to confusion in enforcement efforts for citizens and public officials alike. Part III explores the multitude of social costs that are likely to be part and parcel of increased recreational marijuana use. Finally, Part IV takes an even broader perspective of the concerns raised by legalization of marijuana and considers how this may impact America’s standing in the global community.

¹⁶ Caitlin Hendee, *More Colorado marijuana tax dollars are rolling in*, DENVER BUSINESS JOURNAL (July 11, 2014), <http://www.bizjournals.com/denver/news/2014/07/11/more-colorado-marijuana-tax-dollars-are-rolling-in.html>.

¹⁷ Joe Harpaz, *Tax Payers to Colorado Lawmakers: ‘Don’t Bogart That Tax Revenue*, FORBES (Feb. 27, 2015, 2:39 PM), <http://www.forbes.com/sites/joeharpaz/2015/02/17/tax-payers-to-colorado-lawmakers-dont-bogart-that-tax-revenue/>.

¹⁸ Jake Grovum, *With legal marijuana taxes set, all eyes on Colorado and Washington*, THE DENVER POST (Nov. 21, 2013, 10:38 AM), http://www.denverpost.com/nationworld/ci_24554445/legal-marijuana-taxes-set-all-eyes-colorado-and-washington.

¹⁹ Michael S. Greve, *Laboratories of Democracy*, AEI ONLINE (Mar. 31, 2001), <http://www.aei.org/article/politics-and-public-opinion/elections/laboratories-of-democracy>.

²⁰ For a general description of the processes used to conduct a valid empirical experiment, see <https://explorable.com/empirical-research> (last visited Aug. 1, 2014).

II. UNDERSTANDING THE TAX SIDE OF MARIJUANA LEGALIZATION

Will elected state legislators have an insatiable appetite for enhancing state coffers by taxing legalized marijuana sales? Professor David McCuan predicts the drive for revenue will swell:

It will only take a small chink in the armor of a law-enforcement organization that embraces some type of legalization effort that could grow the number of measures across the country seeking to tax dope as a way out of a fiscal crisis.²¹

Attempting to accurately predict the revenue stream from legalized marijuana is difficult as the level of demand is an unknown variable, but estimates for Colorado and Washington vary “from tens of millions of dollars in the first few years to as much as \$2 billion in the first half-decade of legalization. The disparity comes, in part, over uncertainty about demand.”²² In Colorado, there are two levels of state taxation that were overwhelmingly approved by voters. The first is a 15 percent tax imposed on the wholesale price of retail marijuana, with the first \$40 million dedicated to school construction.²³ The second is a retail sales tax of 10 percent imposed on consumers, which is in addition to the state sales tax of 2.9 percent.²⁴ Some cities, such as Denver, have also opted to impose an additional local tax on retail sales.²⁵ In Washington, there is a 25 percent tax imposed at three different transaction points: sales by growers, sales by wholesalers/processors, and sales by retailers to consumers.²⁶ “The effective tax rate for individuals ends up being between 35 percent and 45 percent, depending on how many transfers are involved and other variables.”²⁷

Another unknown variable in terms of how much tax revenue recreational marijuana will bring in is the uncertainty with regard to the extent to which federal authorities will refrain from interfering with state activities. According to economics professor Jeffrey Miron, “It’s easy to get a little overexcited that

²¹ Daniel B. Wood, *Election 2013: What takeaways from votes on marijuana taxes, GMO foods?*, THE CHRISTIAN SCIENCE MONITOR (Nov. 6, 2013), <http://www.csmonitor.com/USA/Elections/2013/1106/Election-2013-What-takeaways-from-votes-on-marijuana-taxes-GMO-foos-video>.

²² Grovum, *supra* note 18.

²³ *Id.*

²⁴ *Id.*

²⁵ Jeremy P. Meyer, *Recreational Marijuana: Denver Council sets sales tax, retail rules*, THE DENVER POST (Aug. 26, 2013), http://www.denverpost.com/breakingnews/ci_23949699/denver-city-council-makes-big-decisions-retail-pot.

²⁶ Pat Oglesby, *Marijuana Tax Measurement: Dollars, Grams, THC*, THE HUFFINGTON POST (May 15, 2014), http://www.huffingtonpost.com/pat-oglesby/marijuana-tax-measurement_b_5324705.html.

²⁷ Grovum, *supra* note 18.

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legalizing marijuana is going to solve the world's budgetary problems....But the question for the tax revenue part of this will be how much the federal government allows these markets to come completely above ground."²⁸ Consequently, as states consider the possibility of legalizing marijuana, voters and legislatures must consider the possibility of some form of intervention by the federal government. As the 2016 presidential election looms closer, bringing a change in the White House and possible changes in Congress, it may be preferable for states considering legalization in the coming year to take a "wait and see" approach.

Of equal importance, and as explained further in this section, voters and legislatures should consider the appropriateness of additional sin taxes and concerns about the black market. Legalization of recreational marijuana is not without parameters and enforcement efforts will be necessary to ensure compliance with the law, which will potentially drive up enforcement costs. Because of this, "opponents, and some skeptical economists, say the dreams of a windfall are far too optimistic. They worry that the higher cost of enforcement and regulation could outweigh any tax revenue from marijuana sales."²⁹

A. States Rely on Excise Taxes

States rely on excise taxes as a means to fund governmental operations. Increasingly, states are looking to enhance their revenue streams through alternative forms of excise taxation.³⁰ "State governments are much more likely than their local counterparts to depend on taxes other than sales, property, and personal income taxes. Excises on alcohol, beer, tobacco, gambling, and business taxes are among the alternative taxes."³¹ State excise taxation is nothing new. For example, in 1650, New York had a tax on wine and beer and in 1653, extended taxes to tobacco, grain, hemp, butter, cheese, and flax as well.³² Pennsylvania soon followed New York's lead and taxed items such as wine and rum. Other colonies, such as New Hampshire, did not enact excise taxes until almost a hundred years later when in 1756 the colony imposed a tax on cider, rum, wine, and tea.³³ In contemporary society excise taxes imposed on products that are

²⁸ Dan Frosch, *States Push to Get the Most Out of Marijuana Taxes*, N.Y. TIMES, Apr. 24, 2013, at A14, available at <http://www.nytimes.com/2013/04/25/us/colorado-considers-marijuana-tax.html> (quoting Dr. Jeffrey Miron, an economics professor at Harvard University and senior fellow at the Cato Institute).

²⁹ Healy, *supra* note 13.

³⁰ William F. Fox, *Can State and Local Governments Rely on Alternative Tax Sources?*, 6 FED. RES. BANK OF ST. LOUIS REGIONAL ECON. DEV. 88, 88-89 (2010).

³¹ *Id.* at 88.

³² James R. Hines Jr., *Taxing Consumption and Other Sins*, 21 J. OF ECONOMIC PERSPECTIVES 49, 54 (2007).

³³ *Id.*

deemed undesirable or those products considered best used in moderation are often referred to as “sin taxes.”³⁴

1. The Popularity of Sin Taxes

Both federal and state governments have long recognized a potential for revenue by targeting specific products and activities for taxation. Prohibition ended as the country was in the process of recovering from the Great Depression. By repealing Prohibition, the government increased tax revenues by approximately \$500-\$600 million per year in the 1930s. The additional revenues helped defray New Deal spending, which was approximately \$2 billion per year.³⁵ At the state level, states were also eager to tax alcohol sales, “in part because they were desperate for revenue after the Great Depression.”³⁶ Sin taxes are often used to offset budget shortfalls. “An examination of the legislative history of various sin taxes will reveal that, no matter the justifications offered to the public, sin taxes are enacted when states are having budget crises and need money.”³⁷

2. The Effectiveness of Sin Taxes

Are sin taxes an effective means of raising revenue at the state level, and why are they so appealing?

Vices are attractive targets for selective taxation because sinners are not very sensitive to increases in the prices of the sinful goods and services that they buy. They reduce their purchases, of course, but not by much. Taxing sin thus is a tax revenue-generating engine.... Such taxes may ‘nudge’ consumption in the desired downward direction, but bad habits are hard to break.³⁸

Proponents of sin taxes often make the argument that sin taxes are effective in discouraging unhealthy behavior while concurrently providing funds

³⁴ See generally Robert A. Sirico, *The Sin Tax: Economic and Moral Considerations*, ACTON INSTITUTE (2001), <http://web.uncg.edu/dcl/courses/viceCrime/m2/The%20Sin%20Tax.html> (discussing the economics and moral justifications for sin taxes).

³⁵ Hines, *supra* note 32 at 52.

³⁶ Frosch, *supra* note 28.

³⁷ Rachel E. Morse, *Resisting the Path of Least Resistance: Why the Texas “Pole Tax” and the New Class of Modern Sin Taxes are Bad Policy*, 29 B. C. THIRD WORLD L. J. 189, 206 (2009).

³⁸ Adam J. Hoffer et al., *Sin Tax Costs Outweigh Benefits*, U.S. NEWS (Feb. 5, 2013, 9:18 AM), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/02/05/sin-tax-costs-outweigh-benefits>.

to support worthy causes.³⁹ However, “[i]f the tax is actually effective at discouraging consumption of a ‘sinful’ good, after all, then there would be very little revenue raised because people would purchase much less of the more expensive good in question.”⁴⁰ For example, a study of the effects of food prices (and taxes and subsidies) on obesity levels concluded that while changes in BMI or obesity would likely not result from a low tax, “nontrivial pricing interventions might have a measurable effect on Americans’ weight outcomes.”⁴¹

As a solution, programs to discourage marijuana use by minors will be implemented with part of the tax revenue stream from marijuana sales.⁴² Whether these programs will have the intended effect of reducing marijuana use remains to be seen, but an analogy can arguably be drawn to cigarette smoking. The first comprehensive tobacco control program in the United States was implemented in California in 1989.⁴³ The program included a variety of elements such as media campaigns highlighting the harmful effects of smoking, restrictions on tobacco advertising, school programs to work the anti-smoking message into the curriculum, and enforcement of policies designed to prevent the youth from gaining access to tobacco.⁴⁴ A study assessing the literature with regard to the effectiveness of these programs concluded that such programs are an effective means of reducing teenage smoking.⁴⁵ Armed with evidence linking tax increases on the purchase of tobacco with a corresponding decline in its use, legislatures are increasingly using sin taxes to advance public health policies and practices.⁴⁶ For example, “[i]nflation-adjusted state cigarette taxes more than tripled, on average, from 1982 to 2007, contributing to a more than 160 percent rise in average cigarette prices during this period.”⁴⁷ These price increases have helped to reduce the prevalence of adult smoking.⁴⁸

³⁹ Sirico, *supra* note 34.

⁴⁰ Richard Williams & Katelyn Christ, *Taxing Sin*, 55 MERCATUS ON POL’Y 1, 2 (2009).

⁴¹ Lisa M. Powell & Frank J. Chaloupka, *Food Prices and Obesity: Evidence and Policy Implications for Taxes and Subsidies*, 87 MILBANK Q. 229, 249 (2009).

⁴² See, e.g. Aaron Smith, *Colorado Stash: \$184 Million in Marijuana Taxes*, CNN MONEY (Feb. 20, 2014, 2:25), <http://money.cnn.com/2014/02/20/news/economy/marijuana-taxes-colorado/>.

⁴³ Melanie Wakefield & Frank Chaloupka, *Effectiveness of Comprehensive Tobacco Control Programmes in Reducing Teenage Smoking in the USA*, 9 TOBACCO CONTROL 177 (2000).

⁴⁴ *Id.*

⁴⁵ *Id.* at 184.

⁴⁶ *Florida, Hawaii and Mississippi Celebrate Tobacco Tax Victories*, ROBERT WOOD JOHNSON FOUNDATION (May 15, 2009), <http://www.rwjf.org/en/about-rwjf/newsroom/newsroom-content/2009/05/florida-hawaii-and-mississippi-celebrate-tobacco-tax-victories.html>.

⁴⁷ Powell, *supra* note 41, at 250, citing D.R. Levy et. al., *Recent Trends in Smoking and the Role of Public Policies: Results from the SimSmoke Tobacco Control Policy Simulation Model*, 100 ADDICTION 1526 (2005).

⁴⁸ *Id.*

Does a similar pattern occur with the consumption and taxation of alcohol? Looking to alcohol use, a review of the literature produced over the past several decades on the relationship between the alcohol tax and price levels and alcohol sales or consumption measures identifies price as an important influence on drinking habits.⁴⁹ “We know of no other preventative intervention to reduce drinking that has the numbers of studies and consistency of effects seen in the literature on alcohol taxes and prices.”⁵⁰ Another study found that changing the tax rate for only one part of the alcohol market is not as effective as changing the tax rate for the entire market.⁵¹ For example, a relationship exists between higher excise taxes on a range of alcohol products (rather than one particular alcohol product), such as beer, wine, and spirits and a decrease in alcohol-related mortality.⁵² “Findings add to the literature by demonstrating that alcohol taxation remains a robust policy instrument for reducing alcohol-related disease mortality even when state-level alcohol consumption and alcohol-related disease mortality are relatively very low.”⁵³

Similar conclusions were reached in a later study of alcohol price and consumption, which concluded “higher alcohol prices and alcohol taxes are associated with reductions in both excessive alcohol consumption and related, subsequent harms. Results were robust across different countries, time periods, study designs and analytical approaches, and outcomes.”⁵⁴ Although these studies report an inverse relationship between the consumption of alcohol and a tax increase on the purchase of alcohol, other studies have shown that people simply replace alcohol with equally harmful products when the price of alcohol becomes too high.⁵⁵ For instance, “two studies showed that teen marijuana consumption increased when states raised beer taxes or increased the minimum drinking age.”⁵⁶ These studies demonstrate the inherent risk and the unpredictability of results when trying to influence behavior by manipulating the rates of sin taxes.

⁴⁹ Alexander C. Wagenaar et al., *Effects of Beverage Alcohol Price and Tax Levels on Drinking: A Meta-Analysis of 1003 Estimates from 112 Studies*, 104 ADDICTION 179 (2009).

⁵⁰ *Id.* at 187.

⁵¹ Chris Delcher et. al., *Effect of Alcohol Taxes on Alcohol Related Disease Mortality in New York State from 1969 to 2006*, 37 ADDICTIVE BEHAVIOR 783, 788 (2012).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Randy D. Elder, et. al., *The Effectiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption and Related Harms*, 38 AM. J. PREVENTIVE MED. 217, 226 (2010).

⁵⁵ William N. Evans & Matthew C. Farrelly, *The Compensating Behavior of Smokers: Taxes, Tar, and Nicotine*, 29 THE RAND JOURNAL OF ECONOMICS 578, 579 (1998).

⁵⁶ *Id.*

3. The Problems with Sin Taxes

Lawmakers often advocate sin taxes as a means of raising money while at the same time encouraging moral behavior.⁵⁷ Taking each of these goals to their logical outcome highlights the inherent tension between them:

Ironically, these justifications are at odds with one another; you *either* stamp out an activity, or you make money off of its continued consumption. This conflict puts governments in the position of having to decide whether to encourage destructive behavior in order to maintain the same income levels, or to come up with more creative ways to balance tight budgets. This moral hazard of governments indicates that legislators may not always be acting with their citizens' best interests at heart....⁵⁸

Consider, for example, when Congress was considering the imposition of a 25 percent tax on Internet pornography. Opponents of the tax argued, "if the government stood to make money from adult websites, it would lack incentive to discourage the maintenance and patronage of such sites."⁵⁹ Similarly, if the states proceed with the goal of raising revenue to fill state coffers, it will be challenging to ensure that use of the drug actually decreases instead of increases in light of the fact that states will not have an incentive to maintain the current level of marijuana purchases. Alternatively, those states moving toward legalization should observe the dynamics of the relationship between taxes and recreational marijuana use in Colorado and Washington in the coming years.

Another problem with sin taxes is the greater degree by which the government seeks to judge and direct individual behavior.⁶⁰ Economist Thomas DiLorenzo warns of possible government encroachment upon liberty: "once it becomes 'legitimate' for government to protect individuals from their own follies, there is no way to establish limits to governmental power."⁶¹ Furthermore, "as Nobel Prize winner James Buchanan pointed out, any attempt of government to restrict private consumption choices with sin taxes is nothing but a 'meddlesome preference'."⁶² While few people would argue with the importance of initiating policies and programs to discourage destructive behavior, "sin taxes are not an appropriate remedy for social ills."⁶³

⁵⁷ Morse, *supra* note 37, at 203.

⁵⁸ *Id.* at 203-04.

⁵⁹ *Id.* at 216.

⁶⁰ *Id.*

⁶¹ *Id.* at 200 (citing D. Dowd Muska, *Sin Tax Error*, 7 NEV. J. 5 (1999), <http://nj.npri.org/nj99/05/feature2.htm>).

⁶² Williams, *supra* note 40 at 3.

⁶³ Morse, *supra* note 37 at 191-92.

B. Excessive Excise Taxes May Increase Black Market Sales

With the push in Colorado and Washington to impose a high level of excise taxation on marijuana consumers to help fund education and other worthy causes, the question that remains unanswered at this time is whether higher prices will drive consumers back to the black market.

1. Black Market Alternative

If a state increases the rate of excise taxation, is there a risk of driving transactions underground? Evidence suggests that a correlation exists between excessive excise taxation (driving prices higher) and an increase in black market sales.⁶⁴ “When the price of an item increases substantially, it can induce people to shop on the black market.”⁶⁵

Robert Corry, Treasurer of the “No to Proposition AA Campaign” in Denver, sees the high tax rates of Colorado Proposition AA as just another form of prohibition. He argues, “Proposition AA would reestablish prohibition and drive marijuana back underground to the detriment of all Coloradans.”⁶⁶ A recent Wall Street Journal editorial echoes this sentiment:

The [marijuana tax] money [in Colorado] is earmarked for education, so now parents can tell their kids they’re getting high for their future, or something. The problem is that the tax rate, which can reach 35% in some localities, will be so high that it may encourage a black market, thus defeating the supposed purpose of legalization. This is what comes from taking up before economics class.⁶⁷

According to Lieutenant Mark Comte of the Colorado Springs Police Force, “[Legalization] has done nothing more than enhance the opportunity for the black market.”⁶⁸ The price disparity between legalized marijuana and

⁶⁴ *Pro-marijuana group warns against “excessive” taxation in Massachusetts*, HERALD-TRIBUNE (Mar. 18, 2015), <http://marijuana.heraldtribune.com/2015/03/18/pro-marijuana-group-warns-against-excessive-taxation-in-massachusetts/>.

⁶⁵ Morse, *supra* note 37 at 212.

⁶⁶ Robert Corry, Letter to the Editor, *Excessive Marijuana Taxes Make System Dysfunctional*, DAILY CAMERA (Oct. 20, 2013, 1:00 AM), http://www.dailycamera.com/letters/ci_24338792/robert-j-corry-jr-excessive-marijuana-taxes-makes.

⁶⁷ *Colorado pot tax a high or a low? Opinionline*, Op-Ed., USA TODAY (Nov. 11, 2013, 5:53 PM), <http://www.usatoday.com/story/opinion/2013/11/11/colorado-pot-tax-marijuana-legalization-column/3500635/>.

⁶⁸ Leah Barkoukis, *Colorado's Marijuana Black Market is Alive and Well*, TOWNHALL.COM, (Apr. 4, 2014, 1:42 PM), <http://townhall.com/tipsheet/leahbarkoukis/2014/04/04/conservative-s-launch-boycott-of-mozilla-after-gays-press-ceo-to-quit-n1818872>.

marijuana available on the black market are helping keep black market dealers in business. Black market prices undercut legal prices since black market dealers do not collect state and local sales taxes. For example, a black market dealer may sell high-quality marijuana for between \$225 and \$300 an ounce, compared to a \$400 plus price tag on the same amount of legalized marijuana, which includes sales taxes.⁶⁹ Narcotics News reports that black-market, high-grade offerings can run as low as \$156 to \$250 an ounce.⁷⁰ As the amount of marijuana available for legal sale becomes more readily available, the gap between the prices of the two markets will likely close to an extent, but the extra cost due to taxes and other regulatory costs will continue.⁷¹

2. The Uruguay Model

One country has decided to combat the possibility of driving transactions to the black market by deciding not to impose any taxation on marijuana sales. Uruguay passed legislation in December 2013 allowing for the growth and sale of marijuana, making it the first country to do so.⁷² “Uruguay will exempt marijuana production and sales from taxes in a bid to ensure prices remain low enough to undercut competition from black market pot smuggled in from Paraguay, according to consultants advising the government on a legalization plan.”⁷³

Under the new law, registered Uruguayans over the age of 18 are permitted to purchase up to 1.4 ounces of marijuana a month.⁷⁴ In May 2014, regulations were announced providing that eligible citizens would be able to purchase up to “10 grams of pot a week for [approximately] US \$0.90 per gram.”⁷⁵

Government officials have been clear in their rationale for exempting the sale of marijuana from taxation.

⁶⁹ Jacob Sullum, Op-Ed., *Yes, Legal Pot Does Cost More Than Black-Market Pot (For Now At Least)*, FORBES (Jan. 6, 2014, 11:44 AM), <http://www.forbes.com/sites/jacobsullum/2014/01/06/yes-legal-pot-does-cost-more-than-black-market-pot-for-now-at-least/>.

⁷⁰ Brian Bremner & Vincent Del Giudice, *Legal Weed's Strange Economics in Colorado*, BLOOMBERG BUSINESS (Jan. 9, 2014), <http://www.bloomberg.com/bw/articles/2014-01-09/colorado-legal-marijuanas-strange-economics>.

⁷¹ Sullum, *supra* note 69.

⁷² Malena Castaldi, *Uruguay to sell marijuana tax-free to undercut drug traffickers*, REUTERS (May 19, 2014, 10:03 AM), <http://www.reuters.com/article/2014/05/19/us-uruguay-marijuana-idUSKBN0DZ17Z20140519>.

⁷³ *Id.*

⁷⁴ *Uruguay Becomes First Nation to Legalize Marijuana Trade*, BBC NEWS, Latin America and Caribbean (Dec. 11, 2013, 6:49 AM), <http://www.bbc.com/news/world-latin-america-25328656>.

⁷⁵ *Tax-free pot: Uruguay moves further in war against marijuana black market*, RT.COM (May 19, 2014, 7:03 PM), <http://rt.com/news/160008-uruguay-tax-free-marijuana/>.

The low price was established in a bid to fight against drug cartels and compete with black market marijuana smuggled mostly from Paraguay, a neighboring South American country which is one of the region's largest producers of illegal cannabis. But opponents of the law insist the legalization will only expose more people to drugs.⁷⁶

Although the bill passed the Senate by a margin of 16 to 13, many opposed the bill. One opposing senator expressed the following concern: "This project envisages a social engineering experiment and respects none of the ethic safeguards of experimentation on human beings, and these are important in the case of a substance like marijuana, which causes damage to human beings."⁷⁷ And, criticism is not limited to local politicians. For example, "the International Narcotics Control Board ("INCB") warned the law would 'be in complete contravention to the provisions of the international drug treaties to which Uruguay is party.'"⁷⁸

III. THE DICHOTOMY BETWEEN FEDERAL AND STATE LAWS ON LEGALIZED RECREATIONAL MARIJUANA IS NOT A TENABLE POSITION

In our federalist system, no dispute is as fundamental as the struggle of states to maintain their rights in the shadow of the strong central government.⁷⁹ One area in which this battle is waged is the authority to regulate drugs. Early in the nation's history, drug use was unregulated at both the state and federal level. It wasn't until the Civil War era that concerns about drug use and addiction began to surface.⁸⁰ During that time it was standard practice for pharmaceutical companies to add cocaine and opiates to medications, resulting in addictions.⁸¹ For example, so much morphine was administered to wounded soldiers during the Civil War that "chronic morphine use became known as 'soldiers' disease'."⁸² As a result of concerns about morphine addiction, heroin became the drug of choice for pharmaceutical companies. For example, Bayer often added heroin to its cough suppressants and doctors routinely prescribed heroin to treat 'female problems' and hiccups.⁸³ By the end of the 19th century, cocaine gained

⁷⁶ *Id.*

⁷⁷ *Uruguay Becomes First Nation to Legalize Marijuana Trade*, *supra* note 74.

⁷⁸ *Id.*

⁷⁹ David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567 (2013).

⁸⁰ JOSEPH A. CALIFANO, JR., *HIGH SOCIETY: HOW SUBSTANCE ABUSE RAVAGES AMERICA AND WHAT TO DO ABOUT IT* 20 (2007).

⁸¹ *Id.* at 19.

⁸² *Id.*

⁸³ *Id.* at 19-20.

prominence in many elixirs and pain relief products and was even added to wine, chewing gum, and cheese.⁸⁴ By 1905, Americans were consuming 11 tons of cocaine each year, often unknowingly.⁸⁵ As a result, the federal government passed the Pure Food and Drug Act of 1906 requiring that the drug content of all medicines be included on the label.⁸⁶ In 1914, the federal government went a step further and passed the Harrison Narcotics Act of 1914, criminalizing nonmedical uses of narcotic drugs.⁸⁷ In 1937, Congress passed the Marijuana Tax to criminalize the drug, which had grown in popularity from the time American sailors started smoking it in the early 1900s.⁸⁸ Despite restrictions, marijuana use, especially among college students, was widespread in the 1960s and 1970s. In 1970, comprehensive federal legislation was signed into law via the Controlled Substances Act of 1970 (“CSA”), classifying drugs into five schedules, depending on the potential for abuse and medical benefit.⁸⁹ Marijuana, along with other drugs such as heroin and LSD, was categorized as a Schedule I drug, having no accepted medical use and a high potential for abuse.⁹⁰

Not content to abide by the authority of the federal government to dictate drug classification and penalties, states have crafted their own parameters for permissible marijuana use.⁹¹ In fact, state marijuana legalization efforts often fly in the face of federal restrictions and enforcement of federal authority is becoming increasingly complex.⁹² There have been repeated calls to remove marijuana from federal regulation under the CSA.⁹³ David Schwartz has gone so far as to dub state legalization of marijuana as “a federalism crisis.”⁹⁴ Part II will take a closer look at the issues that arise from the conflicting approaches of federal and state law and the cases that have come before the courts due to this lack of certainty.

⁸⁴ *Id.* at 20.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 20-21.

⁸⁹ *Id.* at 22.

⁹⁰ *Id.*

⁹¹ Kimberly A. Houser & Robert E. Rosacker, *High Times: A History of Marijuana Laws in the United States*, 11 INT. J. OF BUS. & PUB. ADMIN. 131 (2014) (summarizing the state laws that are at odds with federal treatment of marijuana).

⁹² *Id.*

⁹³ For example, Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013) seeks to remove marijuana from the Controlled Substances Act.

⁹⁴ Schwartz, *supra* note 79, at 570.

A. *Understanding the Operation of the Controlled Substances Act and the Interaction with State Law*

As part of its opening declarations in the CSA, Congress made clear that a distinction between interstate and intrastate flow of controlled substances was not possible because intrastate manufacture and intrastate possession and local distribution are integral parts of interstate commerce,⁹⁵ thereby explaining the need for the federal government to regulate local transactions. Experience dictates that states have been partners with the federal government in drug regulation and enforcement efforts.⁹⁶ In fact, the CSA makes clear that it does not intend the federal legislation to be a blanket preemption of state law. Rather, the CSA provides:

No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.⁹⁷

1. The Basis of the “Federalism Crisis”

The conflict between federal law and state marijuana legalization efforts necessarily involves two specific doctrines: the Anti-Commandeering Doctrine of the Tenth Amendment and the Supremacy Clause governing federal preemption of state law.⁹⁸ Pursuant to the Anti-Commandeering Doctrine, the federal government lacks the authority to force states to criminalize conduct.⁹⁹ With regard to enforcement of drug laws, this means that Congress cannot demand that a state criminalize marijuana or prosecute those who violate the CSA.¹⁰⁰ The federal government’s primary recourse, then, appears to be to take action to directly enforce prohibition laws on its own and prosecute violators under federal law. However, such action is not without challenges. “That the federal government relies on the assistance, infrastructure, and know-how of state and

⁹⁵ 21 U.S.C. § 801 (2014).

⁹⁶ See, e.g., LISA N. SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R43164, *STATE MARIJUANA LEGALIZATION INITIATIVES: IMPLICATIONS FOR FEDERAL LAW ENFORCEMENT* (2013), available at <http://www.fas.org/sgp/crs/misc/R43164.pdf>.

⁹⁷ 21 U.S.C. §903 (2014).

⁹⁸ Schwartz, *supra* note 79 at 570.

⁹⁹ Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029, 1035 (2013).

¹⁰⁰ Schwartz, *supra* note 79 at 571.

local governments is evinced by, as an example, the fact that ninety-nine percent of drug-related investigations and arrests are carried out by state agents.”¹⁰¹ California provides an example of the magnitude of the problem that the federal government would face, should it seek to enforce the CSA in that state. In 2008, when George W. Bush left office there were approximately 700 medicinal marijuana storefronts in the state of California. “Since 2011, the Obama Administration has waged war on state medicinal marijuana laws, and yet in late-2012, it was estimated that there were at least 500 (and perhaps more than 1,000) dispensaries *in Los Angeles alone*.”¹⁰² Should the federal government decide to enforce federal law, it is likely that resources will prove to be woefully inadequate.¹⁰³

The Supremacy Clause adds another layer of complexity to the federal/state federalism crisis. This Clause, adopted as Article VI, Paragraph 2 of the U.S. Constitution, establishes precedence of federal laws over state laws and state constitutions: “The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.”¹⁰⁴ However, the Supremacy Clause is not without its limits. “There is . . . a presumption against federal preemption when it comes to the exercise of ‘historic police powers of the States’.”¹⁰⁵ Since state police powers include the ability to regulate drugs and the practice of medicine, medical marijuana laws will sometimes come within this presumption.¹⁰⁶ A question for the courts to assess is to what extent Congress, through the CSA, intended to preempt state legislative actions regarding marijuana. The legislative history of the CSA sheds no helpful light on federal/state conflict resolution.¹⁰⁷

However, a petition filed by the states of Nebraska and Oklahoma in December 2014¹⁰⁸ may help resolve the issue. The petition asks the United States

¹⁰¹ Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1 (2013).

¹⁰² Kreit, *supra* note 99, at 1036 (emphasis added).

¹⁰³ See, e.g., Memorandum for Selected United States Attorneys (Oct. 19, 2009), <http://blogs.justice.gov/main/archives/192>.

¹⁰⁴ U.S. CONST. art VI, cl.2.

¹⁰⁵ TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 2, 8 (2012).

¹⁰⁶ *Id.*

¹⁰⁷ Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 13 (2013).

¹⁰⁸ Ilya Somin, *Dangerous Implications of the Nebraska-Oklahoma Lawsuit against Marijuana Legalization in Colorado*, WASH. POST (Dec. 19, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/19/dangerous-implications-of-the-nebraska-oklahoma-lawsuit-against-marijuana-legalization-in-colorado/>.

Supreme Court to issue a declaratory judgment stating Colorado's recreational marijuana laws are preempted by federal law, and therefore unconstitutional and unenforceable under the Supremacy Clause.¹⁰⁹ The crux of the petition is that "Colorado's decision to legalize marijuana under state law, in the face of continuing federal prohibition, harms neighboring states because it facilitates the flow of marijuana across [the borders of Nebraska and Oklahoma] and may increase crime there."¹¹⁰ In a similar vein, in March 2015, a dozen sheriffs from Colorado, Nebraska, and Kansas filed a lawsuit in the federal district court in Denver, seeking to end Colorado's legalization of recreational marijuana.¹¹¹ Colorado Sheriff, Justin Smith, has stated that state legalization has "created a constitutional showdown" and he hopes that the Supremacy Clause prevails.¹¹²

2. Judicial Reaction to Preemption Claims

"[T]he rapid proliferation of state marijuana law reforms has occasioned the need for the courts to make more in-depth inquiries into Congress's preemptive intent under the CSA. Courts have been confronted with a growing docket of suits claiming that state reforms are preempted by the CSA."¹¹³ Some courts have found that, in the absence of a "positive conflict" with the CSA, preemption did not apply. For example, in the recent case of *John Ter Beek v. City of Wyoming*,¹¹⁴ the Supreme Court of Michigan found that the CSA did not preempt the Michigan Medical Marijuana Act (MMMA), which provides immunity for the medical use of marijuana.¹¹⁵ This case resulted from a challenge to a zoning ordinance adopted by the City of Wyoming ("City") that prohibited any use of property in violation of federal or state law or local ordinance.¹¹⁶ Plaintiff, John Ter Beek, was a resident of the City and a medical marijuana patient who wished to grow and use marijuana as allowed by the Michigan statute.¹¹⁷ He therefore challenged the validity of the City ordinance.¹¹⁸ The court

¹⁰⁹ Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint, Complaint and Brief in Support at 28, *States of Nebraska and Oklahoma v. Colorado*, No. 220144 (Dec. 2014).

¹¹⁰ Somin, *supra* note 108.

¹¹¹ Steve Nelson, *Anti-Pot Sheriffs File Lawsuit Against Colorado Legalization*, U.S. NEWS AND WORLD REPORT (Mar. 5, 2015, 1:39 PM), <http://www.usnews.com/news/articles/2015/03/05/anti-pot-sheriffs-file-lawsuit-against-colorado-legalization>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Ter Beek v. City of Wyoming*, 495 Mich. 1 (2014).

¹¹⁵ *Id.* at 10.

¹¹⁶ WYOMING, MICH. CODE § 90-66 (2010).

¹¹⁷ *Tar Beek*, 495 Mich. at 6.

¹¹⁸ *Id.* at 6-7.

first considered whether the CSA preempted the Michigan statute. The court decided that it did not because § 4(a) of the MMMA did not “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA.”¹¹⁹ The next issue the court had to decide was whether the MMMA preempted the City ordinance.¹²⁰ In this instance, the court found preemption to exist because “the Ordinance directly conflicts with the MMMA by permitting what the MMMA expressly prohibits—the imposition of a ‘penalty in any manner’ on a registered qualifying patient whose medical use of marijuana falls within the scope of § 4(a)’s immunity.”¹²¹

In 2013, a year before the Michigan court’s ruling in *Ter Beek*, the Supreme Court of California also grappled with the state/local authority issue. California law allowed the cultivation and use of medicinal marijuana.¹²² The dispute in *City of Riverside v. Inland Empire*¹²³ revolved around a local zoning ordinance adopted by the City of Riverside (“City”) that banned medical marijuana facilities in the City on the grounds that they constituted a public nuisance.¹²⁴ As an operator of a medical marijuana dispensary, the defendant in the case argued against the City’s request for injunctive relief that would close the dispensary’s operations.¹²⁵ Affirming the decisions of both the trial and appellate courts, the State Supreme Court upheld the zoning ordinance.¹²⁶ The court found that “. . .neither the CUA [Compassionate Use Act] or the MMP [Medical Marijuana Program] expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medicinal marijuana, and to enforce such policies by nuisance actions. . .”¹²⁷ Relying on *Riverside*, in March 2014, the Court of Appeals of California upheld the right of the County of San Bernardino to adopt an ordinance that banned the operations of medical marijuana dispensaries in the county.¹²⁸

¹¹⁹ *Id.* at 19.

¹²⁰ *Id.*

¹²¹ *Id.* at 20.

¹²² See, e.g., Compassionate Use Act of 1996, CAL. HSC CODE, §11362.5 and the Medical Marijuana Program, CAL. HSC CODE, §11362.7.

¹²³ *City of Riverside v. Island Empire Patients Health and Wellness Cent., Inc., et al.*, 56 Cal. 4th 729 (2013).

¹²⁴ *Id.* at 737.

¹²⁵ *Id.* at 741.

¹²⁶ *Id.* at 738.

¹²⁷ *Id.* at 762.

¹²⁸ *Clearview Lake Corp. v. Cnty. of San Bernardino*, No. EO56208, 2014 WL 936831, at *1 (Cal.App. 4 Dist. Mar. 11, 2014).

3. Department of Justice and Enforcement of Federal Law

Given the dichotomy between state marijuana laws and the CSA, the federal government has sought to clarify its approach through enforcement guidelines issued by the Department of Justice. For example, in October 2009, Deputy Attorney General Ogden issued a “Memorandum for Selected United States Attorneys” on *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*. This memorandum acknowledges that the Department has “limited investigative and prosecutorial resources” and reminds U.S. Attorneys:

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department. . . and the Department’s investigative and prosecutorial resources should be directed toward these objectives. As a general matter, *pursuit of these 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 marijuana.*¹²⁹

Within two years of issuing this memorandum, the Department of Justice received inquiries from some local governments that were considering “approving the cultivation of large quantities of marijuana, or broadening regulation and taxation of the substance.”¹³⁰ In response, Deputy Attorney General James Cole issued a “Memorandum for United States Attorneys” on *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*. Concerned about the increased quantities of drug cultivation and revenue projections in the millions of dollars, the memo reminded U.S. Attorneys:

The Ogden Memorandum was never intended to shield such activities from federal enforcement actions and prosecution, even where those activities purport to comply with the state law. Persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such

¹²⁹ Memorandum from David W. Ogden for Selected U.S. Attorneys (Oct. 19, 2009), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf> (emphasis added).

¹³⁰ Memorandum from James Cole to Select U.S. Attorneys (June 29, 2011), available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.

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activities, are in violation of the Controlled Substances Act, regardless of state law.¹³¹

In December 2012, after recreational marijuana was legalized in Colorado and Washington, in an interview with ABC news, President Obama expressed the sentiment that the federal government had “bigger fish to fry” than legal recreational users in Colorado and Washington. He stated, “It would not make sense for us to see a top priority as going after recreational users in states that have determined it’s legal.”¹³² On August 2013, Deputy Attorney General Cole issued yet another memorandum to update U.S. Attorneys on the Department of Justice’s position in light of actions in Colorado and Washington authorizing the production, processing, and sale of recreational marijuana.¹³³ Almost twice the length of the previous memos, this memorandum goes into greater detail on how U.S. Attorneys should assess activities involving marijuana. Specifically, Cole reminds U.S. Attorneys that, “The primary question in all cases – and in all jurisdictions-should be whether the conduct at issue implicates one or more of the [federal] enforcement priorities. . .”¹³⁴ If it does, then such conduct may be addressed by federal authorities.¹³⁵ But if it does not, federal resources should not be used to interfere with activities that are legal under state law, and any issues should be addressed by “state and local law enforcement and regulatory bodies.”¹³⁶ The federal government has provided what it considers to be the

¹³¹ *Id.* at 2.

¹³² Devin Dwyer, *Marijuana Not High Obama Priority*, ABC NEWS BROADCAST (Dec. 14, 2012), <http://abcnews.go.com/Politics/OTUS/president-obama-marijuana-users-high-priority-drug-war/story?id=17946783>.

¹³³ Memorandum from James Cole to U.S. Attorneys (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

¹³⁴ *Id.* at 2-3. The Memorandum outlines the following enforcement priorities:

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

¹³⁵ *Id.* at 4.

¹³⁶ *Id.* at 3.

blueprint for the Attorney General's actions, but how that will unfold in application remains to be seen.

In addition, although the Attorney General may have a blueprint for action, blueprints do not yet exist for the various federal agencies that may interact with the legalized marijuana industry. Legislators in Colorado and Washington have voiced concerns over a lack of uniformity in the approach of various federal agencies toward legalized marijuana. In a July 28, 2014, letter addressed to the White House Chief of Staff and to Attorney General Eric Holder, United States Senators from Colorado and Washington have made clear:

It is incumbent on the Administration to work with all federal departments and agencies setting forth a clear, consistent, and uniform interpretation and application of the CSA and other federal laws that could affect the [marijuana] industry. Such guidance should reflect the same deference to our state laws, as does the Cole memorandum.¹³⁷

B. The Dichotomy Causes a Host of Practical Problems

Consider the following hypothetical which was raised during a May 2014 Congressional hearing:

If Congress allows a District of Columbia law to take effect that would decriminalize the possession of small amounts of marijuana, and someone with one foot on the National Mall and another foot on city property is caught carrying the drug, would that person be charged with a crime under federal law?¹³⁸

According to Robert MacLean, the acting chief of the United States Park Police, the answer is yes; but, according to the Assistant Chief of DC Metropolitan Police Department, the

¹³⁷Letter from Patty Murray & Maria Cantwell, U.S. Senators from Washington, Mark Udall & Michael Bennet, U.S. Senators from Colorado, to Denis McDonough, White House Chief of Staff, and Eric Holder, U.S. Attorney General (July 28, 2014), *available at* <http://www.murray.senate.gov/public/index.cfm/2014/7/marijuana-washington-colorado-senators-press-obama-administration-on-marijuana-policies>.

¹³⁸David S. Joachim, *Review of Marijuana Law Exposes List of Conflicts Between Jurisdictions*, N.Y. TIMES, May 10, 2014, at A15, *available at* http://www.nytimes.com/2014/05/10/us/review-of-marijuana-law-exposes-list-of-conflicts-between-jurisdictions.html?_r=1; *Mixed Signals: The Administration's Policy on Marijuana, Part Three Hearing Before the H. Subcomm. on Government Operations*, 113th Cong. (2014) [hereinafter *Subcommittee Hearing*] (statement of John Mica, Chairman, H. Subcomm. On Government Operations), *available at* <http://oversight.house.gov/hearing/mixed-signals-administrations-policy-marijuana-part-three/>.

answer is no.¹³⁹ These conflicting responses by those charged with enforcing the law in DC epitomize the practical implications of an inconsistent marijuana policy.

1. Local Officials Are Uncertain How to Reconcile the Federal/State Conflict

Law enforcement officers have reported that the inconsistency between state and federal law is a significant problem, especially when trying to determine the correct manner of handling seized marijuana.¹⁴⁰ Cases demonstrate the uncertainty of state and local officials in determining how to proceed in light of the conflicting regimes. For example, in *City of Garden Grove v. The Superior Court of Orange County*,¹⁴¹ the question before the court was whether marijuana that was seized from Felix Kha, a medical marijuana patient, by police officers during a traffic stop, could be lawfully returned to him after the criminal charge of transporting marijuana was dropped.¹⁴² The trial court ordered the City to return the marijuana as soon as the charges were dropped.¹⁴³ The City appealed the order of the trial court.¹⁴⁴ While agreeing that Mr. Kha's possession of marijuana was legal under California law, the City nevertheless refused to return the marijuana because the drug was illegal under federal law.¹⁴⁵ The City also argued that to the extent that state law authorizes return of the marijuana, federal law preempts state authorization.¹⁴⁶ Furthermore, they asserted that police officers could be criminally liable under the CSA if they returned the marijuana to Mr. Kha.¹⁴⁷ The Attorney General of California filed an amicus brief in the case, supporting the trial court's ruling.¹⁴⁸ An amicus brief was also filed on behalf of California's sheriffs', police chiefs', and peace officers' associations asking the court to overrule the trial court order.¹⁴⁹ Citing "due process and

¹³⁹ *Subcommittee Hearing, supra* note 138.

¹⁴⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-189 Report to the Chairman, Subcomm. on Criminal Justice, Drug Policy and Human Resources, Committee on Government Reform, U.S. House of Representatives, *Marijuana: Early Experiences with Four States' Laws That Allow Use for Medical Purposes* 34 (Nov. 2002).

¹⁴¹ *City of Garden Grove v. Superior Court of Orange County*, 157 Cal. App. 4th 355, 362 (2007).

¹⁴² *Id.*

¹⁴³ *Id.* at 363.

¹⁴⁴ *Id.* at 364.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 365.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

fundamental fairness,” the appeals court found that the marijuana that rightfully belonged to Mr. Kha and ordered that it be returned to him.¹⁵⁰

In Oregon, a similar dispute arose over the proper handling of 2.5 grams of marijuana seized from an individual medical marijuana user. When the state charges against the individual were dismissed, the court ordered the Portland police to return the marijuana.¹⁵¹ The City argued that they could not do so because such an action “would constitute delivery of a controlled substance in violation of federal law.”¹⁵² The Oregon Court of Appeals rejected the City’s argument.¹⁵³

2. Financial Institutions are Receiving Mixed Messages

In February 2014, separate decisions by the United States Department of the Treasury and the United States Department of Justice moved the production and sale of marijuana from the shadows of the underground economy to the commercial mainstream of the United States’ financial system.¹⁵⁴ The Treasury Department issued a set of rules aimed at making it easier for United States’ banks to transact business with marijuana-focused businesses in states where the sale of marijuana is legal.¹⁵⁵ The Justice Department instructed U.S. Attorneys not to pursue prosecution of banks conducting business with organizations dealing in marijuana production and sale, as long as they follow the rules issued by the Treasury Department.¹⁵⁶

However, months after the guidance was issued by the Treasury Department and the Justice Department, marijuana dispensers continue to face difficulty with even simple tasks, such as opening a checking account.¹⁵⁷ The problem for banks is that the current rules and guidance provide minimal comfort and protection against the possibility of federal prosecution.¹⁵⁸ There is no guarantee that banks will not be prosecuted for transacting business with

¹⁵⁰ *Id.* at 389.

¹⁵¹ *Oregon v. Kama*, 39 P.3d 866, 867 (Or. Ct. App. 2002).

¹⁵² *Id.*

¹⁵³ *Id.* (finding that 21 U.S.C. 885(d) provides state and local officers with immunity for such actions).

¹⁵⁴ Danielle Douglas, *Obama Administration Clears Banks to Accept Funds from Legal Marijuana Dealers*, WASH. POST (Feb. 14, 2014), http://www.washingtonpost.com/business/economy/obama-administration-clears-banks-to-accept-funds-from-legal-marijuana-dealers/2014/02/14/55127b04-9599-11e3-9616-d367fa6ea99b_story.html.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Dan Frosch and Robin Sidel, *For Pot Shops, Finding a Bank Is Still a Pipe Dream*, WALL ST. J. (Apr. 21, 2014, 6:24 PM), <http://online.wsj.com/news/articles/SB10001424052702304049904579515911975177756>.

¹⁵⁸ *Id.*

marijuana dispensers; there is simply a directive from the Justice Department instructing U.S. Attorneys not to pursue banks.¹⁵⁹ Not surprisingly, such uncertainty has caused banks to remain hesitant to work with state-based dispensers.¹⁶⁰ To help address this issue, in July 2014, the House of Representatives passed an amendment, referred to as the Heck Amendment, which prevents both securities and treasury regulators from seeking to use federal funds to penalize banks that conduct business with the marijuana industry.¹⁶¹ Although the measure has made it through the House, Senate approval is still pending. Further, the Amendment does not go so far as to provide banks unfettered permission to do business with the marijuana industry; instead it merely prevents resources from being used to penalize banks that do so.¹⁶² As a result of the uncertainty, the huge marijuana industry in the United States continues to be primarily a cash-based industry with little access to mainstream commercial banks.¹⁶³

One negative ramification of the lack of available banking services is the inability to pay expenses via check or bank wire. Consider for, example, the requirement of the Internal Revenue Service (“IRS”) that all businesses submit quarterly withholding taxes to the IRS via bank wire.¹⁶⁴ Without banking services, the marijuana industry has been unable to comply with this requirement, and as a result, some businesses have faced a ten percent penalty for paying in cash.¹⁶⁵ In a lawsuit filed against the IRS in the U.S. Tax Court, Allgreens LLC, a marijuana dispensary located in Denver, Colorado, challenged the ability of the

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ David Migoya, *U.S. House OKs bill that may open door to bank accounts for pot shops*, THE DENVER POST, (July 16, 2014, 2:39 PM), http://www.denverpost.com/business/ci_26160270/house-oks-bill-stop-feds-from-using-cash.

¹⁶² *Id.*

¹⁶³ Kristen Wyatt, *Colorado Approves First Marijuana Banking System*, THE HUFFINGTON POST (May 7, 2014, 8:11 PM), http://www.huffingtonpost.com/2014/05/07/colorado-marijuana-banking_n_5284442.html.

¹⁶⁴ See BUSINESS OWNER'S TOOLKIT, www.bizfilings.com/toolkit/sbg/tax-info/payroll-taxes/payroll-tax-payment-and-filing-requirements.aspx (last visited Aug. 1, 2014); see also ELECTRONIC FEDERAL TAX PAYMENT SYSTEM, <https://www.eftps.gov/> (last visited Aug. 1, 2014).

¹⁶⁵ David Migoya, *IRS fines unbanked pot shops for paying federal payroll tax in cash*, THE DENVER POST (July 2, 2014, 11:17 AM), http://www.denverpost.com/business/ci_26075425/irs-fines-unbanked-pot-shops-paying-federal-payroll. Internal IRS policies suggest that taxpayers without banking services send the money to the IRS through a third party but such actions may fall within the definition of money laundering.

IRS to impose this penalty.¹⁶⁶ In March 2015, the IRS settled the case, agreeing to refund Allgreens \$25,000 in fines.¹⁶⁷

In an attempt to combat the banking problem, the Colorado Legislature approved the “world’s first financial system for the marijuana industry. . . , a network of uninsured cooperatives designed to give [marijuana] businesses a way to access basic banking services.”¹⁶⁸ The purpose of the legislation is to develop a financial services system for marijuana businesses.¹⁶⁹ As noted by a Colorado state senator, “We are trying to improvise and come up with something in Colorado to give marijuana business some opportunity, so they do not have to store large amounts of cash.”¹⁷⁰ Colorado’s Governor, John Hickenlooper, signed this legislation into law on June 6, 2014.¹⁷¹ On November 2014, Colorado’s Divisions of Financial Services approved the state charter of the Fourth Corner Credit Union, making it the world’s first financial institution established for the marijuana industry.¹⁷²

3. Individuals Pay the Price for Engaging in an Lawful State Activity

With the current trend in the United States of developing a more tolerant view toward the use of marijuana, people often forget that “[n]early half of all drug arrests each year are for marijuana-related offenses, the overwhelming majority of which are for personal possession.”¹⁷³ However, the consequences of a marijuana conviction are serious and can deprive offenders of basic rights and deny them access to resources. For example, a marijuana conviction could “make it difficult or impossible to vote, obtain educational loans, get a job, secure housing, or even adopt a child.”¹⁷⁴ Additionally, a conviction could influence the outcome of a child custody case in family court or deprive offenders of federally

¹⁶⁶ *Id.*

¹⁶⁷ Michael Cohn, *IRS to Refund Penalties to Marijuana Dispensary*, ACCOUNTING TODAY (Mar. 23, 2015), <http://www.accountingtoday.com/news/tax-practice/irs-to-refund-fines-to-marijuana-dispensary-74070-1.html>.

¹⁶⁸ Wyatt, *supra* note 163.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Plan to establish marijuana banks becomes law*, THE DENVER POST (June 6, 2014, 10:56 AM), http://www.denverpost.com/news/ci_25912219/plan-establish-marijuana-banks-become-s-law.

¹⁷² Sarah Eberspacher, *Colorado approves world’s first marijuana credit union*, THE WEEK (Nov. 22, 2014), <http://theweek.com/speedreads/441263/colorado-approves-worlds-first-marijuana-credit-union>.

¹⁷³ *Reducing the Harms of Marijuana Prohibition*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/reducing-harms-marijuana-prohibition> (last visited Aug. 1, 2014).

¹⁷⁴ *Id.*

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subsidized housing.¹⁷⁵ Other basic rights that can be affected include the right to possess firearms, the right to receive food stamps and other welfare benefits, and the right to enter some foreign nations.¹⁷⁶ A marijuana conviction may also affect an offender's ability to secure gainful employment.¹⁷⁷ Proponents of legalization see these consequences of marijuana possession and use as out-of-proportion to the gravity of the offense.¹⁷⁸ However, legalization efforts at the state level cannot guarantee that such consequences will not occur as long as the drug remains illegal for federal purposes.

Conflicting federal and state laws with regard to marijuana produce uncertainty at both the state and local level. These situations often involve application of medical marijuana laws, which carve out specific permissible behavior with regard to cultivation, possession, and use of the drug. A growing number of disputes over state legislation can be expected now that Colorado and Washington have brought marijuana into the mainstream economy, and these certainly can be expected to further complicate this "crisis of federalism."

IV. ARE THE SOCIAL COSTS OF MARIJUANA TOO HIGH TO JUSTIFY LEGALIZATION FOR RECREATIONAL PURPOSES?

Because legal sales of recreational marijuana did not go into effect in Colorado until January 2014 and in Washington until June 2014, it is too soon to answer this question with certainty. Nevertheless, it is a question that must be given serious consideration, especially since numerous states are already seeking to follow in the footsteps of Colorado and Washington. One of the most significant unknowns at this point is to what extent marijuana consumption may increase.

If legalization led to a consumption increase of 10 percent above current levels it would have to be counted as a good move. If legalization led instead to a tripling of use—particularly in the number of very heavy users—any but the most sanguine about the drug's effects would probably count legalization as a disaster. . .

¹⁷⁵ *12 Little Known Consequences of a Marijuana Conviction or Arrest*, WASHINGTON DRUG DEFENSE, http://washington-drug-defense.com/Marijuana_Conviction_or_Arrest (last visited Aug. 1, 2014).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Jesse Wegman, Opinion, *The Injustice of Marijuana Arrests*, N. Y. TIMES, July 28, 2014, at A20, available at http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?_r=0.

The problem for the analyst is that a 10 percent increase and a tripling seem equally plausible outcomes of legalization.¹⁷⁹

Recent findings published in a report released by the Colorado Department of Revenue confirm this inability to accurately predict increased usage as a result of legalization. The study, released on July 9, 2014, “finds total marijuana demand to be much larger than previously estimated.”¹⁸⁰ The report explains the extent to which expected demand was underestimated:

Our point estimate of demand is 121.4 tons per year for adult residents. This is 31 percent higher than a recent Department of Revenue assessment, 89 percent higher than a study by the Colorado Futures Center, and 111 percent higher than an older study by the Colorado Center for Law and Policy.¹⁸¹

Analogizing to society’s experience with the prohibition of alcohol, consider that the repeal of Prohibition changed consumption levels.¹⁸² In fact, that experience showed that “changes in a drug’s legal status, even if the drug is already widely consumed and even if enforcement is far from perfect, can substantially change the number of very heavy users.”¹⁸³ Consider the possibility that legalization of recreational marijuana leads to an increase in use to the point that voters consider whether marijuana should once again be considered illegal. Unfortunately, at some point the situation may be irreversible because not all users who began using marijuana when it was legal would have the desire or inclination to quit when the drug once again becomes illegal.¹⁸⁴ Those who do not quit “would swell the revenues of illicit marijuana dealers and multiply the headaches of marijuana enforcement agencies.”¹⁸⁵ An increased user population makes enforcement that much more difficult.¹⁸⁶

But whether the number of users and heavy users increases significantly or not, it is worth bearing in mind that legalized recreational marijuana is not without cost both to our society and to our youth.

¹⁷⁹ MARK A.R. KLEINMAN, MARIJUANA: COSTS OF ABUSE, COSTS OF CONTROL 164 (1989).

¹⁸⁰ Miles K. Light *et. al.*, *Market Size and Demand for Marijuana in Colorado: Prepared for the Colorado Department of Revenue*, Colorado Department of Revenue and Marijuana Policy Group 3 (July 9, 2014), available at <http://www.colorado.gov/cs/Satellite/Rev-MMJ/CBON/1251592985115>.

¹⁸¹ *Id.*

¹⁸² Mark H. Moore, Opinion, *Actually, Prohibition Was a Success*, N.Y. TIMES, (Oct. 16, 1989), <http://www.nytimes.com/1989/10/16/opinion/actually-prohibition-was-a-success.html>.

¹⁸³ Kleinman, *supra* note 179, at 174.

¹⁸⁴ *Id.* at 174-175.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 164.

A. Costs to our Society

The opening of the marijuana shops makes a wide variety of marijuana products available to the public, including rice crispy treats, lollipops, lemonade, butter, cookies, cooking oils, agave nectar, caramels, and even bacon cheddar biscuits.¹⁸⁷ There are a multitude of marijuana edibles available and they are appealing to broad segments of society from college students to senior citizens. The purchase of marijuana has moved into the mainstream to such an extent that Fodor's Travel now provide tourists with advice on "Pot Tourism."¹⁸⁸ In Colorado, 18 licensed shops made the first legal sales of recreational marijuana on January 1, 2014.¹⁸⁹ By the end of March 2014, 160 shop licenses were issued.¹⁹⁰ In December 2014, that number had more than doubled to 322.¹⁹¹

Such widespread availability may contribute to the message that marijuana is simply a "harmless drug," while downplaying the health and economic consequences that may accompany it. Another factor contributing to the belief that marijuana is a "harmless drug" is a conception that harkens back to the marijuana of the 1960s and 1970s and "the lack at that time of conclusive findings regarding short or long-term health consequences."¹⁹² The marijuana purchased in times past was of poor quality, with a level of marijuana's psychoactive ingredient, tetrahydrocannabinol (THC), equal to anywhere from three to six percent. "Today's cannabis, with THC levels that range from six percent to twenty-two percent is much more potent, and concentrates of cannabis can reach THC levels of sixty percent."¹⁹³

1. The Health Effects of Marijuana

It is beyond the scope of this paper to explore the full range of health effects that may occur as a result of marijuana usage. These effects are well documented and have been addressed by those more qualified to do so.¹⁹⁴

¹⁸⁷ Nile Cappello, *Weed Edibles: The Most Creative Marijuana Products*, THE HUFFINGTON POST (Aug. 30, 2013, 9:10 AM), http://www.huffingtonpost.com/2013/08/30/weed-edibles_n_3831498.html.

¹⁸⁸ Kevin Fixler, *Pot Tourism: How to Buy Marijuana in Colorado*, FODORS.COM (Mar. 26, 2014, 1:00 PM), <http://www.fodors.com/news/pot-tourism-how-to-buy-marijuana-in-colorado-10403.html>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ J. Smith, *Marijuana Sales in Colorado*, GUARDIAN LIBERTY VOICE (Feb. 28, 2015), available at <http://guardianlv.com/2015/02/marijuana-sales-in-colorado/>.

¹⁹² Nicholas J. Kozel & Edgar H. Adams, *Epidemiology of Drug Abuse: An Overview*, 234 SCI. 970, 973 (1986).

¹⁹³ Roger Parloff, *Yes, We Cannabis*, 167 FORTUNE INTERNATIONAL (ASIA) 1 (2013).

¹⁹⁴ *See, e.g.,* Kozel, *supra* note 192.

Among other things, marijuana use has been linked to respiratory illness, and cognitive impairment.¹⁹⁵ And while there are some who maintain that marijuana is not addictive,¹⁹⁶ according to the Department of Health and Human Services, of the 4.3 million cases of drug addiction that require treatment each year, two thirds of them involve marijuana.¹⁹⁷ It is safe to say these numbers are likely to increase as marijuana goes mainstream.

One challenge for marijuana consumers is developing an understanding of an appropriate level of marijuana consumption. This is especially challenging for those consuming marijuana infused edibles. Such confusion can lead to tragic results. In the few months since legalization, two deaths have possibly been connected to the ingestion of marijuana edibles.¹⁹⁸ The first death occurred in March 2014, when a 19-year-old college student fell from a balcony after eating a marijuana infused cookie. The student was visiting Colorado from Wyoming for spring break to try marijuana. Eating one cookie caused the young man to go “off the wall,” according to his friends.¹⁹⁹ The coroner determined that the student’s death was attributable to “marijuana intoxication” since THC was the only drug in his system.²⁰⁰ The cookie consumed by the student contained 65mg of THC, while a single serving is approximately 10 mg.²⁰¹ Most people are used to eating a whole cookie, and as such the student may not have had an appropriate frame of reference for safe consumption.²⁰² A few weeks later, a man shot his wife while she was on the phone with a 911 dispatcher. According to the wife, her husband

¹⁹⁵ *The Public Health Consequences of Marijuana Legislation*, THE WHITE HOUSE, OFFICE OF NATIONAL DRUG CONTROL POLICY (ONDCP), <http://www.whitehouse.gov/ondcp/marijuana> (last visited Aug. 1, 2014).

¹⁹⁶ See, for example Lester Grinspoon, et. al., *Marijuana Addiction*, 277 SCI. 749 (Aug. 1977) for a lively exchange between health professionals on the addictive nature of marijuana.

¹⁹⁷ John Walters, *The Myth of ‘Harmless’ Marijuana*, WASH. POST, May 1, 2002, at A25, available at <http://www.washingtonpost.com/wpdyn/content/article/2002/05/01/AR2006051500683.html>.

¹⁹⁸ Keith Coffman, *Colorado tightens control on marijuana edibles, concentrates*, REUTERS (May 21, 2014, 11:31 PM), <http://www.reuters.com/article/2014/05/22/us-marijuana-colorado-idUSBREA4L02U20140522>.

¹⁹⁹ Keith Coffman, *Exchange student falls to death in Denver after eating marijuana cookie*, REUTERS (Apr. 2, 2014, 5:49 PM), available at <http://www.reuters.com/article/2014/04/02/us-usa-colorado-marijuana-idUSBREA3127N20140402>.

²⁰⁰ *Id.*

²⁰¹ *Colorado to Revisit Edible Marijuana Rules After Deaths*, USA TODAY (Apr. 29, 2014, 7:47 AM), <http://www.usatoday.com/story/news/nation/2014/04/29/denver-marijuana-edibles/8449175/>.

²⁰² In comparison to alcohol, for example, individuals may not be as aware of their limits and what the impact will be. An individual may know the impact drinking two shots of whiskey will have on her, but may not know the effect of a piece of candy with 20mg THC. The newly proposed regulations in Colorado governing edibles should help consumers learn to distinguish between THC levels and their effects.

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had eaten high-potency marijuana-infused candy and was hallucinating. While the gunman may have also been on prescription painkillers at the time of the shooting, this second death possibly linked to marijuana use caused Colorado lawmakers to recognize the need to enact the increased restrictions on potency and labeling for the edibles.²⁰³ In May 2014, Colorado's Governor signed legislation that would, among other things, (1) convene a task force to regulate packaging for marijuana edibles to ensure that the product is easily differentiated from regular food and (2) regulate the amount of concentrated marijuana that an individual can purchase.²⁰⁴ As a follow-up to the Governor's request for tightened restrictions on the packaging and labeling of marijuana edibles, Colorado's marijuana regulators have drafted proposed rules that will require "makers of edible pot to physically demark their products so that consumers can 'intuitively determine' how much constitutes a dose of marijuana's intoxicating ingredient, THC."²⁰⁵

Another concern is whether marijuana is a "gateway drug". In other words, does it open the door to experimentation with other additional drugs?²⁰⁶ Although a direct causal relationship between marijuana use and use of other drugs has not been proven, there is evidence that "adults who were early marijuana users were found to be eight times more likely to have used cocaine, 15 times more likely to use heroin, and five times more likely to develop a need for treatment of abuse or dependence on any drug."²⁰⁷ In fact, "the single best predictor of cocaine use is frequent marijuana use during adolescence."²⁰⁸

2. Economic Impacts

A correlation has also been shown between marijuana and a loss of productivity in the workplace. For example, absence from work was 75 percent higher for marijuana users than non-users, and the marijuana users were 55 percent more likely to have an industrial accident.²⁰⁹ Marijuana use also increases

²⁰³ Coffman, *supra* note 198.

²⁰⁴ *Id.*

²⁰⁵ Marc Stewart, *Colorado tightening edible pot rules; regulations to make THC dose easier to determine*, 7NEWS DENVER (July 31, 2014, 8:11 PM), <http://www.thedenverchannel.com/news/local-news/colorado-tightening-edible-pot-rules-regulations-to-make-thc-dose-easier-to-determine07312014>.

²⁰⁶ For additional discussion of this point see, for example, THE EPIDEMIOLOGY OF OPIATE ADDICTION IN THE UNITED STATES, JOHN C. BALL & CARL D. CHAMBERS, EDS. (1970) (Part II contains five chapters on connection between marijuana and opiate addiction).

²⁰⁷ ONDCP, *supra* note 195.

²⁰⁸ Kozel, *supra* note 192, at 192.

²⁰⁹ David Evans, *Marijuana's Legalization Costs Outweigh Its Benefits*, US NEWS AND WORLD REPORT (Oct. 30, 2012, 3:13 PM), <http://www.usnews.com/debate-club/should-marijuana-use-be-legalized/marijuana-legalizations-costs-outweigh-its-benefits>.

public health costs. For example, in 2010, marijuana use resulted in 461,000 emergency room visits in the United States, representing 39% of all visits that were related to drug use.²¹⁰ A recent study released by the U.S. Healthcare Cost and Utilization Project showed that emergency use visits attributed to cannabis increased 50.4% between 2007 and 2012 in Colorado, one of the first states to legalize recreational and medical marijuana.²¹¹ Also impacting the health system are illnesses resulting from accidental ingestion. At about the same time the federal government adopted a “hands off” policy with regard to those using marijuana in accordance with state medicinal marijuana laws, the physicians at Children’s Hospital in Colorado first began noticing children brought in after accidental ingestion.²¹² “From January 2005 through September 2009, there were no marijuana-related visits.... Between October 2009 and December 2011, however, 14 of 588 children were seen for marijuana exposure,” some from medicinal marijuana and others from edibles.²¹³

Like any addictive drug, marijuana has the propensity to lead users into a downward cycle in which they become consumed with securing their next high, sometimes at any cost, even resorting to crime to obtain money to pay for their habit. In fact, one study showed that “more than 41 percent of male arrestees in sampled U.S. cities tested positive for marijuana.”²¹⁴ Research has confirmed a connection between the use of marijuana and an increase in violent behavior; youth who use marijuana are four times more likely than non-users to act violently.²¹⁵

Of great interest is a report issued by The National Center on Addiction and Substance Abuse (CASA) at Columbia University which represents the first time a study was done on the total amount spent by federal, state, and local governments on substance abuse.²¹⁶ The study found that social costs indeed

²¹⁰ *Answers to Frequently Asked Questions About Marijuana*, THE WHITE HOUSE, OFFICE OF NATIONAL DRUG CONTROL POLICY (ONDCP), <http://www.whitehouse.gov/ondcp/frequently-asked-questions-and-facts-about-marijuana> (last visited Aug. 1, 2014).

²¹¹ Deborah Brauser, *Cannabis-Related ED Visits Rise in States With Legalized Use*, Medscape (Dec. 16, 2014) available at <http://www.medscape.com/viewarticle/836663>.

²¹² Bonnie Rochman, *More Kids Accidentally Ingesting Marijuana Following New Drug Policies*, TIME (May 28, 2013), <http://healthland.time.com/2013/05/28/more-kids-accidentally-ingesting-marijuana-following-new-drug-policies/>.

²¹³ *Id.*

²¹⁴ ONDCP, *supra* note 195.

²¹⁵ *Id.*

²¹⁶ *Shoveling Up II: The Impact of Substance Abuse on Federal, State and Local Budgets*, THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE (CASA COLUMBIA) (May 2009), available at <http://www.casacolumbia.org/addiction-research/reports/shoveling-ii-impact-substance-abuse-federal-state-and-local-budgets>. This was an extensive review involving a look at more than 900 articles and other publications that connect substance abuse and public spending.

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outweighed the revenue stream generated by alcohol and tobacco. “Alcohol and tobacco taxes fail to pay their way For each dollar in alcohol and tobacco taxes and liquor store revenues that hit federal and state coffers, these governments spent \$8.95 cleaning up the wreckage of substance abuse and addiction.”²¹⁷ An earlier study, which considered the social costs of alcohol use, caused the federal government to remark, “The cost to society of alcohol alone is estimated to be more than 15 times the revenue gained by their taxation.”²¹⁸

B. Costs to Our Youth (Our Future)

When considering whether legalization of recreational marijuana will result in increased use by teenagers, a preliminary question to consider is whether legalization will change public perception about marijuana, particularly in the young.²¹⁹ A study designed to determine whether California’s legalization of medical marijuana in 1996 resulted in a change in attitude about marijuana found that “medical marijuana policy had little impact on youth and young-adult marijuana related attitudes and use.”²²⁰ This survey was completed only three years after legalization, perhaps too short a time frame in which to discern changes in attitude. A later study conducted in 2013, showed a significant change in the attitude of middle and high school students toward marijuana use.²²¹ While 72.5 percent of 12th graders considered regular marijuana use to be unsafe in 1993, by 2013 that percentage was down to only 39.5%.²²² In 2013, 46.5 percent of 10th grade students perceived marijuana as unsafe, compared to 78.5 percent in 1993.²²³ The views of eighth grade students also shifted, although to a lesser extent, with 79.6 percent believing regular marijuana use to be harmful in 1993, dropping to 61 percent 20 years later.²²⁴ Although these changes in attitude could be attributable to factors other than legalization efforts, the pro-marijuana campaigns that characterize marijuana “harmless” and encourage legalization

²¹⁷ *Id.* at 4.

²¹⁸ The Public Health Consequences of Marijuana Legalization, THE WHITE HOUSE, OFFICE OF NATIONAL DRUG CONTROL POLICY (ONDCP), <http://www.whitehouse.gov/ondcp/marijuana> (last visited Aug. 1, 2014) (citing Ellen E. Bouchery, *MS et. al.*, The Economic Costs of Excessive Alcohol Consumption, 2006, 41 *AM. J. PREVENTIVE MED.* 516 (2011), available at [http://www.ajpmonline.org/article/S0749-3797\(11\)00538-1/fulltext](http://www.ajpmonline.org/article/S0749-3797(11)00538-1/fulltext)).

²¹⁹ Shereen Khatapoush & Denise Hallfors, *Sending the Wrong Message: Did Medical Marijuana Legalization in California Change Attitudes About the Use of Marijuana?* 34 *J. OF DRUG ISSUES* 751, 765 (2004).

²²⁰ *Id.*

²²¹ Evie Blad, *Students Views Shifting on Risks of Marijuana*, *EDUC. WK.* 1, 10 (2014).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

should no doubt be among those factors.²²⁵ According to the Office of National Drug Control Policy, “Confusing messages being presented by popular culture, media, proponents of ‘medical’ marijuana, and political campaigns to legalize all marijuana use perpetuate the false notion that marijuana is harmless. This significantly diminishes efforts to keep our young people drug free and hampers the struggle of those recovering from addiction.”²²⁶

1. Psychological Impacts

Marijuana use, even in modest amounts, can negatively affect mental health, causing, among other things, panic attacks, anxiety, and schizophrenia.²²⁷ Teenagers are especially at risk for these psychiatric effects: the younger the age at which marijuana use begins, the greater the risk.²²⁸ Similarly, the more frequent the use, the greater the risk. Consider, for example, the experience of Jolan Tobias, who became addicted to marijuana by age 18 after first beginning to casually use the drug at age 15.²²⁹ Although she overcame her addiction, several years after recovering she found herself experiencing many of the same symptoms that accompanied her marijuana use: hallucinations, hearing voices, and having a compulsion to jump out of a window.²³⁰ Psychiatric experts concluded that her past marijuana use caused her to develop schizophrenia.²³¹ Marijuana use is especially troubling for those who are already vulnerable to mental illness. Identifying those most vulnerable to adverse effects from marijuana is a challenge, since that vulnerability can result from a variety of factors, including genetics and personality type.²³² For example, 80 percent of people who develop schizophrenia have no immediate family members with it, and, therefore, it is difficult for someone to know if they are vulnerable to schizophrenia.²³³

A policy statement issued by the American Academy of Pediatrics in January 2015 echoed some of these concerns. The statement pointed to a study

²²⁵ See, for example, Robert Hornik, *"Personal Influence" and the Effects of the National Youth Anti-Drug Media Campaigns*, 608 ANNALS AM. ACAD. POL. & SOC. SCI., 282 (2006) and Craig Anderson et. al., *Influence of Media Violence on Youth*, 4 PSYCHOL. SCI. PUB. INT. 81 (2003) for a discussion of impact of media on youth.

²²⁶ ONDCP, *supra* note 195.

²²⁷ See C.H. Ashton, *Cannabis Dangers and Possible Uses*, 294 BRIT. MED. J. 141 (1987).

²²⁸ *Id.*

²²⁹ MESSING WITH HEADS: MARIJUANA AND MENTAL ILLNESS, Films On Demand, (Film Media Group 2005).

²³⁰ *Id.*

²³¹ *Id.*

²³² Nancy A. Melville, *Public in a Haze About Marijuana's Safety*, MEDSCAPE.COM (Sept. 4, 2013), <http://www.medscape.com/viewarticle/810427>.

²³³ MESSING WITH HEADS, *supra* note 229.

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“linking marijuana use with higher rate of psychosis in patients with a predisposition to schizophrenia,” and therefore, highlighted a possible problem of long-term psychiatric effects.²³⁴

2. Marijuana Impedes Academic Achievement

A correlation between marijuana use and negative academic performance has been found. A study of public high school students in Mississippi determined that “frequent smokers, binge drinkers, and current marijuana users were more likely than other students to report poor academic performance.”²³⁵ Marijuana users were found to be “significantly more likely than all other students to report having lower grades.”²³⁶ Those who use marijuana are 2.3 times more likely to drop out of high school than those who have never smoked marijuana.²³⁷ Significantly, the American Academy of Pediatrics reported recent evidence from four scientific trials that indicated “marijuana use during adolescence is associated with reductions in the odds of high school completion and degree attainment.”²³⁸ Since marijuana has been found to interrupt memory, it is not surprising that this could impede a student’s academic ability.²³⁹ The loss of energy and procrastination caused by marijuana²⁴⁰ would also make it much more difficult for a student to succeed academically.

A drop in IQ later in life has also been connected to long-term marijuana use.²⁴¹ Neuropsychological testing of more than 1,000 individuals over a span of

²³⁴ Seth D. Ammerman, Sheryl A. Ryan, and William D. Adelman, *The Impact of Marijuana Policies on Youth: Clinical, Research, and Legal Update*, 135 PEDIATRICS 584, 585, available at <http://pediatrics.aappublications.org/content/135/3/584.full.pdf+html>.

²³⁵ Reagan Cox et. al., *Academic Performance and Substance Use: Findings from a State Survey of Public High School Students*, 77 J. SCH. HEALTH 109, 113 (2007).

²³⁶ *Id.* The authors acknowledge that a variety of factors, such as predisposition to nonconformity, weak bonds with family or school, exposure to deviant family or peers, and not just marijuana use in isolation, can account for poor academic performance. Such a discussion is beyond the scope of this paper. For additional information on the multitude of factors that impact teenage drug use and poor academic performance or drop-out rate, see Daniel F. McCaffrey et.al., *Marijuana Use and High School Dropouts: The Influence of Unobservables*, 19 HEALTH ECON. 1281 (2010).

²³⁷ Jeremy Bray et.al., *The Relationship Between Marijuana Initiation and Dropping Out of High School*, 9 HEALTH ECONOMICS 9 (2000).

²³⁸ Ammerman, *supra* note 234 at 586 (citing Edmund Silins PhD et. al., *Young adult sequelae of adolescent cannabis use: an integrative analysis*, 1 THE LANCET PSYCHIATRY 4, 286 (2014) available at [http://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366\(14\)70307-4/abstract](http://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(14)70307-4/abstract)).

²³⁹ McCaffrey, *supra* note 236, at 1283.

²⁴⁰ Mitch Earleywine & Mallory Loflin, *Curious Consequences of Cannabis Prohibition*, 6 ALBANY GOVERNMENT L. REV. 438, 442 (2013).

²⁴¹ ONDCP, *supra* note 195 (discussing public health).

25 years (from ages 13 through 38) showed that those who began to use cannabis in adolescence, and became dependent on the drug before 18, had an eight point IQ drop, which did not improve after discontinuing marijuana use.²⁴² M.H. Meier considers this drop significant indicating that on average this would be comparable to “going from the 50th to the 29th percentile in intelligence.”²⁴³ Michelle Lipinski, who runs a school in Massachusetts (a state which has decriminalized marijuana), has shared anecdotal information about how students are now coming to school stoned and how difficult it has become to overcome the students’ perception that “it’s just weed.”²⁴⁴ Colorado school officials are also seeing an increase in incidents related to marijuana use in schools. Such incidents initially increased after Colorado first legalized medical marijuana in 2010, but increased even more after the legalization of recreational marijuana in 2012.²⁴⁵ Officials believe this increase is attributable to the changing attitudes toward marijuana in the state. Students now smoke pot before school and even during lunch breaks.²⁴⁶ In fact, 32 percent of the expulsions from Colorado public schools during 2012-2013 were associated with marijuana.²⁴⁷ While the vast majority of young people addicted to marijuana can become symptom free, they may not bounce back to full capacity academically or professionally.²⁴⁸ In fact, a recent study conducted by a researcher from Northwestern University concluded that teenagers who smoke marijuana on a daily basis “risk losing a fifth of their capacity for long-term memory by early adulthood.”²⁴⁹ Even if an individual overcomes marijuana addiction, the long-term effects of newer, more potent marijuana continue to pose a danger.

From an academic perspective, any hindrance to academic performance should be kept to a minimum. This is especially true given the recent measurement of the academic performance of U.S. students in relation to their international counterparts. In December 2013, Arne Duncan, the Secretary of

²⁴² Jenny L. Williamson, et. al., *How Does Marijuana Work in the Brain?*, 75 AM. BIOLOGY TEACHER, 299, 299-300 (2013); for additional discussion of neurological effects, see the full study: M.H. Meier et. al, *Persistent Cannabis Use Shows neuropsychological decline from Childhood to Midlife*, *Proceedings from the National Academy of Sciences* 109 (2012); see also, Pam Harrison, *Early Persistent Cannabis Use Linked to Marked Drop in IQ*, MEDSCAPE.COM (Aug. 27, 2012), <http://www.medscape.com/viewarticle/769805>.

²⁴³ Williamson, *supra* note 242, at 300.

²⁴⁴ Peter Katel, *Teen Drug Use*, CQ RESEARCHER 481, 483 (2011).

²⁴⁵ Nancy Lofholm, *Pot problems in Colorado schools increase with legalization*, THE DENVER POST (Nov. 12, 2013, 4:56 PM), http://www.denverpost.com/breakingnews/ci_24501596/pot-problems-colorado-schools-increase-legalization.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ MESSING WITH HEADS, *supra* note 229.

²⁴⁹ Oliver Moody, *Cannabis users lose fifth of long-term memory*, THE TIMES (Mar. 12, 2015), available at <http://www.thetimes.co.uk/tto/science/article4379502.ece>.

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Education, reported that the performance results for United States students on the 2012 Programme for International Student Assessment [PISA] were “mediocre” and “the U.S. [was] not among the top performing OECD nations in any subject tested by the PISA.”²⁵⁰ Secretary Duncan went on to express concern about the future:

A more pressing concern. . . is the fact that American students are standing still while others are advancing. In a knowledge-based global economy, where education is more important than ever before, both to individual success and collective prosperity, our students are basically losing ground.²⁵¹

Secretary Duncan’s concerns were echoed by the Secretary-General of the OECD, Angel Gurría who said, “The United States’ lack of progress is particularly worrisome when it comes to math.... This is a great loss to the American economy, it’s obviously a very great consequence to people’s futures.”²⁵²

V. WILL LEGALIZATION OF MARIJUANA IMPACT U.S. STANDING IN THE GLOBAL COMMUNITY?

As described in Part II, inconsistency between the classification of marijuana for purposes of federal and state laws, creates a multitude of problems. Enforcement challenges will only continue to increase as more states legalize marijuana. As a result, there have been repeated calls for the federal government to take marijuana off of the controlled substance list. For example, in February 2013, Colorado Representative Jared Polis introduced the Ending Federal Marijuana Prohibition Act of 2013.²⁵³ The Act would remove marijuana from the controlled substances list of the CSA and essentially treat the drug in the same manner as alcohol for legal purposes. This paper has explored a variety of the “costs” of legalization of marijuana for recreational purposes.²⁵⁴ We now explore

²⁵⁰ Allie Bidwell, *American Students Fall in International Academic Tests, Chinese Leading the Pack*, US NEWS AND WORLD REPORT (Dec. 3, 2013), <http://www.usnews.com/news/articles/2013/12/03/american-students-fall-in-international-academic-tests-chinese-lead-the-pack>.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013), *see also* Colorado Representative Diana DeGette introduced Respect States’ and Citizens’ Rights Act of 2013 to amend the CSA’s preemption provision to clarify that it is not the intent of Congress to preempt state marijuana laws. This legislation did not move beyond its introduction in the House. H.R. 964, 113th Cong. (2013).

²⁵⁴ *Supra*, Section III, Are the Social Costs of Marijuana Too High to Justify Legalization for Recreational Purposes?

some of the possible issues that may be presented by legalization as a result of United States commitments under international agreements.

A. Understanding the Requirements of International Conventions

The international conventions governing the possession and/or use of illicit drugs are adhered to by almost 200 countries and are therefore considered to be “among the most successful international agreements in terms of formal adherence.”²⁵⁵ Historically, it was the United States that initiated the plans for an international agreement on drug prohibition, and supported such efforts first at the League of Nations, and then at the United Nations.²⁵⁶ Currently there are three conventions in effect that frame drug policy for the signatory nations: (1) 1961 Single Convention on Narcotics Drugs, as amended in 1972 (“1961 Convention”)²⁵⁷; (2) the 1971 Convention on Psychotropic Substances²⁵⁸; and (3) the 1988 Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances.²⁵⁹ The UN International Narcotics Board (“INCB”) oversees these Conventions.²⁶⁰

As one of the signatories to the 1961 Convention the United States has committed to the following general obligations:

- a) To give effect and carry out the provisions of this Convention within their own territories;
- b) To co-operate with other States in the execution of the provisions of this Convention; and
- c) Subject to the provisions of this Convention, *to limit exclusively to medical and scientific purposes the production,*

²⁵⁵ Stephen Pudney, *Drugs Policy: What Should We Do About Cannabis?*, *ECON. POL’Y* 165, 183 (2010).

²⁵⁶ *Id.* at 182-83.

²⁵⁷ United Nations Single Convention on Narcotic Drugs, 1961, As Amended By The 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, Aug. 8, 1975, 976 U.N.T.S. 105, *available at* http://incb.org/documents/Narcotic-Drugs/1961-Convention/convention_1961_en.pdf (expanded international control of the distribution, use, and production of narcotics and the raw plants used in producing narcotics).

²⁵⁸ United Nations Convention on Psychotropic Substances 1971, Feb. 2, 1971, 1019 U.N.T.S. 175, *available at* http://incb.org/documents/Psychotropics/conventions/convention_1971_en.pdf (incorporating a variety of synthetic substances, such as depressants, stimulants, and hallucinogens under the international rules).

²⁵⁹ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Dec. 20, 1988), 1582 U.N.T.S. 95, *available at* http://incb.org/documents/PREC_URSORS/1988_CONVENTION/1988Convention_E.pdf (contains a more detailed framework for dealing with international drug trafficking issues, such as money-laundering, freezing assets, and extradition).

²⁶⁰ Pudney, *supra* note 255, at 183.

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*manufacture, export, import, distribution of, trade in, and possession of drugs.*²⁶¹

All parties to the Convention adopt the understanding, “that eradication of illicit traffic is a collective responsibility of all states, and that, to that end, coordinated action within the framework of international co-operation is necessary.”²⁶² Action or inaction by a Member State, which is not in conformity with obligations under the Convention, has the capacity to undermine the international drug systems and so consistent implementation of drug policy is essential.²⁶³ The federalist system of some States, such as the United States, adds another layer of complexity to compliance with treaty obligations. “[I]n some countries, while there is full compliance with the conventions at the national level, policies and measures at the state, provincial, and municipal level are not in line with the provisions of the convention.”²⁶⁴

Raymond Yans, President of the INCB, expressed the following concerns in the foreword of the organization’s 2013 Annual Report issued in March 2014:

INCB is concerned about some initiatives aimed at the legalization of non-medical and non-scientific use of cannabis. Such initiatives, if pursued, would pose a grave danger to public health and well-being, the very thing the States, in designing the conventions intended to protect. INCB looks forward to maintaining an ongoing dialogue with all countries, including those where such misguided initiatives are being pursued, with a view to ensuring full implementation of the conventions and protecting public health.²⁶⁵

The Report goes on “to emphasize that the structure of all States parties (whether federal, state regional, or provincial) should contain, develop, and continually evaluate a comprehensive system of intergovernmental coordination procedures in order to ensure that drug control laws and policies are nationally

²⁶¹ *Convention on Narcotic Drugs*, *supra* note 257, at 18-19.

²⁶² *Convention Against Illicit Traffic in Narcotic Drugs*, *supra* note 259.

²⁶³ *Id.*

²⁶⁴ Contribution of the International Narcotics Control Board to the High-Level Review of the Implementation by Member States of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter to World Drug Problem 8, INTERNATIONAL NARCOTICS CONTROL BOARD, *available at* http://www.incb.org/documents/Publications/ePublication/E-Publication_E_FINAL.pdf (last visited Aug. 1, 2014).

²⁶⁵ Report of the International Narcotics Control Board for 2013, INTERNATIONAL NARCOTICS CONTROL BOARD, *available at* <http://www.incb.org/incb/en/publications/annual-reports/annual-report-2013.html> (last visited Aug. 1, 2014).

consistent.”²⁶⁶ Also singled out in the report is the current experience in the United States: “although the use, sale, and possession of cannabis remains illegal under federal law, an increasing number of states have approved laws attempting to decriminalize possession of cannabis for personal use and/or created exemptions for medical cannabis.”²⁶⁷

B. Application of International Conventions to Developments in the United States

The goal of the 1961 Convention is to use coordinated international efforts to combat drug abuse.²⁶⁸ Congress considered its obligations under the 1961 Convention when it drafted the CSA as the following excerpt from the bill indicates:

The bill also specifically recognizes our international obligations under the Single Convention of 1961 and will allow the United States to immediately control, under the schedules of the bill, drugs hereafter included under schedules of the Single Convention upon the recommendation of the World Health Organization.²⁶⁹

An issue arises as to the extent that the Convention will dictate federal and state treatment of marijuana. It is sometimes noted that, “treaties are unquestionably the ‘supreme law of the land’ and trump any contrary state statutes.”²⁷⁰ What, then, is the impact, if any, of the Convention as state legalization efforts move forward? For the states and for the federal government the question to be considered is whether legalization might run afoul of existing treaties. For example, while medical use of marijuana has been permitted in a variety of states for many years, technically this is not in conformity with the Conventions because the Conventions require that marijuana for medicinal

²⁶⁶ *Id.* at 43.

²⁶⁷ *Id.* at 42. The INCB Report goes on to cite other countries facing similar issues such as Australia, where authorities in New South Wales have permitted the “drug injection rooms” to exist even though contrary to national policy. A similar issue has come up in Vancouver, Canada. There the federal government sought to shut down a drug injection site that was illegal under federal law, but the Supreme Court of Canada determined that the facility should be permitted to stay open indefinitely.

²⁶⁸ United Nations Office on Drug and Crime, UNODC.ORG, <https://www.unodc.org/unodc/en/treaties/single-convention.html> (last visited Aug. 1, 2014).

²⁶⁹ *Id.* at 25.

²⁷⁰ M. Wesley Clark, *Can State “Medical” Marijuana Statutes Survive the Sovereign Federal Drug Laws? A Toke Too Far*, 35 U. BALT. L. REV. 1, 23 (2005).

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purposes be secured through a government agency at the wholesale level.²⁷¹ To date, this lack of conformity has not resulted in any adverse international efforts; it is therefore “possible that the route of turning a blind eye to the conflicts with international treaties may also be followed for the new schemes for legal markets in cannabis for pleasure.”²⁷²

Early indicators illustrate, however, that the INCB is paying attention. For example, less than two weeks after Colorado and Washington adopted the legislation that legalized recreational marijuana in November 2012, the INCB President expressed “grave concern”.²⁷³ He stated, “These developments are in violation of the international drug control treaties, and pose a great threat to the public health and the well-being of society far beyond those states.”²⁷⁴ When Eric Holder announced in December 2012, that the Colorado and Washington laws had no bearing on the status of marijuana under federal law, the President of the INCB referred to these statements by Attorney General Holder as “good but not sufficient.”²⁷⁵ In March 2014, the INCB issued its 2013 Annual Report recommending that “the Government of the United States . . . take necessary measures to ensure full compliance with the drug control treaties in its entire territory.”²⁷⁶

An in-depth discussion of the interaction between the Conventions and United States’ domestic marijuana policies is beyond the scope of this article and we do not seek to reproduce that debate here.²⁷⁷ Regardless, it is important to

²⁷¹ Robin Room, *Legalizing a Market for Cannabis for Pleasure: Colorado, Washington, Uruguay and Beyond*, 109 ADDICTION 345, 345-46 (2013).

²⁷² *Id.* at 346.

²⁷³ United Nations Information Service, *INCB President Voices Concern About the Outcome of Recent Referenda About the Non-Medical Use of Cannabis in the United States in a Number of States* (Nov. 15, 2012), available at http://www.incb.org/documents/Publications/PressRelease/PR2012/press_release_151112.pdf.

²⁷⁴ *Id.*

²⁷⁵ Angela Hawken & Jonathan Kulick, *Treaties (Probably) Not an Impediment to 'Legal' Cannabis in Washington and Colorado*, 109 ADDICTION 355, 356 (2014).

²⁷⁶ *Id.*

²⁷⁷ For a more detailed discussion of this issue see, Melissa T. Aoyagi, *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, 37 N.Y.U. INT'L L. & POL. 555, 610 (2005) (discussing how states “may pursue certain harm minimization and decriminalization policies and still be in compliance with the treaties”); Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1318 (2013) (arguing “the same principle [that gave states the authority to regulate alcohol after Prohibition] should spur both the U.S. government and the United Nations to withdraw from marijuana prohibition”); and John C. Lawn, *The Issue of Legalizing Illicit Drugs*, 18 HOFSTRA L. REV. 703, 709 (1990) (stating if the United States created a legal market in cocaine, heroin, marijuana, or other dangerous drugs, it would violate international treaties to which the United States is a signatory, including the Single Convention on Narcotics Drugs of 1961 and the Convention

keep in mind that not all scholars agree with the position of the INCB and instead maintain that a federal central authority is not required to supersede legislation enacted by states, provinces, or municipalities.²⁷⁸

Is legalization of recreational marijuana inconsistent with U.S. obligations under the Conventions? What consequences, if any, will result? Should more states and, possibly the federal government, move toward legalized possession, production, and distribution? Also of what significance is the impact that United States' behavior, in this regard, may have on other nations? Given that the stance of the federal government is to tolerate state actions which are in contravention of federal law, and given that it seems likely that the number of states authorizing recreational marijuana is likely to increase in the years ahead, a federal task force should be convened to determine whether such actions violate the terms of the United States' commitments under its international agreements. Answers to these questions should be part of any discussion on the merits of and impediments to legalization efforts.

VI. CONCLUSION

The steady stream of revenue flowing into the state and local coffers in Colorado and Washington from the burgeoning commercial market for recreational marijuana is not without cost. Because recreational sales in those states commenced in 2014, it is too soon to adequately assess the extent of this cost. As a result, the most prudent course of action for those states seeking to follow the trail first blazed by Colorado and Washington may be to put those plans on hold and adopt a "wait and see" approach. The unknown variables regarding the revenue stream, the potential increase in the black market, and increased social costs make this difficult terrain to navigate. Adding to the mix is the dichotomy between federal and state law, which causes confusion for the public and government officials alike. Such confusion is not limited to the domestic environment, as issues remain as to how the push toward legalization may impact America's commitments under international conventions, and therefore, America's standing in the global community.

on Psychotropic Substances of 1971. Under which the United States is obligated to establish and maintain effective controls on those substances covered by the treaties).

²⁷⁸ Hawken, *supra* note 275, at 356.