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DECRIMINALIZATION OF MARIJUANA: AN ANALYSIS OF THE LAWS IN THE UNITED STATES AND THE NETHERLANDS AND SUGGESTIONS FOR REFORM

I. INTRODUCTION

Generally, the government does not have the authority to interfere with the private lives of U.S. citizens.¹ It will interfere, however, when such intercession is necessary to promote public welfare and prevent harm.² An example involves the government's desire to control the types of substances people choose to ingest. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act (CDAPCA),³ which sets forth substances that should be outlawed or regulated and what penalties apply if someone violates this Act.⁴ The CDAPCA is designed to limit and control access to intoxicating drugs or prescription drugs that have the potential for abuse, such as steroids, antidepressants, and sedatives.⁵ The CDAPCA also sets forth prohibited activities, such as manufacturing, distributing, and possessing a controlled substance, and also lays out the penalties for violations.⁶

One substance that the government controls is marijuana.⁷ In the Controlled Substances Act, marijuana is classified as a Schedule I drug,⁸ which means it has the "highest abuse potential . . . no accepted medicinal value . . . [and] nobody is allowed to

1. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (stating that "also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

2. See, e.g., *Osborne v. Ohio*, 495 U.S. 103 (1990) (holding that the government could regulate viewing of child pornography in an individual's home).

3. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 801 (1994)) [hereinafter CDAPCA].

4. 21 U.S.C. §§ 802, 812, 841.

5. *U.S. Drug Abuse Regulation and Control Act of 1970*, at http://www.erowid.org/psychoactives/law/law_fed_info1.shtml (last modified Oct. 31, 2000) [hereinafter *RCA of 1970*] (explaining the purpose and scope of the CDAPCA).

6. 21 U.S.C. § 841(a).

7. *Id.* § 812.

8. *Id.*

possess or prescribe [it] except in the performance of licensed research.”⁹ In essence, marijuana is an illegal drug and thus, anyone who possesses it, manufactures it, or distributes it will be subject to serious criminal penalties.¹⁰ In most states, possession of even a small amount of marijuana is punishable by incarceration or a significant fine.¹¹ Many people who are arrested, jailed, or fined because of marijuana offenses are recreational users of the drug.¹² They are, however, subject to the same sanctions as traffickers.¹³

The United States deals with marijuana offenses differently than some European countries, especially the Netherlands. In the Netherlands, the penalties for consumption-related offenses are less severe than trafficking offenses.¹⁴ The main purpose of drug and marijuana laws in the Netherlands is to help rehabilitate the addicts, and “protect the health of the individual users, the people around them and society as a whole.”¹⁵ This is the opposite of U.S. laws, which aim solely to punish drug offenders without giving much attention to the rehabilitation process.¹⁶ The laws in the Netherlands are moving toward decriminalization, as they tend not

9. *RCA of 1970*, *supra* note 5. The Act categorizes drugs according to potential for abuse as perceived by the government and tradition. *Id.* The greater the perceived potential for abuse, the greater the limitations on a drug’s prescription, and the lower the number on the schedule. *Id.*

10. *See generally* 21 U.S.C. § 841.

11. *The Decriminalization of Illegal Drugs: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the Comm. on Gov’t Reform*, 106th Cong. 69–72 (1999) [hereinafter *NORML Testimony*] (testimony of R. Keith Stroup, Esq., Executive Director, *NORML*).

12. *Id.*; *see also* ARTHUR D. HELLMAN, *LAWS AGAINST MARIJUANA: THE PRICE WE PAY* 28 (1975).

13. *See generally id.* (explaining that the majority of marijuana smokers are otherwise law abiding citizens and concluding that they should not be arrested and jailed like ordinary criminals).

14. RICHARD J. BONNIE, *MARIJUANA USE AND CRIMINAL SANCTIONS* 187 (1980).

15. Netherlands Ministry of Justice, *Fact Sheet: Dutch Drugs Policy*, at http://www.minjust.nl:8080/a_beleid/fact/cfact7.htm (last visited Sept. 22, 1999) [hereinafter *Fact Sheet*]. This fact sheet, as well as another information sheet entitled *Themes: Dutch Drugs Policy*, at http://www.minjust.nl:8080/a_beleid/thema/drugs/intro.htm, were made available to the public by the Netherlands Ministry of Justice to explain the segments of Dutch drug policy and reasons behind it. *Id.*

16. *See* Lisa M. Bianculli, *The War on Drugs: Fact, Fiction, and Controversy*, 21 SETON HALL LEGIS. J. 169 (1997).

to prosecute behavior that is consumption related, such as possession of marijuana only for personal use.¹⁷

Why is there such a difference in the marijuana laws of the United States and the Netherlands? This Comment analyzes the consequences of both the stringent U.S. policies and the more lenient health care-centered laws of the Netherlands. Part II discusses the background of these drug laws, and focuses on the reasons behind marijuana prohibition and the development of the various laws regulating and later outlawing marijuana. Next, Part III analyzes how the marijuana laws are applied to offenders and discusses the various debates on both sides of the issue of marijuana decriminalization. Some argue that it should remain illegal and all offenders should receive the maximum penalty because marijuana is a harmful controlled substance. Others offer various theories as to why marijuana should be decriminalized or even legalized, from ideas centering around the medicinal uses of the drug, to theories insisting that any benefits of criminalizing marijuana are outweighed by the costs to society from attempting to enforce the laws.¹⁸ Part IV focuses on what reforms have been suggested and already implemented with regard to U.S. laws. This section also discusses how certain reforms have affected society in the Netherlands in an effort to predict how they may affect U.S. society and its own drug problem. Part V concludes that the current laws in the United States should be reformed and that steps should be taken to decriminalize the possession of marijuana.

II. BACKGROUND

A. History of Marijuana Prohibition and Criminalization

Theoretically, the government should not have the power to tell people what they can or cannot consume in the privacy of their own homes, especially if people are only harming themselves.¹⁹ Historically, however, the government has not abided by this theory. During alcohol prohibition, the U.S. government told people that they could not consume alcoholic beverages.²⁰ In

17. BONNIE, *supra* note 14, at 192.

18. HELLMAN, *supra* note 12, at 17.

19. See generally *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

20. See MIKE GRAY, *DRUG CRAZY* 65–91 (1998); see also Bianculli, *supra* note 16, at 169, 174.

1914, Congress enacted the Harrison Narcotics Act²¹ to regulate the distribution and use of certain drugs.²² Congress used its taxation power “to regulate the manufacture, importation, sale, and possession of opium, coca products, and their derivatives.”²³ This was the one of the government’s first actions pertaining to the regulation of drugs.²⁴ Prior to this Act, the drugs specifically mentioned in the Harrison Narcotics Act—opium based drugs and cocaine—as well as marijuana, were readily available and prescribed by doctors as medication.²⁵

Marijuana itself became recognized as an intoxicant in the 1920s and 1930s and developed a bad reputation, becoming known as the “Devil’s Weed.”²⁶ In 1930, the federal government founded the Federal Bureau of Narcotics, which spread misinformation about marijuana, including “[e]xaggerated accounts of violent crimes committed by [people] reportedly intoxicated by marijuana.”²⁷ Anti-marijuana propaganda spread throughout the country, including assertions that marijuana stimulated sexual desires, causing users to engage in “unnatural acts,” and destroyed brain tissue and nerve centers.²⁸ The inevitable result of continued marijuana use, according to the propaganda, was “insanity, which those familiar with it describe as absolutely incurable, and, without exception ending in death.”²⁹

Apparently fearing for the safety and health of their citizens, many states passed laws against marijuana.³⁰ To further the states’ support for anti-marijuana legislation, in 1937, Congress passed the Marihuana Tax Act,³¹ which was modeled after the Harrison Narcotics Act.³² The Marihuana Tax Act levied a tax on all buyers, sellers, importers, growers, physicians, veterinarians, and all people who dealt in marijuana commercially, prescribed it

21. Harrison Narcotics Act, Pub. L. No. 63-223, 38 Stat. 785 (1914).

22. Bianculli, *supra* note 16, at 169, 172.

23. *Id.*

24. *Id.*

25. *Id.*

23. *NORML Testimony*, *supra* note 11, at 65.

24. *Id.*

25. *Id.*

29. *Id.*

30. *See generally id.*

31. Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (1937), *repealed by* Internal Revenue Code Act of 1939, ch. 4, 53 Stat. 1 (1939).

32. *See* Bianculli, *supra* note 16, at 172.

professionally, or possessed it.³³ The Marihuana Tax Act appears to be simply a token tax on all people who dealt with marijuana.³⁴ Consequently, the Marihuana Tax Act discouraged all marijuana possession, use, or distribution.³⁵ According to R. Keith Stroup, Executive Director of the National Organization for the Reform of Marijuana Laws (NORML), there was little debate over the passage of the Marihuana Tax Act.³⁶ Some members of Congress did not really know what the bill was about—Speaker of the House Sam Rayburn said, “[i]t has something to do with a thing called marijuana. I think it is a narcotic of some kind.”³⁷ If this is true, a thoughtless process not supported by science led to the prohibition of marijuana. Proponents of decriminalization believe that this tradition of thoughtlessness continues today.³⁸

After the Marihuana Tax Act, Congress enacted the CDAPCA in 1970, which consolidated federal laws addressing drug trafficking and drug abuse.³⁹ The CDAPCA ultimately finalized the prohibition of drugs including marijuana, as it made it “unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense a controlled substance”⁴⁰ This steady legislative prohibition of drugs contributed to the creation of a narcotics black market similar to that which existed for alcohol during the Prohibition.⁴¹ For example, prior to the prohibition of drugs, heroin was sold legally at low prices.⁴² The outlawing of drugs, however, caused prices to rise drastically and increased the popularity of drugs, especially heroin, on the black market.⁴³ The same holds true for marijuana—while the government’s goal was to decrease the use of marijuana, its prohibition probably contributed to popularity on the black market, which poses more dangers for users compared to obtaining the drug legally.⁴⁴

33. See Marihuana Tax Act, ch. 553, 50 Stat. 551–53.

34. See *id.*

35. See *id.*

36. See *NORML Testimony*, *supra* note 11, at 67.

37. *Id.*

38. *Id.*

39. Bianculli, *supra* note 16, at 173.

40. 21 U.S.C.S. § 841(a) (2000).

41. Bianculli, *supra* note 16, at 174.

42. *Id.*

43. *Id.*

44. See generally *NORML Testimony*, *supra* note 11, at 63 (noting the problems of

B. Possible Reasons for the Support of Marijuana Criminalization

In light of the government's many efforts to outlaw marijuana, one may question the origin of its motivation and strong hatred for the drug. Aside from the 1930s scare of the "Devil's Weed,"⁴⁵ proponents of marijuana prohibition assert several reasons why the drug should remain illegal with strict criminal sanctions. One reason is to punish those who engage in this "deviant" behavior.⁴⁶ Historically, many considered marijuana use a criminal, degenerate activity in which only deviants engaged.⁴⁷ Thus, making the use or possession of the drug a criminal offense would appropriately punish those involved in such a socially unacceptable lifestyle.⁴⁸ The problem with this reasoning, however, is that today the average marijuana user is not a social deviant.⁴⁹ Usually, he or she is just an average person engaging in experimental or recreational use of marijuana, and if a user becomes addicted to the drug, he or she deserves to be helped rather than punished.⁵⁰

Another reason why proponents of marijuana criminalization, including the government, believe marijuana should be criminalized involves therapy for drug addiction.⁵¹ The government claims that marijuana users are subjected to criminal sanctions "to identify particular offenders in need of treatment and to exert leverage for this purpose . . . [because] *most* . . . persons who engage in [this behavior] are in need of attention."⁵² Opponents of marijuana criminalization, however, maintain that most marijuana users and offenders are not in need of therapy or treatment, and thus, the leverage rationale is not applicable to mere possession of the drug.⁵³

Many believe that marijuana offenses should be criminalized because society needs a basis for confining a "dangerous"

crime and violence associated with an uncontrolled and unregulated black market in marijuana); see also BONNIE, *supra* note 14, at 58 (stating that marijuana users often have contact with dealers, who may sell more dangerous drugs).

45. *NORML Testimony*, *supra* note 11, at 65.

46. BONNIE, *supra* note 14, at 24.

47. *Id.*

48. *Id.*

49. *Id.*; see also *NORML Testimony*, *supra* note 11, at 68-69.

50. BONNIE, *supra* note 14, at 24.

51. *Id.*

52. *Id.*

53. *Id.* at 24-25.

person.⁵⁴ The argument is that marijuana users are criminals, who will steal or kill for their next fix of the drug, or are so high that they lose perception of reality.⁵⁵ This idea probably stems from the original anti-marijuana misinformation from the 1930s, such as reports that individuals intoxicated by marijuana lose their inhibitions and commit violent crimes with no fear.⁵⁶ After all, this is why any behavior is made criminal—to protect the welfare of the law-abiding citizens and to control the dangerous law-breakers. The truth is that marijuana users are not dangerous to anyone except perhaps themselves, and even that danger is not so strong as to necessitate incarceration.⁵⁷

Another of the government's purposes for making marijuana use a criminally prohibited offense is deterrence.⁵⁸ The government determined that citizens should be discouraged from using marijuana, and therefore the law punishes anyone who possesses it.⁵⁹ There are several arguments against the deterrence theory. For example, it is difficult to determine exactly how or why people are deterred from doing certain things.⁶⁰ It is too simple to say that people will always be deterred from engaging in behaviors that have negative legal consequences.⁶¹

When dealing specifically with marijuana use and deterrence, some have argued that marijuana use is an “expressive” behavior and is less likely to be deterred by legal threats.⁶² In addition, marijuana users are usually adolescents and young adults, who are less persuaded by legal threats than are their elders,⁶³ possibly because young people feel that they are invincible or they do not fully understand the possible consequences of their actions. Also, the government's aim with deterrence is to minimize heavy use of the drug, but deterrence only plays a minor role in determining the frequency or amount of use; reasons for use are more often

54. *Id.* at 25.

55. *See generally NORML Testimony, supra* note 11, at 65.

56. *Id.*

57. *See BONNIE, supra* note 14, at 25; *see NORML Testimony, supra* note 11, at 70–72.

58. *See BONNIE, supra* note 14, at 25.

59. *Id.*

60. *See id.*

61. *See generally id.* at 25–26.

62. *Id.* at 25

63. *Id.*

determined by social and psychological factors.⁶⁴ Despite the government's insistence that marijuana prohibition helps to deter people from heavy use of the drug or perhaps from trying it at all, there are several viable points that contradict this theory.

The preceding arguments describe some theories as to why marijuana was, and continues to be, perceived as a threat to society, and therefore needs to be criminalized. Proponents of marijuana decriminalization offer many arguments to the contrary.⁶⁵ Nevertheless, this is just the beginning of a complex debate over the illegal status of marijuana and whether or not this should be changed. In other countries, the status of marijuana has changed, and this may serve as a guide to changes that could take place in the United States.⁶⁶

C. History and Reasons Behind the Development of Drug Laws in the Netherlands

The earliest Dutch drug laws began with the Act of May 12, 1928, which was enacted in the wake of an international opium treaty in 1925.⁶⁷ This Act set forth serious penalties for every drug offense, including possession, use, and trafficking.⁶⁸ Beginning in 1972, the government of the Netherlands, including the Ministry of Justice, began to change the drug policies so that the "penalties for possession for personal use of cannabis products be reduced from a felony to a misdemeanor as soon as possible and that penalties for trafficking . . . be differentiated according to the risk inherent in the use of these drugs."⁶⁹ In 1976, the government implemented revisions in the drug laws, by increasing penal sanctions for illegal trafficking in drugs other than cannabis products, while significantly reducing penalties for domestic trafficking of cannabis products.⁷⁰

64. *Id.* at 25–26.

65. For a general discussion of decriminalization proponents' arguments, see *NORML Testimony*, *supra* note 11, at 63–75; *BONNIE*, *supra* note 14; *HELLMAN*, *supra* note 12; *Bianculli*, *supra* note 16.

66. See Dan Baum, *The Drug War on the Ballot*, *ROLLING STONE*, Nov. 23, 2000, at 61 ("European governments tend to be more willing to moderate their drug policies.").

67. *BONNIE*, *supra* note 14, at 187.

68. *Id.*

69. *Id.* at 188.

70. *Id.*

The provisions of the 1976 Act that set forth penalties for consumption-related behavior appear to be similar to laws of the United States—that is, possession of most drugs carries a penalty equivalent to a misdemeanor.⁷¹ In actual practice, however, the Dutch government treats marijuana differently.⁷² It appears that the 1976 revisions to the drug laws were the beginnings of a decriminalization policy.⁷³ The government's position is that marijuana is not a drug involving "unacceptable risks" and that separate penal sanctions for more serious drugs induce drug-dependent people to get treatment.⁷⁴

Currently in effect in the Netherlands is the Opium Act,⁷⁵ which draws a distinction between hard drugs (heroin and cocaine), which "pose an unacceptable hazard to health," and soft drugs (hashish and marijuana), which constitute far less serious hazards.⁷⁶ The Opium Act demoted possession of up to thirty grams of marijuana or hashish from a serious offense to a misdemeanor.⁷⁷ The Dutch government feels that marijuana is a drug that does not pose serious risks to individuals or society and thus, its use does not warrant punishments with severe criminal sanctions.⁷⁸ Other drugs are criminalized, not to punish those who use them, but to try to get people to seek help for drug problems.⁷⁹

The drug policy in the Netherlands focuses on the prevention of serious drug use as well as the care and treatment of addicts.⁸⁰ As the Ministry of Justice states, "[o]n the principle that everything should be done to stop drug users from entering the criminal underworld where they would be out of the reach of the institutions responsible for prevention and care, the use of drugs is not an offence."⁸¹ The Netherlands's attitude toward marijuana is

71. *Id.* at 190.

72. *See id.* at 190–92.

73. *See id.* at 191–92.

74. *Id.* at 192.

75. Opium Act, Pub. L. No. 18-10, §§ 1006–1009, 40 Stat. 1130 (1919).

76. *Fact Sheet, supra* note 15.

77. Eric Thomas Berkman, *Sacrificed Sovereignty?: Dutch Soft Drug Policy in the Spectre of Europe Without Borders*, 19 B.C. INT'L & COMP. L. REV. 173, 177 (1996).

78. BONNIE, *supra* note 14, at 192.

79. *Id.* "The introduction of a separate penal sanction for possession for personal use of drugs . . . (other than cannabis) is not motivated by the assumption that such use should be punished by law. The sanction will be used chiefly to induce drug-dependent persons . . . to accept treatment." *Id.*

80. *Fact Sheet, supra* note 15.

81. *Id.*

that it is harmless.⁸² The policy on harder drugs focuses on helping the drug users, rather than punishing them.⁸³

The Netherlands follows a policy of an “expediency principle,” meaning that if enforcement of a law is “more trouble than it’s worth,” the government does not enforce it.⁸⁴ Based on this idea, the Netherlands has chosen to ignore its laws against marijuana.⁸⁵ The Dutch government recognized that young people will inevitably experiment with drugs, and decided that, based on scientific evidence finding a significant difference between marijuana and other drugs, it would be better for people to experiment with marijuana than heroin.⁸⁶ “The plan was to erect a wall between the so-called soft drugs—marijuana and hashish—and hard drugs like heroin and cocaine.”⁸⁷ The government set up a distribution system whereupon only small amounts of hashish were sold to people over sixteen-years-old.⁸⁸ This way, only individuals of the required age could buy the drug, and no hard drugs were made available.⁸⁹

The reasoning behind this lenient policy regarding marijuana may stem from the Netherlands’ Constitution.⁹⁰ Article 10 states that “[e]veryone shall have the right to respect of his privacy, without prejudice to restrictions laid down by or pursuant to an Act of Parliament.”⁹¹ Article 11 states that “[e]veryone shall have the right to inviolability of his physical person, without prejudice to restrictions laid down by or pursuant to an Act of Parliament.”⁹² In addition, Article 15 reads, “[e]xcept for the cases laid down by or pursuant to an Act of Parliament, *no one may be deprived of his liberty.*”⁹³ These provisions emphasize the Netherlands’ Constitution’s core commitment to personal autonomy—“the view that the individual should have unfettered liberty over his own life

82. See BONNIE, *supra* note 14, at 192 (“[T]he [Dutch] government regards the recreational use of the drug as a relatively benign activity.”).

83. *See id.*

84. GRAY, *supra* note 20, at 165.

85. *Id.*

86. *Id.* at 166.

87. *Id.*

88. *Id.* at 167.

89. *Id.*

90. GRW. NED. ch. 1, art. 10.

91. *Id.*

92. *Id.* art. 11.

93. *Id.* art. 15 (emphasis added).

and person insofar as the exercise of such liberty does not harm others.”⁹⁴ This emphasis on personal autonomy and privacy is possibly the main reason why the Netherlands does not treat personal possession of marijuana as a serious crime.⁹⁵

Additionally, Article 22 of the Netherlands’ Constitution asserts that “[t]he authorities shall take steps to promote the health of the population.”⁹⁶ The stated aim of the drug policy in the Netherlands is the safeguarding of health,⁹⁷ which clearly derives from the constitutional mandate that the health of the citizens is the responsibility of the law enforcement authorities. The Ministry of Justice and Welfare in the Netherlands stated, “[a]lthough the attention focused on such questions as drug related crimes and drug trafficking sometimes seems to over-shadow concern for health problems, this latter aspect has always been kept in mind during policy development.”⁹⁸ This accounts for the Netherlands’ concentration on treatment and rehabilitation for drug users, rather than strictly punishment.⁹⁹

The Netherlands’ policies differ greatly from the development of drug laws in the United States. The main purpose of the laws in the United States is to punish, deter, and scare people away from marijuana in order to protect society from the “Devil’s Weed” and the deviants who use it.¹⁰⁰ The reasons behind the criminalization of marijuana were, and continue to be, heavily debated.¹⁰¹ In the Netherlands, however, the purpose behind the development and change in the drug laws focuses on treatment for serious drug addicts.¹⁰² Also, the Netherlands’ drug policy recognized a difference between marijuana as a soft drug, and other harder,

94. See Dr. G. Steven Neeley, *The Constitutional Right To Suicide, The Quality Of Life, And The “Slippery-Slope”: An Explicit Reply To Lingering Concerns*, 28 AKRON L. REV. 53, 66 (1994).

95. See GRW. NED. ch. 1. For a general comment on the Netherlands’ Constitution’s focus on personal autonomy, see Neeley, *supra* note 94.

96. GRW. NED. ch. 1, art. 22.

97. Netherlands, Ministry of Welfare, Health and Cultural Affairs, *Netherlands Drug Policy*, at http://www.welcomehome.org/cohip/PAGES/DRUG_WAR/NETHSTUD.HTM (last visited Feb. 2, 2001).

98. *Id.*

99. See BONNIE, *supra* note 14, at 192.

100. See discussion *supra* Part II.A.

101. For a general idea of the scope of the debate, see *NORML Testimony*, *supra* note 11, at 63–75; BONNIE, *supra* note 14; HELLMAN, *supra* note 12; Bianculli, *supra* note 16; GRAY, *supra* note 20.

102. BONNIE, *supra* note 14, at 192.

more dangerous drugs.¹⁰³ The United States recognizes no such distinction, which clearly shows that punishment is one of the main goals of U.S. drug laws.

The laws in the Netherlands have sparked a decriminalization movement in the United States.¹⁰⁴ Proponents of such a movement aim to reform the marijuana laws.¹⁰⁵ They insist that the model of marijuana decriminalization in countries like the Netherlands is more beneficial to society.¹⁰⁶

III. DECRIMINALIZATION MOVEMENTS AND THEORIES ANALYZED

The first decriminalization efforts in the United States focused on possession of marijuana for personal use and were recommended in the First Report of the National Commission on Marihuana and Drug Abuse (Commission) from 1972.¹⁰⁷ The Commission reported that a disturbingly large number of people arrested for marijuana offenses were arrested for possession.¹⁰⁸ The Commission recognized that decriminalizing possession would eliminate some serious injuries to individuals as well as to society.¹⁰⁹ Not only would recreational marijuana users themselves be left alone, but society would have far less "criminals" if people were not arrested for simply possessing the drug.¹¹⁰

A. Arguments For and Against Decriminalization

Since the Commission set forth its recommendations, the withdrawal of criminal sanctions for the possession of marijuana for personal use has remained an issue on the legislative agenda.¹¹¹

103. *Fact Sheet*, *supra* note 15; *see Berkman*, *supra* note 77.

104. *See NORML Testimony*, *supra* note 11, at 63.

105. *See id.*

106. *See BONNIE*, *supra* note 14, at 192-94.

107. *Id.* at 19. The Commission defines "possession" as possessing small amounts of the drug for personal use and casual, non-profit distribution of small amounts. *Id.*

108. *Id.* (discussing findings from 1970 that 200,000 people were arrested for possession and in 1978, 450,000 were arrested). Today, the situation is similar: in 1997, eighty-three percent of marijuana arrests were for simple possession, not dealing. *NORML Testimony*, *supra* note 11, at 69.

109. *BONNIE*, *supra* note 14, at 20.

110. *See generally HELLMAN*, *supra* note 12, at 28-31 (discussing the fact that the large number of marijuana arrests consume law enforcement resources); *BONNIE*, *supra* note 14, at 28-30 (discussing the same).

111. *BONNIE*, *supra* note 14, at 21.

The government, however, is reluctant to change the law, mainly because of lack of substantial information regarding the long-term effects of marijuana use.¹¹² On the other hand, proponents of decriminalization maintain that there are several facts in their favor. First, at least forty million Americans have tried marijuana and at least fifteen million continue to use it regularly.¹¹³ Also, the majority of marijuana users only use the drug for recreational purposes, and the moderate, recreational use of marijuana presents no risk of serious physical or psychological short or long-term harm to the user.¹¹⁴

Advocates of decriminalization concede that marijuana can be somewhat harmful, as the ingestion of any psychoactive drug in high doses causes ill effects on a user's body and mental functions.¹¹⁵ Despite the risk of some damage to the user, proponents contend that marijuana is substantially less harmful than alcohol, and in fact, marijuana is "probably the least harmful psychoactive substance now in widespread use in the world."¹¹⁶ Therefore, the argument of the public and the legislature that marijuana should remain illegal because of its harmful effects loses some merit.

There has been further support for the proponents of decriminalization. In the case of *NORML v. Bell*,¹¹⁷ the plaintiffs who opposed statutes criminalizing marijuana offered evidence of studies that dispelled many of the myths about the drug.¹¹⁸ For example, marijuana is not a narcotic, not physically addictive, is

112. *Id.* at 20 (discussing that the reason why possession of marijuana remains criminal is because "[w]e're not yet sure how use of the drug would affect a person's physical and mental health if he were to use it for a long time."). This theory assumes that if marijuana were decriminalized, then people would use it more.

113. *See id.* at 23. Aside from alcohol, marijuana is the most widely used recreational drug in the United States. *Id.* This suggests that even though decriminalization of the drug appears to be disfavored by society, more people are actually using it than may be admitting it.

114. *See id.*; *see also* Bianculli, *supra* note 16, at 185 (discussing statistics showing that just as U.S. citizens consume alcohol in moderation, most U.S. citizens who use drugs use them in moderation).

115. BONNIE, *supra* note 14, at 23.

116. *Id.* If true, then statistics support arguments based on the theory that marijuana should be legalized because alcohol is legal and is more harmful than marijuana.

117. *NORML v. Bell*, 488 F. Supp. 123 (D.D.C. 1980).

118. *Id.* at 129.

generally not a stepping stone to harder, more serious drugs, nor does it cause aggressive behavior or insanity.¹¹⁹

Despite these facts dispelling the theory that marijuana is extremely harmful to one's health, adverse findings still exist that raise important questions about marijuana use.¹²⁰ Smoking marijuana may contribute to lung disorders in the same way as tobacco, especially because marijuana smoke contains more tar, which can impair the lungs with heavy, long-term use.¹²¹ There is also evidence that marijuana may lower levels of testosterone in males, may impair the functioning of the immune system, and may affect the cardiovascular system by accelerating the heart rate.¹²² While proponents of decriminalization possess strong arguments in favor of their position, and can prove that marijuana is no longer the "Devil's Weed" it was once thought to be, its long-term effects are still in question.¹²³ This explains why the drug remains illegal—although marijuana does not seem to be extremely harmful to one's health, the fact remains that the information is not conclusive, and the government would rather be safe than sorry.¹²⁴

In fact, government officials have stated various reasons for their continued opposition to the legalization of drugs.¹²⁵ They assert that there is a potential increase in addiction and its side effects, as illustrated by the rise in the number of opium addicts when opium was legal, and the fact that states with the most lenient drug laws have the highest rates of addiction to marijuana.¹²⁶

Opponents also refute the argument that marijuana is beneficial for medical purposes.¹²⁷ Proponents of legalization urge

119. *Id.* at 123, 129 nn.15–16 (stating that marijuana may be psychologically addictive, and that studies denying a relationship between marijuana and harder drugs may not have taken into account social and psychological pressures).

120. *Id.* at 129.

121. *Id.*

122. *Id.* The studies that reported such findings all focused on these effects occurring because of long-term, heavy use of marijuana. *Id.*

123. *Id.*

124. *Id.* at 130; *People v. Sinclair*, 194 N.W.2d 878, 881 (Mich. 1972) ("This is not to say that our scientific knowledge concerning any of the mind-altering drugs is at all complete. It is not.").

125. Bianculli, *supra* note 16, at 190–98.

126. *Id.* at 191. Because of topics already discussed in this Comment regarding addiction, it is assumed that "addiction" refers to psychological addiction.

127. *Id.* at 191–92.

that marijuana can be used to treat glaucoma and is helpful to AIDS patients because it kills their pain and encourages their appetites.¹²⁸ On the other hand, those against the decriminalization of marijuana argue that there are better ways to remedy those diseases that have less adverse effects than marijuana.¹²⁹

The opponents of decriminalization also attack the argument that if drugs were legal, they would be less expensive, and the crime rate would decrease.¹³⁰ Instead, with the legalization of drugs, the number of users would increase, leading to a rise in purchase-related crimes.¹³¹ Also, opponents to legalization argue that taxing drugs in a legitimate market to raise revenue will not eliminate the black market that exists for drugs, but would instead further it because drugs would not be equally available to everyone.¹³²

Both proponents and opponents of decriminalization of marijuana have valid and fact-centered arguments. This has encouraged many debates about marijuana, its effects, and whether it should remain illegal. Nevertheless, this does not help the lawmakers who are asked to reform the marijuana laws; rather it proves that the issue is still in question and cannot be decided until some substantial, concrete proof exists for either side.

B. Costs of the Marijuana Laws

Supporters of decriminalization assert that they are several high costs associated with the criminalization of marijuana.¹³³ The costs incurred by society can be placed into three categories:

- (a) "enforcement costs" through diversion of resources better spent elsewhere;
- (b) individual injustices through the application of criminal sanctions to the nearly half-million individuals apprehended annually for violating the possession

128. *Id.* at 192.

129. *Id.* "Marijuana is not the best painkiller and appetite encouragement drug for AIDS patients to ingest because THC damages the immune system causing an increase in the susceptibility of AIDS patients to other diseases." *Id.*

130. *Id.* at 194.

131. *Id.*

132. *Id.*

133. See BONNIE, *supra* note 14, at 28–34; HELLMAN, *supra* note 12, at 26–32.

laws[;] and (c) injuries to the nation's legal institutions, in particular to the operation of the rule of law.¹³⁴

The criminal justice system is the most obvious area where resource depletion occurs as a result of the money and energy spent prosecuting marijuana offenses.¹³⁵ "Efforts to enforce marijuana laws divert scarce law enforcement resources that could be mobilized against crimes which directly threaten the safety of persons and property."¹³⁶ Marijuana *possession*, for which most offenders are arrested, is not a crime against persons or property, and thus, the energy spent on marijuana offenders is wasted.¹³⁷ Additionally, over half of the marijuana charges are dismissed at some point in the criminal process because of judicial unwillingness to apply the criminal penalties.¹³⁸ Again, the resources of the criminal justice system are wasted.

Excessive resources are also spent on people convicted of drug possession offenses and subsequently incarcerated.¹³⁹ Drug offenders make up an extremely large percentage of prison inmates because their likelihood of conviction is high and their sentences are longer.¹⁴⁰ The government spends a lot of money on incarceration, but despite the increasing imprisonment of drug offenders, there does not seem to be a direct effect on drug-related crimes.¹⁴¹ The government's money, which derives from taxes paid by the general public, is spent on jailing an incredibly large number of drug offenders, while drug-related crimes are not decreasing. If possession-related offenses were not criminally sanctioned, the number of people in jail for drug crimes would significantly decrease and the criminal justice system's resources could be spent on preventing crimes that actually harm other people.¹⁴²

134. BONNIE, *supra* note 14, at 28.

135. *See id.*

136. HELLMAN, *supra* note 12, at 31.

137. *NORML Testimony*, *supra* note 11, at 69 (discussing that the majority of marijuana arrests are for simple possession); *see* HELLMAN, *supra* note 12, at 31.

138. BONNIE, *supra* note 14, at 28.

139. Bianculli, *supra* note 16, at 176-77.

140. *Id.* at 176.

141. *See id.* The increase in drug-related crimes and arrests is also a problem for the state and federal court systems. *Id.* at 177. The courts are overburdened with criminal cases, and some judges have refused to preside over drug cases. *Id.*

142. HELLMAN, *supra* note 12, at 31.

Another consequence of the marijuana laws is the effect that enforcement has on individuals.¹⁴³ The laws have resulted in prison sentences for thousands of otherwise law-abiding people.¹⁴⁴ In many states, the penalties prescribed for violation of marijuana laws are “grossly out of proportion to the gravity of the offense,”¹⁴⁵ especially with regard to possession offenses. Proponents of criminalization counter this argument by maintaining that the majority of the marijuana offenders are not convicted, and if they are, it is of a misdemeanor.¹⁴⁶ A misdemeanor, however, is still a crime and still carries with it the stigma and other consequences of a criminal conviction.¹⁴⁷ These consequences are often visited upon people who have never had any other contact with the criminal justice system, and are usually well-educated, middle-or upper-class citizens.¹⁴⁸ The only “illegal” activity in which they engage is marijuana use.¹⁴⁹ By punishing marijuana users through the criminal process, the designation of marijuana users as deviants is reinforced.¹⁵⁰ When marijuana users are singled out, punished for their drug use, and labeled “criminals,” they become outsiders and are alienated from those in their community who are not sympathetic to the use of the drug.¹⁵¹

Another serious problem with marijuana prohibition is its impact on the law as an institution.¹⁵² Marijuana laws tend to foster disrespect for the law and the legal system generally.¹⁵³ This is because judges and prosecutors will often take advantage of any loopholes in the law to prevent convictions of certain types of marijuana users, especially young, middle-class users.¹⁵⁴ The

143. BONNIE, *supra* note 14, at 29.

144. *Id.* at 27. For every person actually sent to prison for a marijuana offense, probably thousands more are subjected to the consequences of arrest. *Id.* at 29.

145. HELLMAN, *supra* note 12, at 27.

146. BONNIE, *supra* note 14, at 29–30.

147. *Id.* at 30. Other consequences may include up to a year in jail at the discretion of the court, loss of professional licenses, loss of occupational licenses, and loss of public employment. *Id.*

148. HELLMAN, *supra* note 12, at 28.

149. *See id.*

150. *Id.* at 30. Marijuana users are portrayed as a threat to society because they are members of the criminal class; because they are violating the law by using the drug, this technically makes them criminals. *Id.*

151. *Id.*

152. BONNIE, *supra* note 14, at 31.

153. HELLMAN, *supra* note 12, at 29.

154. *Id.* Courts will also give disparate sentences for the same crime, depending on the offender (e.g., a high profile football player receives a lesser sentence than a militant

police, prosecutors, and courts exercise discretion in deciding whom to arrest or convict for marijuana offenses, usually deciding that the young, or otherwise unlikely, offender does not deserve the stigma of a criminal record.¹⁵⁵ Thus, law enforcement spares the "innocent" offender from the consequences of criminalization. "The police respond unsystematically and inconsistently, . . . the prosecutors decline to prosecute, . . . and the judges respond according to their own views of the offense and of their role as judges."¹⁵⁶ This sort of manipulation of the laws makes people cynical about the legal system as a whole,¹⁵⁷ and people tend to lose faith in that system.

Marijuana laws place the legal system in question for other reasons as well.¹⁵⁸ Criminal laws usually punish behavior of which society as a whole disapproves, and feels it should punish.¹⁵⁹ Criminal laws are enforced most fairly and effectively when they command a popular consensus.¹⁶⁰ The consensus supporting marijuana prohibition has decreased,¹⁶¹ and the lack of shared values regarding this issue has decreased the utility of the laws. Thus, people disobey and ridicule the laws because it seems that the criminal justice system operates selectively and unfairly.¹⁶²

These costs to individuals and society seem to outweigh any supposed benefits of marijuana prohibition, such as prevention of harm and deterrence. The criminal justice system and the government unnecessarily expend resources on the enforcement of marijuana laws, which would not occur if it were not a crime to use or possess marijuana.¹⁶³ Also, the government would not adversely affect or harm those people who use marijuana on only a recreational basis and who are otherwise law-abiding citizens, simply because they choose to use the drug.¹⁶⁴ In addition, the

African American man for the same crime). *Id.* at 29–30.

155. BONNIE, *supra* note 14, at 33.

156. *Id.*

157. HELLMAN, *supra* note 12, at 29.

158. BONNIE, *supra* note 14, at 31–34; *see also* HELLMAN, *supra* note 12, at 29–31.

159. BONNIE, *supra* note 14, at 31.

160. *Id.*

161. *Id.* at 32 (stating that public opinion polls demonstrate that at least a quarter of the public opposes criminalization and another quarter supports a small fine as the maximum penalty for possession of marijuana).

162. *Id.*

163. *See* Bianculli, *supra* note 16, at 176–78; BONNIE, *supra* note 14, at 28–29; HELLMAN, *supra* note 12, at 31.

164. *See* HELLMAN, *supra* note 12, at 28.

public would respect the legal system as an institution if the public actually supported the criminal laws and if the courts applied the drug laws uniformly.¹⁶⁵ The fact that courts feel the need to manipulate the laws to fit a particular type of offender¹⁶⁶ is evidence that something is wrong with the law itself, and the legislature should change the law to take into account the different types of offenders. It is the legislature's job, not the courts', to create the laws—when the courts decide whom to and whom not to protect from the marijuana laws, they are essentially creating laws of their own.¹⁶⁷

C. Constitutional Arguments: Right to Privacy and Equal Protection

1. The Right to Privacy

In many cases concerning marijuana laws, those in favor of legalizing marijuana challenge the laws prohibiting marijuana use and possession on the basis that these laws violate the constitutional rights to privacy in one's home and individual autonomy.¹⁶⁸ The right to privacy is not mentioned specifically in the U.S. Constitution, but the courts have interpreted the Fourth and Fourteenth Amendments to extend a right of privacy to individuals.¹⁶⁹

A central argument for legalizing marijuana is that the possession of marijuana is included in the fundamental right to privacy. If the government intrudes on that right, it violates one's constitutional rights.¹⁷⁰ Fundamental rights receive the highest constitutional protection and must prevail over governmental restrictions unless the state can demonstrate a compelling interest

165. See BONNIE, *supra* note 14, at 32.

166. *Id.* at 33; HELLMAN, *supra* note 12, at 29.

167. Compare U.S. CONST. art. I, with U.S. CONST. art. III (describing the specific functions of Congress and the judiciary).

168. NORML v. Bell, 488 F. Supp. 123, 130 (D.D.C. 1980); *Ravin v. State*, 537 P.2d 494, 498 (Alaska 1975); *Mann v. County*, 472 P.2d 468 (Cal. 1970).

169. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . .").

170. *Ravin*, 537 P.2d at 497.

in having the law.¹⁷¹ Laws that infringe upon fundamental rights must pass the test of strict scrutiny in order for the courts to uphold them.¹⁷² The law must be “necessary, and not merely rationally related, to the accomplishment of a permissible state policy.”¹⁷³ The question remains whether or not marijuana use and possession falls within the category of fundamental rights that the courts need to protect from governmental interference.

Courts have considered the private use or possession of marijuana as part of the right to privacy if it is viewed as being done in the specially protected area of the home.¹⁷⁴ Supreme Court decisions have shown a preference for protecting individuals’ rights when the behavior at issue takes place in the home.¹⁷⁵ The Court has always recognized that people have the fundamental right to be free “from unwanted governmental intrusions into one’s privacy.”¹⁷⁶ This is true especially where one’s behavior in one’s own home does not harm others.¹⁷⁷

There are arguments on both sides of the issue as to whether marijuana use in the home is included in the fundamental right to privacy in the home. The decision in *State v. Kantner* ultimately disagrees with the argument that marijuana use is a fundamental right.¹⁷⁸ The *Kantner* court held: “we do not think that appellants have established that the interest of the individual in possessing and using marihuana is within the class of interests to which the state and federal constitutions accord the highest degree of

171. *Id.*

172. *Id.*

Once a fundamental right under the constitution of Alaska has been shown to be involved and it has been further shown that this constitutionally protected right has been impaired by governmental action, then the government must . . . meet its substantial burden of establishing that the abridgement in question was justified by a compelling governmental interest.

Id.

173. *Id.*

174. *Id.* at 498.

175. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that people had the right to private enjoyment of obscene matter in their own homes); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down, as unconstitutional, a state statute that prohibited the dispensing of birth control to married people).

176. *Stanley*, 394 U.S. at 564.

177. *See id.* at 565. “One aspect of a private matter is that it *is* private, that is, it does not adversely affect persons beyond the actor, and hence is none of their business.” *Ravin*, 537 P.2d at 504.

178. *State v. Kantner*, 493 P.2d 306, 310 (Haw. 1972).

protection.”¹⁷⁹ The concurrence and dissent in *Kantner*, however, agree that marijuana use should be a protected right.¹⁸⁰ The concurring judge states, for example, “I believe that the right to the ‘enjoyment of life, liberty and the pursuit of happiness’ includes smoking of marijuana, and one’s right to smoke marijuana may not be prohibited or curtailed unless such smoking affects the general welfare.”¹⁸¹ The dissent further argues that the right to privacy and to be “let alone” includes the private,¹⁸² personal use of marijuana and that the private possession of marijuana should not be a crime because there is not sufficient evidence of its social harm to justify having a law against it.¹⁸³

Another aspect of the right to privacy that favors including marijuana use and possession as a protected right is the right to personal autonomy.¹⁸⁴ In *Kantner*, the dissent states that the right to privacy “guarantees to the individual the full measure of control over his own personality consistent with the security of himself and others.”¹⁸⁵ An individual’s choice to smoke marijuana is exactly that—a personal choice.¹⁸⁶ Presumably, people choose to smoke marijuana in pursuit of various personal goals, such as “the relief from tension, the heightening of perceptions, and the desire for personal and spiritual insights.”¹⁸⁷

The dissent in *Kantner* asserts that the right to personal autonomy does protect the individual when smoking marijuana, which is private conduct designed to affect an individual’s personality, as long as such conduct does not produce detrimental results.¹⁸⁸ Other parties have argued in court that private

179. *Id.* at 310. The court recognized that the use of peyote may be protected in certain circumstances because its use is a valid exercise of Native American religion. The use of marijuana, however, with no “intimate connection with a ‘preferred freedom,’” would not be a protected behavior. *Id.*

180. *Id.* at 312–13 (Abe, J., concurring).

181. *Id.* at 312.

182. *See id.* at 313–15 (Levinson, J., dissenting). The dissent notes that an individual’s experiences with marijuana are very private and personal. *Id.* Thus, marijuana use is private behavior with which government should not interfere. *Id.*

183. *Id.* at 315. The dissent also argues that the justifications for prohibiting marijuana possession—mainly that marijuana is psychologically and physically harmful to the user—are not sufficiently scientifically proven. *Id.* at 316.

184. *Id.* at 313.

185. *Id.* at 315.

186. *Id.*

187. *Id.*

188. *Id.* The dissent argues that the state failed to show any harm to the user or others from the private, personal use of marijuana, and therefore laws against this type of use

marijuana use is a personal liberty and that the government should not interfere with this liberty.¹⁸⁹ In *People v. Sinclair*, one judge noted that a basic freedom of the individual is to be free to do as one pleases as long as his or her actions do not interfere with the rights of neighbors or society.¹⁹⁰

Presently, the right to privacy does not protect the personal use and possession of marijuana and courts do not consider it a fundamental right in any respect.¹⁹¹ There are, however, many arguments that it should be included in the right to privacy and protected as such, and an increasing number of judges favor that position.¹⁹² This trend, along with more scientific evidence that marijuana is not really as harmful as people used to believe,¹⁹³ may lead to changes in the status of marijuana use from an unprotected behavior to a protected one.

2. Equal Protection

Proponents of marijuana decriminalization also argue that laws criminalizing marijuana deny users equal protection of the laws.¹⁹⁴ One argument based on this theory is that the legislature does not proscribe other commonly used recreational drugs like alcohol and tobacco, even though they inflict far more damage on

infringed on the right to personal autonomy. *Id.*; see also *Ravin v. State*, 537 P.2d 494, 501 (Alaska 1975).

189. See, e.g., *Kantner*, 493 P.2d at 307; *People v. Sinclair*, 194 N.W.2d 878, 896 (Mich. 1972) (Kavanagh, C.J., concurring); *Ravin*, 537 P.2d at 494; *NORML v. Bell*, 488 F. Supp. 123, 123 (D.D.C. 1980).

190. *Sinclair*, 194 N.W.2d at 896. Judge Kavanagh stated in his concurring opinion, "‘Big Brother’ cannot, in the name of *Public* health, dictate to anyone what he can eat or drink or smoke in the *privacy* of his own home." *Id.*

191. *Kantner*, 493 P.2d at 306; *NORML*, 488 F. Supp. at 123.

192. E.g., *Kantner*, 493 P.2d at 311–20 (Abe, J., concurring; Levinson J., dissenting); *Ravin*, 537 P.2d at 504; *Sinclair*, 194 N.W.2d at 895–96 (Kavanagh, C.J., concurring).

193. *Ravin*, 537 P.2d at 506.

The National Commission on Marihuana and Drug Abuse reported that among users "no significant physical, biochemical, or mental abnormalities could be attributed solely to their marijuana smoking" . . . the use of marijuana . . . does not constitute a public health problem of any significant dimensions. It is, for instance, far more innocuous in terms of physiological and social damage than alcohol or tobacco. The experts generally agree that the early widely-held belief that marijuana use directly causes criminal behavior, and particularly violent, aggressive behavior, has no validity . . . there is little validity to the theory that marijuana use leads to use of more potent and dangerous drugs. The National Commission rejected the notion that marijuana is physically addicting.

Id. at 506–08.

194. *Id.* at 512.

their users than does marijuana.¹⁹⁵ This argument urges the legislature to apply equal controls to equal threats to the public health.¹⁹⁶ Arguments against this reasoning include that there are too many political obstacles to placing controls on alcohol and tobacco.¹⁹⁷ The legislature should not be rendered unable to regulate other substances that are equally or less harmful just because it cannot strictly regulate alcohol and tobacco.¹⁹⁸

Another aspect to the equal protection argument focuses on the classification of marijuana as a harmful controlled substance.¹⁹⁹ The assertion is that the classification of marijuana in the same category as heroin and other narcotics, as a “depressant, stimulant, or hallucinogenic,” is irrational.²⁰⁰ Because marijuana is much less harmful than drugs like heroin or cocaine, the government should not classify it as the same type of drug.²⁰¹ For instance, proponents of this argument argue that the government should not classify marijuana as a Schedule I drug in the Controlled Substances Act.²⁰² Marijuana does not belong in such a strict category because it does not satisfy the statutory criteria, which include a high potential for abuse, no medically accepted use, and no safe use of the drug even under medical supervision.²⁰³ Another argument related to equal protection is that the definition of “possession” in laws criminalizing the possession of marijuana is too vague and violates due process of law.²⁰⁴ Many marijuana laws, like the one at issue in *State v. Hogue*, make the possession of marijuana a punishable offense and define “possession” as “conscious and substantial possession, not a

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* (“It is not irrational for the legislature to regulate those public health areas where it can do so, when there exists other areas where controls are less feasible.”).

199. *Id.*; *NORML v. Bell*, 488 F. Supp. 123, 137 (D.D.C. 1980).

200. *Ravin*, 537 P.2d at 512.

201. *NORML*, 488 F.Supp. at 137.

202. *Id.* at 138.

203. *Id.* at 139. The government argued that all three criteria were met. *Id.* at 140. It maintained that marijuana does have a high potential for abuse because most people use it on their own initiative rather than on the basis of medical advice. *Id.* Although the drug may have therapeutic uses in the treatment of glaucoma and cancer, the FDA does not currently accept it for any form of medical treatment. *Id.* Finally, marijuana cannot be used safely due to the differing concentrations of THC in cannabis. *Id.* For the statutory criteria of the Controlled Substances Act, see 21 U.S.C. § 812(b)(1) (1976).

204. *State v. Hogue*, 486 P.2d 403, 411 (Haw. 1971) (Levinson, J., dissenting).

mere involuntary or superficial possession, and much more than a passing control, fleeting and shadowy in nature."²⁰⁵

According to the dissent in *Hogue*, this definition violates the constitutional guarantee of due process of law because it fails to mark explicitly the boundaries of prohibited possession—the government fails to provide standards which would enable a person to determine what is or is not unlawful possession of marijuana.²⁰⁶ Such a vague definition of “possession” renders the statute in *Hogue*, like a number of marijuana laws, so indefinite that “men of common intelligence must necessarily guess at its meaning and differ as to its application,” thereby violating the Constitution’s due process guarantee.²⁰⁷

In general, the majority of courts have not accepted the constitutional arguments for the decriminalization of marijuana.²⁰⁸ In every case, however, there is at least one judge who recognizes the validity of such arguments.²⁰⁹ This is evidence of significant steps in the direction of the reformation of marijuana laws. This judicial recognition may be evidence that some jurists question the validity of marijuana laws, and this should serve as a catalyst for legislators to re-examine drug laws and policies.

IV. SUGGESTIONS FOR REFORM AND ALTERNATIVES TO THE CURRENT MARIJUANA LAWS

A. Decriminalization

Due to the variety of issues and opinions arising out of marijuana cases, the idea of reforming marijuana laws remains present. Advocates of decriminalization frequently suggest alternative laws, arguing that current laws impose harsh penalties even for simple possession of the drug.²¹⁰ Some suggestions focus on rehabilitative efforts, similar to the systems in the Netherlands

205. *Id.* at 411–12.

206. *Id.* at 412.

207. *Id.* at 411.

208. *State v. Kantner*, 493 P.2d 306 (Haw. 1972); *Ravin v. State*, 537 P.2d 494 (Alaska 1975); *NORML*, 488 F. Supp. at 123.

209. *Kantner*, 493 P.2d at 311–20 (Abe, J., concurring; Levinson, J., dissenting); *Ravin*, 537 P.2d at 504, 511; *People v. Sinclair*, 194 N.W.2d 878, 895–96 (Mich. 1972) (Kavanagh, C.J., concurring).

210. *NORML Testimony*, *supra* note 11, at 69.

and other European countries,²¹¹ while others urge the government to regulate marijuana like alcohol and tobacco.²¹² The primary goal of all of the alternatives is to either remove or decrease the penalties for marijuana possession and use.²¹³ Proponents of alternative laws argue that because marijuana is not as dangerous as drugs like cocaine or heroin, those who simply use marijuana for personal pleasure should not be punished.²¹⁴

One such vocal proponent for reform is NORML, a non-profit public interest group representing the interests of Americans who oppose marijuana prohibition.²¹⁵ The organization supports both legalization and decriminalization of marijuana.²¹⁶ Legalization of marijuana involves “the development of a legally controlled market . . . where consumers could buy marijuana for personal use from a safe, legal source.”²¹⁷ Due to political opposition to marijuana use and the widespread belief that marijuana is extremely harmful, legalization will probably never occur.²¹⁸ Decriminalization, however, may be a viable alternative.²¹⁹ The decriminalization model focuses on “the removal of all penalties for the private possession and responsible use of marijuana by adults, cultivation for personal use, and the casual nonprofit transfers of small amounts.”²²⁰ Proponents of decriminalization insist that it will greatly reduce the harm caused by marijuana prohibition by protecting millions of consumers from the threat of arrest and jail; casual users would no longer be arrested, although commercial sellers would be.²²¹

Decriminalization proponents point to the Netherlands’ drug policies when arguing that decriminalization is effective and does

211. See, e.g., Bianculli, *supra* note 16, at 188.

212. HELLMAN, *supra* note 12, at 197.

213. NORML Testimony, *supra* note 11, at 63; BONNIE, *supra* note 14, at 43.

214. NORML Testimony, *supra* note 11, at 63.

215. *Id.*

216. *Id.*

217. *Id.* The aim of legalization is to provide a legal market for consumers to buy marijuana in an effort to eliminate the problems of crime and violence that come from the uncontrolled and unregulated black market that exists now. *Id.*

218. See *id.* at 64–67.

219. *Id.* at 63 (discussing the experience that the United States has had thus far with decriminalization).

220. *Id.*

221. *Id.* If this model were implemented, then the government would still be able to penalize those who sell marijuana on a large enough scale to be a threat, but those who simply possess it for personal consumption would not be punished.

not increase drug use.²²² “In the Netherlands, marijuana is legal and minimal experimentation by teenagers illustrates that legalization does not necessarily cause increased use.”²²³ When the Dutch government legalized marijuana for personal consumption while maintaining laws against possession and sale of large quantities, the level of marijuana use actually declined.²²⁴

Despite these findings, opponents of decriminalization argue that the Netherlands’ policies are not as successful as they seem.²²⁵ For example, “[t]he Netherlands’ police force maintains a greater presence than those of large cities in the United States. Also, 50% of Dutch inmates are in jail because they committed a drug crime.”²²⁶ So while it may appear that legalization and liberal drug policies have decreased the incidence of drug use in the Netherlands, drug-related crimes continue to be a problem.²²⁷

Some U.S. states have also taken significant steps to decriminalize marijuana. In 1973, Oregon began a decriminalization movement by adopting policies that removed criminal penalties for minor marijuana offenses and replaced them with a small civil fine enforced with a citation instead of arrest.²²⁸ Decriminalization laws also appear to be popular with voters, as shown by a 1998 state-wide vote in Oregon in which citizens voted two-to-one to reject a proposal earlier adopted by the legislature that would have reimposed criminal penalties for marijuana smokers.²²⁹

Members of the government have proposed other decriminalization efforts. In 1999, Representative Barney Frank (D-MA), reintroduced a bill (H.R. 912)²³⁰ in Congress to provide for the medical use of marijuana.²³¹ The bill seeks to move

222. Bianculli, *supra* note 16, at 188; see BONNIE, *supra* note 14, at 193. *But see* GRAY, *supra* note 20, at 168 (noting that the Dutch “have paid a price . . . with an increase in marijuana, and to American critics, that price is unacceptable.”).

223. Bianculli, *supra* note 16, at 188.

224. *Id.*

225. *Id.* at 195.

226. *Id.*

227. *See id.*

228. *NORML Testimony*, *supra* note 11, at 73. “Today, approximately 30% of the population in this country live under some type of marijuana decriminalization law.” *Id.*

229. *Id.*

230. H.R. 912, 106th Congress (1999).

231. *Rep. Barney Frank Introduces New Medical Marijuana Proposal In Congress*, at <http://www.norml.org/laws/HR912.shtml> (last visited Feb. 12, 2001) [hereinafter *New Proposal*].

marijuana from Schedule I to Schedule II under federal law, thereby making it legal for physicians to prescribe.²³² This rescheduling would remove marijuana from the list of drugs alleged to have no valid medical use, such as heroin and LSD, and place it in the same category as morphine and cocaine, which may be addictive but have actual medical uses.²³³ While the proposed legislation does not completely decriminalize marijuana, it represents steps in that direction and recognizes that marijuana does have some beneficial uses.

Most recently, several ballots were proposed in various states for the 2000 election year.²³⁴ Five states placed initiatives on their ballots to reduce the penalty for nonviolent marijuana users.²³⁵ The Massachusetts and Mendocino County, California, propositions considered recommending that “marijuana possession be reduced to a civil violation, like a traffic ticket, not a criminal one”²³⁶ Voters in Nevada and Colorado approved “legalization of marijuana for medical reasons . . . [which] would bring the number of states with such laws to nine, including Maine, Alaska, Oregon, Washington, Arizona, Hawaii and California.”²³⁷

California’s Proposition 36 suggested doing away with jail time for people convicted of simple possession of any drug, and

232. *Id.* The proposed legislation states:

No provision of the [CDAPCA or] the Federal Food, Drug, and Cosmetic Act shall prohibit or otherwise restrict—

(A) the prescription or recommendation of marijuana by a physician for medical use,

(B) an individual from obtaining and using marijuana from a prescription or recommendation of marijuana by a physician for medical use by such individual, or

(C) a pharmacy from obtaining and holding marijuana for the prescription of marijuana by a physician for medical use under applicable state law in a State in which marijuana may be prescribed or recommended by a physician for medical use under applicable State law.

H.R. 912.

233. *Id.*

234. Baum, *supra* note 66, at 61.

235. *Id.*

236. *Id.* The activists in Mendocino County are enraged by the “Drug War” and state that their main purpose in supporting the new initiatives is to make a statement against the war. *Id.* According to one spokesman for the initiative, “people are tired of seeing tax money go to what seems to be a very futile enterprise, and they are tired of seeing young people tainted with arrest records for using a drug that’s acknowledged to be less dangerous than legal drugs like tobacco and alcohol.” *Id.*

237. *Id.*; see also Erika Casriel, *Voters Speak Out Against Drug War*, ROLLING STONE, Dec. 28, 2000, at 34.

advocated giving people three chances to stop using drugs before facing a prison sentence.²³⁸ This proposition is an example of the growing acceptance of a "treatment versus punishment" theory on drug use.²³⁹ Supporters of Proposition 36 maintain that "[a]ddiction is a disease as defined by the World Health Organization and the American Medical Association Treatment has better outcomes than incarceration."²⁴⁰ California voters passed Proposition 36, the Substance Abuse and Crime Prevention Act, in the general elections of early November 2000.²⁴¹ The emergence of support for proposals such as these represents steps in the direction of a model similar to the Netherlands, where treatment, as opposed to punishment, is given to those who need it.

In Europe, several countries have voted to change some of their drug laws.²⁴² In July 2000, "Portugal joined Spain and Italy in decriminalizing possession of small amounts of marijuana and heroin," while in October, the Swiss Cabinet proposed that adults be allowed to legally consume marijuana.²⁴³ In general, European governments seem to be "more willing to moderate their drug policies,"²⁴⁴ and appear to be following the lead of the Netherlands as well.

B. Other Alternatives

Aside from complete legalization or decriminalization, other specific alternatives for the reformation of marijuana laws exist. One such suggestion is that because the government is likely to be afraid of the possible consequences of total depenalization of marijuana use, perhaps it could impose a civil sanction for

238. *Id.*

239. *See id.*

240. *Id.* Ethan Nadelmann, head of the drug-reform organization, Lindesmith Center, notes that the broader agenda of the initiatives in California focuses on "getting people to shift their opinion to thinking of drug use as a health problem instead of incarcerating people." *Id.*

241. *Medical Marijuana Initiatives Pass In Colorado and Nevada; Californians Pass Initiative to Keep Non-Violent Drug Offenders Out Of Jail*, 3 NORML E-ZINE 24 (2000), available at <http://www.norml.org/news/archives/index2000.shtml>; see also Casriel, *supra* note 237, at 34.

242. Baum, *supra* note 66, at 61.

243. *Id.*

244. *Id.*

possession in public,²⁴⁵ as is done in Oregon. The imposition of a civil fine on those possessing marijuana outside the home for personal use “would be levied and processed outside the criminal justice system [P]ossession of marihuana would be the equivalent of a traffic offense in those jurisdictions where such an offense is not criminal.”²⁴⁶

With such a scheme in place, “[w]arrants would presumably not be issued for searches of private residences, and possession offenses would be detected only by accident or if the offender uses the drug in public.”²⁴⁷ This would appear to please everyone, because the government would be able to arrest people for drug use in public, while citizens who choose to smoke marijuana in their own homes would not be harassed.

Other recommendations, which relate to the cultivation of marijuana for personal use, also seek to benefit individuals engaging in marijuana use and possession in their homes.²⁴⁸ “Under most current statutes [regulating marijuana], cultivation of any amount is punishable as a serious felony, with penalties usually as severe as those for sale.”²⁴⁹ Proponents of lighter penalties for personal marijuana use urge that the law should distinguish between cultivation for commercial and non-commercial activity, and subject cultivation for personal use to lesser sanctions.²⁵⁰

This alternative would deter users who grow their own marijuana from supporting the commercial market.²⁵¹ Furthermore, these users would not contact drug dealers who sell more dangerous drugs.²⁵² Here again, both sides stand to gain something. The decrease in people supporting the drug trade would satisfy the government, while the lighter penalties would please those who grow and smoke their own marijuana.²⁵³

Alternatively, the government could adopt a regulatory system for marijuana similar to the schemes regulating alcohol and

245. BONNIE, *supra* note 14, at 35.

246. *Id.*

247. *Id.*

248. *See id.* at 57–58.

249. *Id.* at 57.

250. *Id.* Issues would remain in this case, however, such as the specific amount of marijuana constituting commercial cultivation and whether a reduced offense of cultivation for personal use would merit any criminal penalty. *Id.*

251. *Id.* at 58.

252. *Id.*

253. *See id.*

tobacco.²⁵⁴ As part of such a system, marijuana could be sold and regulated by the government.²⁵⁵ If the government wants to prohibit drug use by young people, it could limit sales to adults.²⁵⁶ Advocates of such a regulatory scheme suggest that private retailers could sell marijuana and place taxes on it similar to those on alcohol and tobacco.²⁵⁷ This option also seems to appease everyone. The government profits from the sale of marijuana, while possibly cutting the public's use of the drug due to increased prices.²⁵⁸ Those who choose to use marijuana would not only be able to do so free from governmental interference, but with governmental permission.²⁵⁹

Despite all of these valid suggestions for reforming the marijuana laws, the government remains wary.²⁶⁰ It may fear that by decriminalizing marijuana or by adopting a regulatory scheme for its sale, it would be symbolically approving the use of the drug.²⁶¹ This is not necessarily true, however. Legislative action of such significance would certainly be extensively debated.²⁶² The legislature could decriminalize marijuana "not [because] the drug is good but [because] the costs of criminalization are out of proportion to the benefits of [the prohibition] . . . policy."²⁶³ Then the public would know that the government is not condoning marijuana use by decriminalizing the drug.²⁶⁴

The existence of such alternatives indicates that scholars and members of the government alike have very strong opinions about the state of the current laws regarding marijuana use and possession. From a general scheme of decriminalization to specific

254. HELLMAN, *supra* note 12, at 197.

255. For an explanation of such a regulatory system, see *id.* at 197-99.

256. *Id.* at 185.

257. *Id.* at 197-98. Commentators have suggested that governmental pricing and taxing of marijuana would keep the price high enough to discourage excessive use by adults. For ordinary users, a high price would result in consumption at a lower than moderate level. *Id.*

258. *See id.*

259. *See id.* at 198-99. The discussion of taxing marijuana and comparing marijuana use to alcohol consumption suggests that the government may be accepting the fact that people use marijuana for recreation.

260. *See id.* at 176; *see also* Bianculli, *supra* note 16, at 190-97 (discussing the government's and other opponents' arguments against decriminalization).

261. HELLMAN, *supra* note 12, at 176.

262. *Id.*

263. *Id.*

264. *See id.*

suggestions on what aspects of the laws should change, all of these alternatives appear to benefit both the government and the individuals who choose to smoke marijuana. The implementation of these reforms, and in fact their mere suggestion, indicates that the idea of reforming marijuana laws may continue to gain widespread acceptance.

V. CONCLUSION

Marijuana decriminalization has been debated since the government first criminalized the drug. Negative societal attitudes toward the use of marijuana have kept it illegal. Despite some evidence that the drug is not as harmful as once believed, the government remains reluctant to change the laws. Proponents of decriminalization urge that the costs to society, as well as to individuals, that come from the prohibition of any behavior involving marijuana actually outweigh the benefits of criminalizing the drug. One commentator views decriminalization as an opportunity to “enable the government to regulate, inform, and educate.”²⁶⁵

Advocates of legalization have pointed to the Netherlands in an effort to strengthen their arguments. The Netherlands has a much more liberal drug policy, and focuses on treatment of addicts rather than punishment. The drug laws in the Netherlands prioritize the health and care of drug users.²⁶⁶ The laws of the Netherlands distinguish between hard drugs like heroin and soft drugs like marijuana.²⁶⁷ Instead of simply confining hard drug users to prisons, the Netherlands offers treatment programs. The possession of soft drugs for personal use is not considered a major offense and is not generally prosecuted.²⁶⁸ Basically, the Netherlands operates with a rehabilitation-centered drug policy for hard drugs and the personal possession and use of marijuana is not a crime. This system has appeared to work well in that country, and proponents of marijuana law reform insist that the United States should adopt similar policies.

There are many constitutional arguments suggesting that the U.S. government’s regulation of marijuana use violates an

265. Bianculli, *supra* note 16, at 186.

266. *Fact Sheet*, *supra* note 15.

267. *Id.*

268. *Id.*

individual's right to privately behave as he or she chooses. Many of the alternatives suggested above would protect an individual user's right to privacy, while at the same time benefit the government in various ways.

The Netherlands' drug laws recognize a distinction between "use" and "abuse," and decriminalization advocates in the United States would like the government to recognize that distinction as well.

By stubbornly defining all marijuana smoking as criminal, including that which involves adults smoking in the privacy of their home, government is wasting police and prosecutorial resources, clogging courts, filling costly and scarce jail and prison space, and needlessly wrecking the lives of genuinely good citizens. It is time that Congress acknowledge what millions of Americans know to be true: there is nothing wrong with the responsible use of marijuana by adults and it should be of no interest or concern to the government. In the final analysis, this debate is only incidentally about marijuana; it is really about personal freedom.²⁶⁹

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269. *NORML Testimony*, *supra* note 11, at 75.

* J.D. Candidate, Loyola Law School, 2001; B.A., Communications, *magna cum laude*, Loyola University, New Orleans, 1998. I dedicate this Comment to my mother, Holly, whose loving efforts to understand and support everything I do mean so much to me, and who inspires me every day to become as wonderful a person as she. I would not be anywhere near the person I am today without your love, pride, and belief in me. Also, this is dedicated in loving memory of Peter Schoff, without whom I would have never made it to California. Thanks to NORML for continuing to advocate for reform of the marijuana laws, and to the Volume 23 Editors and Staff of the *Loyola of Los Angeles International and Comparative Law Review* for their assistance in preparing this Comment. Thanks especially to Talya, for encouraging me to submit for publication in the first place; to Caroline for managing to keep me hard-working and sane at the same time; and to Jean for her assistance in preparing the final version of this Comment. I would also like to give many special thanks to Rainey, Bryan, Aurora, Brenna, Mandie, Brigitte, Karen, and Laura for constantly being there for me and offering their love and support, and being proud of me no matter what. I love you all and I will always be grateful to have every one of you in my life.