

PUFF, PUFF, OR PASS? WHY THE UNITED STATES IS NOT READY TO LEGALIZE RECREATIONAL MARIJUANA

I. INTRODUCTION

When it comes to whether the United States should “puff” or “pass” on legalizing marijuana for recreational use, it is difficult to discern the best path the country should take because the issue is so clouded by moral, scientific, and political polarity.¹ Marijuana is classified as a Schedule I drug under the Controlled Substances Act (“CSA”), making it expressly prohibited under federal law.² Supporters of legalizing marijuana claim it is a natural substance³ that is safer than other mainstream drugs, like alcohol and tobacco,⁴ and therefore, should be legal to consume at will.⁵ Their position is firmly rooted in the stance that prohibition violates individual liberty; the federal government should not have the right to control what one puts in their own body if it does not harm others.⁶

¹ See generally Conn Carroll, *Should the United States Legalize Marijuana?* TOWNHALL.COM (Apr. 3, 2014),

<http://townhall.com/tipsheet/conncarroll/2014/04/03/should-the-united-states-legalize-marijuana-n1817690> (comparing differing opinions on marijuana).

² 21 U.S.C.A. § 812 (West 2014) (using the original spelling of Marihuana).

³ See Harm van Bakel et al., *The Draft Genome and Transcriptome of Cannabis sativa*. GENOME BIOLOGY, Oct. 2011, at 1-2 (explaining marijuana is claimed to be completely natural, but the level of THC can be altered based on selective breeding).

⁴ Eric Wargo, *Can It Be Bad If It's Natural?*, NAT'L INST. ON DRUG ABUSE, (Mar. 26, 2013), <http://teens.drugabuse.gov/blog/post/can-it-be-bad-if-its-natural>.

⁵ See *About Marijuana*, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, <http://norml.org/aboutmarijuana> (last visited Dec. 6, 2014).

⁶ *Arguments For And Against The Legalization Of Marijuana*, LEGALIZATION OF MARIJUANA (Nov. 17, 2014, 1:35 PM), <http://legalizationofmarijuana.com/arguments-for-and-against-the-legalization-of-marijuana> (noting prohibition must be weighed against the loss of personal freedom; countries have a responsibility to respect individual free will and the right of self-determination).

Marijuana, however, is not completely natural and safe,⁷ it does cause harm to others,⁸ and the federal government does have a duty to promote the general welfare of the public by establishing and enforcing laws for the good of the whole.⁹ Unfortunately, instead of abiding by laws established to address this very issue (legalization of banned substances),¹⁰ the federal government is sitting idly by,¹¹ allowing a social experiment to unfold in the United States while everyone watches for the outcome of legal recreational marijuana.¹²

Taking a bold stance, voters in Washington State (“Washington”)¹³ and Colorado¹⁴ approved initiatives in the 2012 election to legalize marijuana for recreational use, regardless of the fact that it is an illegal drug under federal law.¹⁵ In February of 2013, a bill was introduced in Congress to fully legalize marijuana in the United States.¹⁶ Congress has not yet taken action to pass or reject the bill, leading the United States Deputy Attorney General to issue a new memorandum regarding marijuana in August 2013.¹⁷ The memorandum did not address changing the classification of marijuana, which was within his power,¹⁸ but instead allowed states to establish their own regulation of marijuana in adherence with stated guidelines under “big brother’s”

⁷ Amen Clinics, *Marijuana Causes Long-Term Brain Changes*, AMEN CLINICS (Feb. 6, 2014, 7:15 AM), <http://www.amenclinics.com/blog/marijuana-causes-long-term-brain-changes/>.

⁸ See *infra* Part IV.B.

⁹ U.S. CONST. pmbl.

¹⁰ See 21 U.S.C.A. § 811 (West 2014).

¹¹ Ending Federal Marijuana Prohibition Act, H.R. 499, 113th Cong. (2013) (showing no substantive action has been taken by Congress on this bill since its introduction in Feb. 2013).

¹² Suzanne Weiss, *Legally Green*, STATE LEG. MAG. (Feb. 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/legally-green.aspx>.

¹³ WASH. SEC’Y. OF STATE, NOV. 06, 2012 GENERAL ELECTION RESULTS, <http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana.html> (last visited Oct. 25, 2014).

¹⁴ COLO. SEC’Y. OF STATE, 2012 GENERAL ELECTION RESULTS, <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/amendProp.html#64> (last visited Oct. 25, 2014).

¹⁵ See 21 U.S.C.A. § 812 (West 2014).

¹⁶ H.R. 499.

¹⁷ James M. Cole, *Guidance Regarding Marijuana Enforcement*, Mem. Dep. Att’y Gen. (2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

¹⁸ 21 U.S.C.A. § 811 (West 2014).

watchful eye.¹⁹ It deprioritized individual use and possession as a focus for federal law enforcement, except in specific circumstances such as trafficking and use by minors, and in doing so, allowed for selective adherence to federal drug policies.²⁰ Under this guidance, Alaska, Oregon, and Washington, D.C., subsequently passed voter initiatives in 2014 to legalize recreational marijuana.²¹

The current social experiment approach of selectively allowing individual states to operate in direct opposition to federal law, taking a “do nothing” stance, is poised to be precedent setting for future critical issues.²² Even President Obama has acknowledged this social experiment has a slippery slope when he stated:

“If marijuana is fully legalized and at some point folks say, ‘Well, we can come up with a negotiated dose of cocaine that we can show is not any more harmful than vodka,’ are we open to that? If somebody says, ‘We’ve got a finely calibrated dose of meth, it isn’t going to kill you or rot your teeth,’ are we O.K. with that?”²³

Instead of allowing the social experiment to continue, the federal government must take a stance to alleviate the existing conflicts²⁴ between marijuana laws by either: amending the scheduling of marijuana within the guidelines of the Controlled Substances Act;²⁵ implementing a decriminalization model;²⁶ or abiding by current law and enforcing prohibition.²⁷

This Comment will discuss the current attempt to legalize marijuana for recreational use in the United States by allowing a social experiment in several states, in violation of federal law. It will address the failure of the federal government to take a stance and enact,

¹⁹ Cole, *supra* note 17, at 2.

²⁰ *Id.*

²¹ See *Marijuana Policy in the States*, MARIJUANA POLICY PROJECT (Feb. 2, 2015), <http://www.mpp.org/assets/pdfs/library/Map-of-State-Marijuana-Laws.jpg> (showing Alaska, Oregon, and Washington, D.C., initiatives that passed in 2014).

²² See Cole, *supra* note 17, at 2.

²³ Jake Miller, *Obama: Marijuana Not “More Dangerous” Than Alcohol*, CBS NEWS, (Jan. 19, 2014), <http://www.cbsnews.com/news/obama-marijuana-not-more-dangerous-than-alcohol/>.

²⁴ See *infra*. pp. 8-14.

²⁵ 21 U.S.C.A. § 811 (West 2014).

²⁶ *States That Have Decriminalized*, NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited Dec. 6, 2014).

²⁷ See 21 U.S.C.A. § 812 (West 2014).

uphold, or enforce legislation that addresses the genuine impacts of recreational marijuana, instead of establishing de facto legalization. Part II will discuss the path of marijuana regulation from early prohibition to the current attempt at recreational legalization. This will show the conflict among the Controlled Substances Act, medicinal marijuana, the recreational models established in Washington and Colorado, and the impending legislation to federally legalize marijuana. Part III will analyze the conflicts between the above laws and how federal indecision impairs the fiscal sustainability of a legal recreational marijuana market. Part IV will scrutinize the duty of the federal government to address and mitigate social harm prior to legalizing marijuana. To emphasize the flaws in the current approach to legalization, this section will discuss the controversial impacts of crime, addiction, and youth drug use as it relates to marijuana. Part V will make recommendations for the regulatory and social safeguards Congress should enact before considering sweeping change to the federal drug policy.

II. THE PATH OF REGULATION

A. Early Regulation of Marijuana

Regulation of marijuana began in the United States during the early 1900s in connection with anti-narcotic and alcohol prohibition efforts.²⁸ In 1914, the Harrison Narcotics Tax Act (“Harrison Act”)²⁹ was passed, imposing an occupational tax on legitimate handlers of narcotics³⁰ to regulate the prescribing and dispensing of addictive drugs.³¹ Until this time, drug users were viewed as ill and innocent victims needing treatment.³² The passage of the Harrison Act skewed

²⁸ Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 976 (1970); see also the Pure Food and Drugs Act of 1906, 34 Stat. 768, 770 (repealed 1938).

²⁹ Harrison Narcotics Tax Act, 38 Stat. 785 (repealed 1970); see also, Bonnie & Whitebread, *supra* note 28.

³⁰ Bonnie & Whitebread, *supra* note 28, at 987 (defining narcotics of primary concern were opium, cocaine, morphine and heroin, but not marijuana).

³¹ *Id.* (noting that the Harrison Act was enforced by the Internal Revenue Service, not by way of a criminal statute, because Congress believed it could not directly regulate possession and sale of drugs under the confines of the 10th Amendment, but it could under the taxing power of the Commerce Clause).

³² *Id.*

the public’s view and created a local hysteria against drugs; users were soon viewed as mere “dope fiends” partaking in illicit activity.³³ This perception, the evident increase in drug-related crimes, and the inability of the Harrison Act to directly penalize drug users,³⁴ led individual states to enact non-uniform anti-narcotic laws, many of which also banned marijuana.³⁵ Curiously, outside of confined areas of local hysteria, marijuana was not of great public concern during this time.³⁶ Banning marijuana was likely a result of racial discrimination against Mexican immigrants, rather than based on any scientific study.³⁷ Conversely, states geographically insulated from this immigration were banning marijuana for a different reason: out of fear it would be habit-forming and used to replace narcotics or alcohol during the prohibition era.³⁸

Despite the eventual end of alcohol prohibition, the public perception of narcotics remained intolerant and kept anti-narcotic laws intact to address the perceived legal and moral problems of drug use.³⁹ By the late 1920s, the lack of uniformity among state laws, the weak enforcement of those laws, and the public fear of drugs resulted in a call for federal action.⁴⁰ The Uniform State Narcotic Drug Act

³³ *Id.* (noting that addicts were forced to seek drugs in the under-ground market at high costs, which led to criminal activity and increased the public perception of a “degenerate dope fiend with immoral proclivities”).

³⁴ *Id.* at 989.

³⁵ *Id.* at 1010-1011 (noting that by 1931, twenty-two states enacted anti-drug legislation, twenty-one of those included marijuana as a prohibited drug despite evidence that the public had little knowledge or concern of marijuana).

³⁶ *Id.* at 1011.

³⁷ *Id.*; see also, Maureen Cavanaugh and Pat Finn, *The Odd History of Marijuana in the U.S.*, KPBS PUBLIC BROADCASTING (Oct. 7, 2010), <http://www.kpbs.org/news/2010/oct/07/odd-history-marijuana-us/> (noting that Mexican natives were fleeing war in their country and immigrating to the United States at record numbers, and many of them used marijuana. Unsubstantiated stories from Mexico that marijuana caused users to “act crazy” and even kill while under its influence, instilled fear in the public and caused discriminatory feelings and intolerance for anyone using marijuana).

³⁸ Bonnie & Whitebread, *supra* note 28, at 1017, 1019 (explaining that the New York Times wrote prohibiting marijuana was “only common sense” because users would be “likely to increase as other narcotics become harder to obtain”).

³⁹ Bonnie & Whitebread, *supra* note 28, at 1026-1027.

⁴⁰ Bonnie & Whitebread, *supra* note 28, at 1030.

(“Uniform Drug Act”)⁴¹ passed in 1932 and gave states authority to uniformly control the sale, possession, and use of narcotic drugs, including marijuana.⁴² Over the next several years, the Federal Bureau of Narcotics (“Bureau”) conducted a fear mongering *education* campaign to warn the public about the dangers of marijuana.⁴³ In fact, marijuana was still not widely known, or of concern, to the general public so the Bureau later focused its *education* toward Congress.⁴⁴ This campaign was highly effective and led Congress to pass the Marijuana Tax Act (“Tax Act”) in 1937.⁴⁵ The Tax Act imposed a registration and reporting requirement on any person who dealt with marijuana, even for formerly legitimate medical purposes,⁴⁶ and levied a tax on their dealings;⁴⁷ however, under the Uniform Drug Act, it was still illegal to merely possess marijuana in nearly every state.⁴⁸ Thus, in order to comply with requirements of the Tax Act, an individual would have to incriminate himself.⁴⁹ In *Leary v. United States*, 395 U.S. 6 (1969),⁵⁰ the United States Supreme Court addressed this conflict and determined the Tax Act was unconstitutional because it violated an individual’s Fifth Amendment right against self-incrimination.⁵¹

⁴¹ Richard J. Bonnie & Charles H. Whitebread, II, *Passage of the Uniform Narcotics Drug Act*, SCHAFFER LIBRARY OF DRUG POLICY (Nov. 16, 2014, 1:34 PM), <http://www.druglibrary.org/schaffer/library/studies/vlr/vlr3.htm>.

⁴² *Narcotic Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/narcotic> (explaining that a drug, that in moderate doses dulls the senses, relieves pain, and induces profound sleep, but in excessive doses causes stupor, coma, or convulsions).

⁴³ Bonnie & Whitebread, *supra* note 28, at 1036, 1052 -1053 (explaining that the widely referred “Reefer Madness” was based on the 1937 film exploiting the supposed and exaggerated dangers of marijuana).

⁴⁴ *Id.* at 1052-1053.

⁴⁵ *Id.* at 1053.

⁴⁶ *Id.* at 1054 (“Since cannabis had been removed from the *United States Pharmacopoeia* and had no recognized medicinal uses, the variety of medical exceptions in the Harrison Act were inapplicable.”).

⁴⁷ *Gonzales v. Raich*, 545 U.S. 1, 11 (2005).

⁴⁸ UNIF. NARCOTIC DRUG ACT § 2, *repealed by* Controlled Substances Act, 21 U.S.C.A. §§ 801-904 (West 2014).

⁴⁹ See *The Marihuana Tax Act of 1937*, SCHAFFER LIBRARY OF DRUG POLICY (Nov. 17, 2014, 12:30 PM), <http://www.druglibrary.org/schaffer/hemp/taxact/mjtaxact.htm>.

⁵⁰ *Leary v. United States*, 395 U.S. 6, 29 (1969), *aff'd*, 544 F.2d 1266 (5th Cir. 1977).

⁵¹ U.S. CONST. amend. V.

B. The Controlled Substances Act Prohibits Marijuana

Between the 1937 Tax Act and *Leary*, several other laws were enacted to deter a national increase in drug use, including the Boggs Act⁵² and the Narcotic Control Act of 1956.⁵³ The holding in *Leary* jettisoned the Tax Act and left behind fragmented drug laws in the wake of very public marijuana use and awareness.⁵⁴ Until this time, marijuana had gone fairly unnoticed by the general public, and was lumped in with narcotics in most prior laws to make it easy to control;⁵⁵ however, the swift increase in widespread marijuana use made it virtually impossible to enforce the various laws.⁵⁶ This inability to enforce the laws, and the need to curtail drug use, resulted in complete prohibition through the passage of the Controlled Substances Act of 1970 (“CSA”),⁵⁷ which remains in effect today. The CSA maintains a list of controlled substances, divided into five schedules, and outlines criteria to regulate each substance as follows, in pertinent part:

Schedule I –

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.⁵⁸

Schedule II—

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

⁵² Bonnie & Whitebread, *supra* note 28, at 1063 (stating that the Boggs Act implemented much harsher penalties and a mandatory minimum sentence for drug violators).

⁵³ Bonnie & Whitebread, *supra* note 28, at 1077 (stating that the Narcotic Control Act of 1956 further increased penalties and minimum sentences from those set in the Boggs Act under the premise that those penalties had been very effective to curtail drug use).

⁵⁴ Bonnie & Whitebread, *supra* note 28, at 1110.

⁵⁵ Bonnie & Whitebread, *supra* note 28, at 1068 (stating that early laws were mainly focused on opiates, and “marijuana seems to have been along for the ride”).

⁵⁶ Bonnie & Whitebread, *supra* note 28, at 1100.

⁵⁷ See generally Controlled Substances Act, 21 U.S.C.A. §§ 801-904 (West 2014) (establishing guidelines for the use of certain substances).

⁵⁸ 21 U.S.C.A. § 812 (West 2014).

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.⁵⁹

Schedule III—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.⁶⁰

Marijuana is listed as a Schedule I drug, the most strictly regulated, making it wholly illegal to grow, distribute, possess, or use for any purpose.⁶¹ The federal penalty for simple possession of any amount of marijuana is a fine of \$1,000 on the first offense and up to one year in jail.⁶² The second offense carries a mandatory fifteen-day sentence, which can be extended for up to two years in prison, and a \$2,500 fine.⁶³ Any additional possession offenses have a mandatory ninety-day to three-year prison term, and a \$5,000 fine.⁶⁴ Federal penalties exponentially increase for cultivating, distributing, and trafficking crimes, punishable by up to life in prison, and millions of dollars in fines.⁶⁵

C. Medicinal Marijuana Alters the Path

Despite federal prohibition, California legalized marijuana for medicinal purposes in 1996 with the passage of Proposition 215.⁶⁶ Although marijuana remains illegal under federal law, twenty-three states and Washington, D.C., followed course and currently allow marijuana use under the label of “medical necessity.”⁶⁷ Each approving state has enacted autonomous legislation regarding medical

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 21 U.S.C.A. § 841(a)(1) (West 2014).

⁶² 21 U.S.C.A. § 844 (West 2014).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 21 U.S.C.A. § 841(b)(1)(A)(vii-viii) (West 2014).

⁶⁶ CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005) (stating that additional legislation was enacted to supplement the Compassionate Use Act in Cal. Health & Safety Code §§ 11362.7-11362.9).

⁶⁷ See *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEG., (Nov. 13, 2014), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#3>.

registration, use, possession, cultivation, and recognition of out-of-state medical cards.⁶⁸

While the medicinal marijuana trend is growing across the country, the absence of federal guidance has contributed to tenuous regulations in most states for acquiring a medicinal marijuana card.⁶⁹ For example, in California a person merely needs to provide proof of identification, proof of residence, and be diagnosed with a “serious medical condition” to qualify.⁷⁰ Upon diagnosis, the physician can *recommend* that the patient “*may* benefit from the use of marijuana for medical purposes.”⁷¹ Other states have a similar “serious medical condition” requirement, thus it is defined broadly and varies from state to state.⁷²

These vague terms are utilized because physicians are not allowed to *prescribe* marijuana due to its illegality under federal law.⁷³ Yet in *Conant v. Walters* 309 F.3d 629 (9th Cir. 2002), the court held a physician’s First Amendment right to discuss all possible aspects of a patient’s care included acknowledgment that marijuana may be a possible treatment.⁷⁴ *Conant* also affirmed that federal authorities could not suspend or revoke a physician’s license for merely *recommending* marijuana to their patients.⁷⁵ In doing so, the court has given physicians a way to insulate themselves from liability for

⁶⁸ See generally *23 Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881&print=true> (last updated Oct. 30, 2014, 12:29 PM).

⁶⁹ *Id.*

⁷⁰ *Medical Marijuana Program Frequently Asked Questions*, CAL. DEPT. OF PUBLIC HEALTH, <http://www.cdph.ca.gov/programs/MMP/Pages/MMPFAQ.aspx#3> (last visited Dec. 7, 2014) (“Serious medical condition . . . is any of the following: AIDS; anorexia; arthritis; cachexia (wasting syndrome); cancer; chronic pain; glaucoma; migraine; persistent muscle spasms (i.e., spasms associated with multiple sclerosis); seizures (i.e., epileptic seizures); severe nausea; any other chronic or persistent medical symptom that either substantially limits a person’s ability to conduct one or more of major life activities as defined in the Americans with Disabilities Act of 1990, or if not alleviated, may cause serious harm to the person’s safety, physical, or mental health.”).

⁷¹ *Id.*

⁷² See *State Medical Marijuana Laws*, *supra* note 67 tbl. 1 (comparing state medicinal marijuana laws).

⁷³ See 21 U.S.C.A. § 823(b) (West 2014) (prescribing controlled substances requires physicians to apply for special permission in a separate registration process).

⁷⁴ *Conant v. Walters*, 309 F.3d 629, 636-39 (9th Cir. 2002) (providing a *recommendation* was differentiated from aiding or abetting a patient in violating federal law).

⁷⁵ *Id.*

discussing medicinal marijuana with their patients, which provides the *recommendation* needed to secure a medicinal marijuana card.⁷⁶

Instead of addressing the conflict between federal and state marijuana laws, the federal government has sat indolently by for the past eighteen years allowing states to operate in direct opposition to federal law, and without standardized regulations for medicinal marijuana.⁷⁷ Until December 2014, the only hint at redressing this conflict was a memorandum issued by the United States Department of Justice in 2009, announcing that in the states where medicinal marijuana is permitted, the Department would not focus its resources to prosecute patients and caregivers who were in “clear and unambiguous compliance” with state law.⁷⁸ Despite this statement, citizens have faced federal charges regardless of their “clear and unambiguous compliance” with state laws.⁷⁹ Ultimately, the inaction by the federal government to resolve the conflict continues to place state-law abiding citizens in jeopardy of federal penalties, convictions, and incarceration.⁸⁰

D. Decriminalization Provides Another Way

Since 1973, states have protested against steep federal penalties for individuals caught engaging in marijuana possession for personal use by passing decriminalization measures.⁸¹ “Typically, decriminalization

⁷⁶ See *id.* (providing a *recommendation* was broadly viewed as a discussion within the doctor-patient privilege that recognizes physicians must be able to speak frankly and openly to patients in order to identify and to treat diseases with out barriers).

⁷⁷ Compare the Controlled Substance Act, *supra* note p. 7, with medicinal marijuana, *infra* p. 8 and recreational marijuana, *infra* pp. 11-16 (showing that medicinal marijuana was first legal in 1996 in Calif. extending to current efforts to legalize marijuana for recreational use as recent as 2014).

⁷⁸ David W. Ogden, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, MEM. DEP. ATT’Y GEN. (Oct 19, 2009), <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

⁷⁹ See generally, Associated Press, *Wash. Family Faces Fed. Charges for Marijuana Despite State Law*, THE GUARDIAN (May 11, 2014 1:35 PM), <http://www.theguardian.com/world/2014/may/11/washington-marijuana-family-federal-trial-legal-crime>.

⁸⁰ See *Federal Laws & Penalties*, NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS, <http://norml.org/laws/item/federal-penalties-2> (last visited Dec. 12, 2014).

⁸¹ Noelle Crombie, *Legal Marijuana in Oregon: A Look at the State’s Pot History*, THE OREGONIAN (Nov. 7, 2014, 1:23 PM),

means no prison time or criminal record for first-time possession of a small amount for personal consumption. The conduct is treated like a minor traffic violation.”⁸² For example, in California possession of 28.5 grams of marijuana or less is punishable by a \$100 fine.⁸³

After the 2014 elections, twenty-one states and Washington, D.C., had passed some form of decriminalization law.⁸⁴ The benefit of this approach is that an individual pays a fine, which generates state income, in lieu of criminal charges that can detrimentally affect one’s employment, housing, and family.⁸⁵ Decriminalization efforts are often linked to diversion and treatment programs, which act as a preventative measure against future use.⁸⁶ The disadvantage is that most of the civil penalties are fairly small, thus many users are willing to take the risk of getting caught, negating the goal of deterring usage.⁸⁷

A primary argument by supporters of marijuana is to reduce the instance of individuals being harshly criminalized and incarcerated for small amounts of marijuana possession.⁸⁸ Federal action in this direction could achieve this goal without condoning full legalization.⁸⁹

E. Federal Failure to Act Paves the Path to Recreational Marijuana

1. Washington State Initiative 502

In 2012, continuing a trend of blatant opposition to federal law, voters in Washington approved Initiative 502 in a precedent setting election by becoming one of the first two states to simultaneously

http://www.oregonlive.com/marijuana/index.ssf/2014/11/legal_marijuana_in_oregon_a_lo.html (noting Or. was the first state to decriminalize marijuana).

⁸² *States That Have Decriminalized*, *supra* note 26.

⁸³ CAL. HEALTH & SAFETY CODE § 11357(b) (West 2014).

⁸⁴ *States That Have Decriminalized*, *supra* note 26.

⁸⁵ *See Approaches to Decriminalizing Drug Use & Possession*, DRUG POLICY ALLIANCE (Feb. 2014), <http://www.drugpolicy.org/resource/approaches-decriminalizing-drug-use-and-possession>.

⁸⁶ *Id.*

⁸⁷ *See generally States That Have Decriminalized*, *supra* note 26.

⁸⁸ *See generally Drug Sentencing and Penalties*, THE AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties> (last visited Dec. 14, 2014).

⁸⁹ *See generally Rick Perry: Decriminalize Marijuana, Don’t Legalize It*, THE LIBERTARIAN REPUBLIC (Jan. 23, 2014), <http://thelibertarianrepublic.com/rick-perry-decriminalize-marijuana-dont-legalize/#.VI6JoSfLDaY>.

legalize recreational use of marijuana.⁹⁰ Initiative 502 aimed to change the state's Uniform Controlled Substances Act⁹¹ to say:

The people intend to stop treating adult marijuana use as a crime and try a new approach that:

- (1) Allows law enforcement resources to be focused on violent and property crimes;
- (2) Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and
- (3) Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.⁹²

The new law allows persons twenty-one years or older to use or possess: one ounce of usable marijuana; or sixteen ounces of marijuana infused product in solid form; or seventy-two ounces of marijuana infused product in liquid form, without facing state criminal or civil charges.⁹³ In addition, an individual may possess marijuana-related drug paraphernalia without penalty.⁹⁴ Growing marijuana plants in one's home remains illegal.⁹⁵

The language of Initiative 502 authorized the state liquor control board to regulate and tax marijuana, and dictate how to distribute the tax revenue,⁹⁶ but required the State to build a regulatory system from scratch.⁹⁷ Prior to Initiative 502, Washington law only permitted the use and growth, but not the retail sale, of medicinal marijuana.⁹⁸ Consequently, commingling the recreational and medicinal industries was expressly prohibited because medicinal marijuana had no formal regulatory structure in place to duplicate.⁹⁹

⁹⁰ WASH. SEC'Y OF STATE, *supra* note 13.

⁹¹ WASH. REV. CODE § 69.50 (2014).

⁹² Initiative Measure No. 502 Part I, § 1 (Wash. 2012), *available at* <http://lcb.wa.gov/publications/Marijuana/I-502/i502.pdf>.

⁹³ *I-502 Implementation Fact Sheet*, WASH. STATE LIQUOR CONTROL BOARD (2014), http://liq.wa.gov/marijuana/fact_sheet.

⁹⁴ *Id.*

⁹⁵ *FAQs on I-502*, WASH. STATE LIQUOR CONTROL BOARD, http://lcb.wa.gov/marijuana/faqs_i-502#Licenses (last visited Dec. 13, 2014).

⁹⁶ Initiative Measure No. 502, *supra* note 92, at Part IV § 28.

⁹⁷ *See id.* at Part III § 10.

⁹⁸ *See* WASH. REV. CODE § 69.51A.020 (2012).

⁹⁹ *See* Casey Jaywork, *Sen. Kohl-Welles Wants to Lift Cap on Pot Stores, Merge Medical Marijuana Into I-502 System*, SEATTLEMET (Dec. 11, 2014, 12:50 PM), <http://www.seattlemet.com/news-and-profiles/publicola/articles/sen-kohl-welles->

Based on Initiative 502, the new regulatory system requires marijuana businesses to pay a modest licensing fee, but face a hefty three layer taxing structure where products will be taxed 25% at each stage to produce, process, and sell marijuana.¹⁰⁰ Producers and processors can be one in the same and avoid a layer of the 25% tax, but retail sellers cannot produce or process the marijuana they sell.¹⁰¹

Retailers face additional restrictions under the initiative, including maximum size of signage, minimum age of employees, and the minimum distance required between retail stores and schools to reduce the presence of marijuana around youth.¹⁰² In anticipation of potential problems with public intoxication and nuisance from noxious smells, the initiative strictly prohibits public usage of marijuana, violation of which results in a \$100 civil penalty.¹⁰³ The initiative also enacts strict driving guidelines, including zero tolerance for minors under twenty-one,¹⁰⁴ and a threshold limit of 5.0 of tetrahydrocannabinol (“THC”) concentration in the driver’s blood.¹⁰⁵

The legislation left a gray area regarding marijuana infused edible products by simply stating a license would be needed before selling such edibles.¹⁰⁶ However, due to reports of deaths¹⁰⁷ and an increase in injuries to children who ingested marijuana edibles,¹⁰⁸ Washington waited for six months after stores were legal to open before establishing emergency guidelines for processing and packaging edibles.¹⁰⁹ These rules specify serving size guidelines and limiting imagery that would be appealing to children.¹¹⁰

wants-to-lift-cap-on-pot-stores-merge-medical-marijuana-into-i-502-system-december-2014.

¹⁰⁰ Initiative Measure No. 502, *supra* note 92, at Part IV §27.

¹⁰¹ See *FAQs on I-502*, *supra* note 95.

¹⁰² *I-502 Fact Sheet*, *supra* note 93.

¹⁰³ *Wash. Laws and Penalties*, NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS (Nov. 18, 2014, 8:48 PM), <http://norml.org/laws/item/washington-penalties-2>.

¹⁰⁴ WASH. REV. CODE § 46.20.308 (2)(c)(ii) (2013).

¹⁰⁵ *Id.* at (2)(c)(i).

¹⁰⁶ See generally Initiative Measure No. 502 Part III §4(3) (Wash. 2012), available at <http://lcb.wa.gov/publications/Marijuana/I-502/i502.pdf>.

¹⁰⁷ See *infra* note 235 and accompanying text.

¹⁰⁸ 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/>.

¹⁰⁹ See generally Karen McCall, *Emergency Rules for Recreational Marijuana*, WASH. STATE LIQUOR CONTROL BOARD (June 25, 2014), available at http://www.liq.wa.gov/publications/rules/Issue_paper_CR103_Emergency_MJ_Rule

Despite criticism from voters that the state is stalling on making marijuana available legally,¹¹¹ lawmakers are under extreme scrutiny in this social experiment and thus are being cautious and methodical to create thorough policy in uncharted territory.¹¹²

2. Colorado Amendment 64

Simultaneous to Washington's legalization of recreational marijuana in 2012, Colorado voters approved Amendment 64¹¹³ and authorized their state to regulate recreational marijuana in a manner similar to alcohol.¹¹⁴ The Amendment stated:

(a) In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the State of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.¹¹⁵

Amendment 64 allows adults twenty-one and older to possess up to one ounce of marijuana for recreational purposes, and up to six marijuana plants for personal use, only three of which can be flowering.¹¹⁶ Recreational marijuana will be assessed a 10% retail sales tax, and a 15% excise tax on wholesale product from the producer.¹¹⁷ Marijuana businesses will also be assessed an application and

s.pdf.

¹¹⁰ *See id.*

¹¹¹ *See generally* Reid Wilson, *Retail Marijuana Sales in Wash. Face Regulatory Delays*, THE WASH. POST (Apr. 8, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/08/retail-marijuana-sales-in-washington-face-regulatory-delays/> (showing Wash. State remained without a legal retail store for marijuana purchases until seven months after legalization, leaving the public to continue purchasing from the black market).

¹¹² Katy Steinmetz, *These Are the First Edible Pot Products Sold in Wash.*, TIME (Aug. 7, 2014), <http://time.com/3089533/marijuana-pot-edibles-washington-state/>.

¹¹³ COLO. SEC'Y OF STATE, *supra* note 14.

¹¹⁴ COLO. CONST. art. XVIII, § 16(1)(b).

¹¹⁵ Amendment No. 64 § 16(1)(a) (Colo. 2012), *available at* <http://www.fcgov.com/mmj/pdf/amendment64.pdf>.

¹¹⁶ Compare *supra* Amendment No. 64 at § 16(3)(a), (b) with *supra* note 84.

¹¹⁷ MILES K. LIGHT ET AL., MARKET SIZE AND DEMAND FOR MARIJUANA IN COLO. at 38 (July 9, 2014) (noting this tax rate is effective until 2017 and then will be decided by lawmakers).

licensing fees not to exceed \$5,000.¹¹⁸ The first \$40 million in tax revenue is expressly designated to public school capital construction.¹¹⁹

Amendment 64 restricts public consumption,¹²⁰ distribution to minors,¹²¹ and driving under the influence or while impaired by marijuana.¹²²

Unlike Washington’s initiative, Amendment 64 required Colorado to mirror their robust medicinal marijuana industry to regulate recreational marijuana.¹²³ Amendment 64 stated that producers and retailers from the medicinal marijuana industry would be given preference for licensure due to their experience.¹²⁴ This allowed Colorado to implement the new rules, sales structures, and taxing requirements in short time and begin sales on January 1, 2014, the day the initiative took effect.¹²⁵

A disadvantage to this quick implementation was that Colorado faced alarming problems including: defiance of the law against public use by groups openly smoking marijuana on the streets;¹²⁶ an increase in emergency room visits for accidental ingestion by children;¹²⁷ the first known death caused by overdose of marijuana consumption;¹²⁸ and a homicide triggered by hallucinations from marijuana candy.¹²⁹

¹¹⁸ *Supra* Amendment No. 64 at § 16(5)(a)(II) (noting that fees for medicinal marijuana entities will not exceed \$500).

¹¹⁹ *Supra* Amendment No. 64 at § 16(5)(d).

¹²⁰ *Supra* Amendment No. 64 at § 16 (3)(d).

¹²¹ *Supra* Amendment No. 64 at § 16 (1)(b)(II).

¹²² *Supra* Amendment No. 64 at § 16 (6)(b); *see also Colorado Drugged Driving Laws*, NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS, <http://norml.org/legal/item/colorado-drugged-driving> (last visited Dec. 13, 2014) (defined as five nanograms of THC per milliliter (ng/ml) of blood).

¹²³ *See* Amendment No. 64 at § 16(b)(I-II).

¹²⁴ COLO. CONST. art. XVIII, § 16(5)(b)(I) (now codified in Colo. Const.).

¹²⁵ Jonathan Rauch, *Colo.’s Marijuana Legalization Rollout is a Success*, BROOKINGS (July 31, 2014, 10:00 AM), <http://www.brookings.edu/blogs/fixgov/posts/2014/07/31-colorado-marijuana-legalization-implementation-hudak-rauch>.

¹²⁶ Nicholas Riccardi, *Colo. Tries to Take Marijuana Holiday Mainstream*, THE BOSTON GLOBE (Apr. 21, 2014), <http://www.bostonglobe.com/news/nation/2014/04/20/colorado-pot-holiday-tries-mainstream/2JWA7bK4QhPUw1DW169G8M/story.html>.

¹²⁷ Rochman, *supra* note 108.

¹²⁸ Crimesider Staff, *Two Denver Deaths Tied to Recreational Marijuana Use*, CBS NEWS (Apr. 18, 2014), <http://www.cbsnews.com/news/two-denver-deaths-tied-to-recreational-marijuana-use/>.

¹²⁹ *Id.*

These problems, many attributed to edible marijuana products, blindsided Colorado lawmakers and forced them to introduce emergency legislation to better regulate the packaging of edible marijuana products.¹³⁰ The new rules require particular labeling on marijuana edibles to warn about child consumption, and packaging restrictions to reduce similarities to recognizable trademarked candy.¹³¹ Despite the immediate dangers of the edible marijuana market, legislation governing their labeling and packaging was not scheduled to be fully enacted until over one year after legalization began.¹³²

The child-friendly and recognizable packaging continues to be a serious concern to physicians, parents, and reputable companies.¹³³ Within six months of the first retail recreational marijuana sale, The Hershey Company (“Hershey’s”) filed a trademark infringement lawsuit against a Colorado marijuana candy company to prevent it from using look-alike packaging that is well known to children.¹³⁴ In their complaint, Hershey’s stated that the defendant’s packaging “creates a genuine safety risk with regard to consumers, including children, who may not distinguish between Hershey’s candy products and defendants’ cannabis . . . products, and may inadvertently ingest defendants’ products thinking that they are ordinary chocolate candy.”¹³⁵ Federal laws, like the Federal Poison Prevention Act, already have standards in place on food and drug packaging to protect children, which could easily be required for the marijuana industry if the federal government would take a stand.¹³⁶ Instead, they continue to turn a blind-eye and allow the social experiment to take place in a

¹³⁰ Kristen Wyatt, *Colo. Tightening Edible Pot Rules*, ASSOC. PRESS YAHOO NEWS (July 31, 2014, 7:39 PM), <http://news.yahoo.com/apnewsbreak-colorado-tightening-edible-pot-rules-225833700.html> (stating that the new rules, introduced in Aug., would take effect in Nov. 2014 if approved by the governor).

¹³¹ H.B. 14-1366, 69th Gen. Assemb., Second Reg. Sess. (Colo. 2014), available at http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont3/4882145846DC62CE87257C98005D4C5D?open&file=1366hie_01.pdf.

¹³² Will C. Holden et al., *Colo. Health Officials Recommend Ban on Some Marijuana Edibles*, FOX31 DENVER KDVR-TV (Oct. 20, 2014, 10:10 PM), <http://kdvr.com/2014/10/20/report-colorado-health-officials-seeking-marijuana-edibles-ban/>.

¹³³ Jack Healy, *Snacks Laced With Marijuana Raise Concerns*, THE NEW YORK TIMES (Jan. 31, 2014), <http://nyti.ms/1kotalI>.

¹³⁴ Complaint for Plaintiff at 2, *The Hershey Company v. Tincturebelle, LLC*, (D. Colo. June 3, 2014).

¹³⁵ *Id.*

¹³⁶ *See generally*, Poison Prevention Packaging, 16 C.F.R. §§ 1700-1700.20 (2014).

quasi-illegal fashion, despite the public demands to address the conflicts and remove the fear of federal repercussions.¹³⁷

3. H.R. 499: Ending Federal Marijuana Prohibition Act of 2013

In response to the movements in Washington and Colorado, the Ending Federal Marijuana Prohibition Act (“H.R. 499”) was introduced in the United States House of Representatives on February 5, 2013.¹³⁸ The proposed bill seeks to eliminate marijuana from the CSA, making it completely legal, and would allow for sweeping medicinal and recreational marijuana use to be governed by the states like alcohol.¹³⁹ It would also allow the import and export of marijuana across state lines, and would eliminate marijuana as a targeted drug for the purposes of the national youth anti-drug media campaign.¹⁴⁰

To pass H.R. 499 and eliminate marijuana as a controlled substance, Congress must be willing to find that marijuana does not fall under any of the CSA schedules.¹⁴¹ The tiered language of the three prongs in each schedule designation is very specific about how to classify any substance.¹⁴² As a Schedule I drug, marijuana is completely prohibited.¹⁴³ In comparison, a Schedule V drug will still meet the threshold for control even if it has a low potential for abuse, a currently accepted medical use, and proof that abuse of the drug may lead to limited physical or psychological dependence relative to Schedule IV substances.¹⁴⁴

Despite arguments that marijuana does not cause withdrawal symptoms and is therefore not physically addictive, many respected practitioners in the medical and psychology fields, along with published medical studies, show marijuana is in fact very psychologically addictive and causes dependence.¹⁴⁵ Given these

¹³⁷ See generally, Graham Boyd et al., *Marijuana Legalization: Does Congress Need to Act?*, Third Way, <http://www.thirdway.org/report/marijuana-legalization-does-congress-need-to-act> (last visited Dec. 13, 2014).

¹³⁸ Ending Federal Marijuana Prohibition Act, H.R. 499, 113th Cong. (2013).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 21 U.S.C.A. § 812 (West 2014).

¹⁴² *Id.*

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ Compare Amen Clinics, *supra* note 7, with Christopher Ingraham, *No, Marijuana is Not Actually “As Addictive As Heroin”*, THE WASH. POST (Oct. 9, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/09/no-marijuana-is->

results, it would be wrong for Congress to eliminate marijuana from the CSA.

Additionally, simply removing marijuana from the schedule would not eliminate federal involvement.¹⁴⁶ In *Gonzalez v. Raich*, 545 U.S. 1 (2005), the court held that regulating marijuana, even homegrown plants, was within the government's purview under the Commerce Clause.¹⁴⁷

Despite ample opportunity to act on this bill, one way or another, Congress has left it untouched since February 2013.¹⁴⁸ However, this bill is still alive and with the growing public support of marijuana,¹⁴⁹ Congress could choose to act at any time. In the meantime, the pattern of inaction by Congress has emboldened states to freely violate federal law,¹⁵⁰ exemplified by Alaska, Oregon, and Washington, D.C., passing initiatives to legalize recreational marijuana in the 2014 elections.¹⁵¹

4. *The Power of the U.S. Attorney General to Address Marijuana*

The authority to add, change, or eliminate drugs from the schedules is also held by the Attorney General.¹⁵² After gathering necessary data and requesting a scientific and medical evaluation of the drug in question, the Attorney General shall consider the following factors before recommending removal from the schedule:

- (1) Its actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.
- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration, and significance of abuse.
- (6) What, if any, risk there is to the public health.

not-actually-as-addictive-as-heroin/ (showing opposing opinions on whether marijuana is addictive).

¹⁴⁶ See generally, Boyd, *supra* note 137 (“Given the interstate market for marijuana and the widely divergent approaches to marijuana among the states, ceding all control to state laws is not an effective long-term solution.”).

¹⁴⁷ Gonzales, 545 U.S. at 19.

¹⁴⁸ See Ending Federal Marijuana Prohibition Act, H.R. 499, 113th Cong. (2013).

¹⁴⁹ Lanae Erickson Hatalsky et al., *The “Marijuana Middle”: Americans Ponder Legalization*, THIRD WAY, <http://www.thirdway.org/report/the-marijuana-middle-americans-ponder-legalization> (last visited Dec. 13, 2014).

¹⁵⁰ See Boyd, *supra* note 137.

¹⁵¹ See *Marijuana Policy in the States*, *supra* note 21.

¹⁵² 21 U.S.C.A. § 811 (West 2014).

- (7) Its psychic or physiological dependence liability.
- (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.¹⁵³

The Attorney General has abundant resources to conduct and review credible research on the harms, abuses, medicinal qualities, and public health risks of marijuana.¹⁵⁴ Instead of accessing this research and making a firm decision on whether or not to de-schedule marijuana, the U.S. Department of Justice issued a 2013 memorandum¹⁵⁵ allowing states to proceed cautiously with legalization.¹⁵⁶ Under this guidance, the federal government has retained the right to pre-empt states if the chosen regulatory approach is deemed unsatisfactory.¹⁵⁷ As one analyst describes, “this guidance is worth little more than a pinky promise—it provides no legal cover and could be easily changed unilaterally or even ignored by prosecutors in the current Administration or any others in the future.”¹⁵⁸ What the Attorney General has failed to do is address the factors, as dictated under statute,¹⁵⁹ and make a decision about the appropriate *scheduling or de-scheduling* of marijuana, not about *selective enforcement of the law*.¹⁶⁰

Imploring the Attorney General to evaluate the above factors, the co-founder of a bi-partisan alliance, Smart Approaches to Marijuana (“SAM”),¹⁶¹ called on the Obama Administration to partake in a summit to bring public health leaders together to ascertain the truths about marijuana, promulgate reputable scientific research, and propose

¹⁵³ 21 U.S.C.A. § 811(b), (c) (West 2014).

¹⁵⁴ See *Answers to Frequently Asked Questions About Marijuana*, OFFICE OF NAT’L DRUG CONTROL POLICY, <http://www.whitehouse.gov/ondcp/frequently-asked-questions-and-facts-about-marijuana#research> (last visited Dec. 14, 2014) (providing reference to numerous studies conducted with federal funds).

¹⁵⁵ See Cole, *supra* note 17, at 2.

¹⁵⁶ *Id.*

¹⁵⁷ Jeremy Diamond, *Holder “Cautiously Optimistic” On Legal Pot*, CNN, (Oct. 21, 2014), www.cnn.com/2014/10/21/politics/holder-marijuana-optimistic/index.html?sr=sharebar_twitter.

¹⁵⁸ Boyd, *supra* note 137.

¹⁵⁹ See 21 U.S.C.A. § 811 (West 2014).

¹⁶⁰ *Contra* Cole, *supra* note 17, at 2 (noting that instead of evaluating the required factors to de-schedule marijuana, the memo was issued in the interest of “using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way”).

¹⁶¹ See generally, SMART APPROACHES TO MARIJUANA, <http://learnaboutsam.org/about/> (last visited Nov. 1, 2014).

health-first policies regarding marijuana.¹⁶² Unfortunately, this request was ignored by the Administration, allowing for the dissemination of conflicting research and opinion to continue, and for the Attorney General to further skirt his responsibility to enforce the law.¹⁶³

While the White House website for the Office of National Drug Control Policy states, “the Administration steadfastly opposes legalization of marijuana,”¹⁶⁴ President Obama has said it is “important” for the legalization efforts in Washington and Colorado “to go forward.”¹⁶⁵ Still, there is legitimate concern that without concrete action by the federal government, the guidance in the 2013 memorandum will be easily revoked or disregarded, and will expose states and individuals to federal consequences.¹⁶⁶

III. CONFLICTS BETWEEN THE APPROACHES TO MARIJUANA REGULATION: RECREATIONAL, MEDICINAL, AND PROHIBITION

A. Conflicts with Prohibition Under the Controlled Substances Act

Proponents of legalization argue the Schedule I designation of marijuana is misplaced, claiming there is in fact an accepted medical use for the drug.¹⁶⁷ While there is growing public consensus that marijuana has a medical benefit,¹⁶⁸ the United States Food and Drug

¹⁶² See Kevin Sabet, *SAM Calls For White House, DOL, SAMHSA, FDA To Stop Ignoring Marijuana Issue*, SMART APPROACHES TO MARIJUANA (July 27, 2014), <http://learnaboutsam.org/sam-calls-white-house-doj-samhsa-fda-stop-ignoring-marijuana-issue-host-marijuana-summit-public-health-researchers/>.

¹⁶³ See 21 U.S.C.A. § 811 (West 2014).

¹⁶⁴ *Marijuana*, OFFICE OF NAT’L DRUG CONTROL POLICY, <http://www.whitehouse.gov/ondcp/marijuana> (last visited Dec. 14, 2014).

¹⁶⁵ Sam Frizell, *Obama on Marijuana Legalization: ‘It’s Important for It to Go Forward’*, Time (Jan. 19, 2014), <http://swampland.time.com/2014/01/19/obama-on-marijuana-legalization-its-important-for-it-to-go-forward/>.

¹⁶⁶ Boyd, *supra* note 137 (referring to inaction prior to 2016 elections, “[i]f Congress has done nothing by then, a new administration could reverse the Obama guidelines, file preemption lawsuits against Colorado, Washington, and any other state that has legalized marijuana by that point, and prosecute anyone who has participated in their markets.”).

¹⁶⁷ *Medical Use Introduction*, NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS, http://norml.org/marijuana/medical/item/introduction-7?category_id=733 (last visited Feb. 2, 2015).

¹⁶⁸ R. Scott Rappold, *Legalize Medical Marijuana, Doctors Say In Survey*, WEBMD (April 2, 2014), <http://www.webmd.com/news/breaking-news/marijuana-on-main->

Administration has approved only two medicines¹⁶⁹ derived from marijuana, but not marijuana itself.¹⁷⁰

If the federal government concedes that marijuana has a medical benefit,¹⁷¹ there remains great disparity in the remaining prongs of the law as to whether marijuana has a high potential for abuse.¹⁷² Since the 2012 elections, the Obama Administration,¹⁷³ the Drug Enforcement Agency,¹⁷⁴ and the American Medical Association¹⁷⁵ have reasserted their position that marijuana is a dangerous drug that should remain a Schedule I substance because of public health concerns. Adopting this position, yet conceding on the medical benefit, marijuana would still fall under a Schedule II designation, which would be more appropriate than de-scheduling altogether.¹⁷⁶ Even if policymakers were convinced of a medical benefit and lower potential for abuse, marijuana should still fall under a Schedule III drug, rather than be completely de-scheduled.¹⁷⁷ Examples of current drugs under this schedule include known medicines like Tylenol with Codeine, anabolic steroids, and even combination products with less than fifteen milligrams of

street/20140225/webmd-marijuana-survey-web (noting a recent survey of doctors shows 67% believe marijuana poses some benefits to patients).

¹⁶⁹ *FDA and Marijuana*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/newsevents/publichealthfocus/ucm421163.htm> (stating only Sativex for Multiple Sclerosis, and Marinol for cancer and AIDS to treat nausea, are FDA approved).

¹⁷⁰ *See The Dangers and Consequences of Marijuana Abuse*, U.S. DRUG ENFORCEMENT ADMIN. 3 (2014), <http://www.dea.gov/docs/dangers-consequences-marijuana-abuse.pdf>.

¹⁷¹ Whether marijuana has a proven medical benefit is outside the scope of this comment and is mentioned only to analyze current regulations.

¹⁷² *Compare Amen Clinics*, *supra* note 7, with *Ingraham*, *supra* note 145 and accompanying text.

¹⁷³ *Frequently Asked Questions About Marijuana*, *supra* note 154.

¹⁷⁴ *See The Dangers and Consequences of Marijuana Abuse*, *supra* note 170.

¹⁷⁵ *See AM. MED. ASS'N HOUSE OF DELEGATES REPORT OF REFERENCE COMM.*, at 6 (2013), available at <http://www.ama-assn.org/assets/meeting/2013i/i13-refcommk-annotated.pdf>.

¹⁷⁶ *See generally*, Boyd, *supra* note 137.

¹⁷⁷ *See generally Should Marijuana Be Rescheduled?*, PROCON.ORG (Oct. 2009), <http://medicalmarijuana.procon.org/sourcefiles/marijuanareschedulingrevisedoct292009.pdf> (showing Schedule III includes substances with medical use and potential for abuse).

Vicodin.¹⁷⁸ With its mind-altering impacts, even marijuana as a medicine would likely compare to these drugs.¹⁷⁹

Weighing the language of only the first three schedules, it will be difficult for policymakers to find that marijuana does not have at least a moderate or low physical dependence, or high psychological dependence.¹⁸⁰ “Some 4.3 percent Americans have been dependent on marijuana” at some point in their lives, suffering from social, physical, and psychological impairments and withdrawal.¹⁸¹ Additionally, the 2013 National Survey on Drug Use and Health found that 4.2 million persons, twelve and older, were classified with marijuana dependence or abuse, for which 845,000 received treatment.¹⁸²

In the same fashion as the Attorney General’s 2013 memorandum, Congress has recently signaled movement on medicinal marijuana.¹⁸³ While not truly addressing whether or not marijuana has a medical benefit, Congress passed a spending bill in December of 2014 that defunds all law enforcement against medicinal marijuana in states that have legalized it for medicinal use.¹⁸⁴ Supporters of marijuana have called this a victory, but it is simply another example of Congress avoiding a decision based on the merits of medicinal marijuana.¹⁸⁵

¹⁷⁸ *Drug Scheduling*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.dea.gov/druginfo/ds.shtml> (last visited Dec. 14, 2014).

¹⁷⁹ *Medical Marijuana and the Mind*, HARVARD MENTAL HEALTH LETTER (Apr. 2010), available at http://www.health.harvard.edu/newsletters/Harvard_Mental_Health_Letter/2010/April/medical-marijuana-and-the-mind.

¹⁸⁰ See Alan J. Pudney, Ph.D. et al., *Marijuana Dependence and Its Treatment*, ADDICTION SCI. & CLINICAL PRACTICE, 4(1), 2007, at 5.

¹⁸¹ *Id.* at 5, 10.

¹⁸² SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 83, 90 (2014), available at <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/We b/NSDUHresults2013.pdf>.

¹⁸³ See generally Christopher Ingraham, *Congress Wants to Make Marijuana Harder to Get in D.C., but Easier To Get Everywhere Else*, THE WASHINGTON POST (Dec. 10, 2014),

<http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/10/congress-wants-to-make-marijuana-harder-to-get-in-d-c-but-easier-to-get-everywhere-else/>.

¹⁸⁴ *HISTORIC VICTORY: Congress Prohibits Justice Dept. From Undermining State Medical Marijuana Laws*, DRUG POLICY ALLIANCE (Dec. 10, 2014),

<http://www.drugpolicy.org/news/2014/12/historic-victory-congress-prohibits-justice-department-undermining-state-medical-mariju>.

¹⁸⁵ See *id.*

Congress should not take this same approach for legalizing marijuana under H.R. 499; the bill should not pass when scrutinized under the guidelines in the Controlled Substances Act.¹⁸⁶

B. Conflicts Between the Medicinal and Recreational Approaches

The medicinal marijuana system is too loosely regulated due to federal illegality, which causes problems for states looking to allow recreational marijuana.¹⁸⁷ For instance, in Washington, implementing a recreational marijuana system via medicinal marijuana regulation was not viable because medicinal marijuana was only legal to possess and use, but not buy or sell.¹⁸⁸ This conflict has proven to cause a slow and costly rollout of recreational marijuana regulation, unlike Colorado, which already had a thriving medicinal marijuana system to replicate.¹⁸⁹

Washington is now trying to reign in their medicinal stores after years of allowing illegal operation, in an effort to combine medicinal and recreational marijuana because the state is losing money¹⁹⁰ and is having difficulty regulating the conflicting approaches.¹⁹¹ Medicinal marijuana users are generally against this approach because it will cost more to purchase their medicinal marijuana¹⁹² and it decreases access to medically beneficial strands of marijuana.¹⁹³

Alternatively, if marijuana were rescheduled as having a medicinal use, states would be able to implement comprehensive regulations to allow for proper prescriptions by doctors, and distribution by controlled dispensaries.¹⁹⁴ Then, practical taxing schemes could be established to eliminate competition between the medicinal and

¹⁸⁶ See 21 U.S.C.A. § 812 (West 2014).

¹⁸⁷ See *supra* note 10 (showing ease of obtaining a medicinal marijuana card).

¹⁸⁸ WASH. REV. CODE § 69.51A.020 (2012).

¹⁸⁹ See generally *History of Colo.’s Medical Marijuana Laws*, SENSIBLE COLO., <http://sensiblecolorado.org/history-of-co-medical-marijuana-laws/> (noting that dispensaries of medicinal marijuana were legal in Colorado prior to Amendment 64).

¹⁹⁰ See *infra* Part III.C.

¹⁹¹ See Jaywork, *supra* note 99.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See generally Philip Ross, *Marijuana Costs in the U.S.: How Black Market, Retail and Medical Pot Prices Compare*, INTERNATIONAL BUSINESS TIMES (July 8, 2014, 4:19 PM), <http://www.ibtimes.com/marijuana-costs-us-how-black-market-retail-medical-pot-prices-compare-1622362>.

recreational systems, and actually deter buyers from the black market.¹⁹⁵

C. Fiscal Impacts of the Conflicts

Washington and Colorado are slowly recognizing the detrimental fiscal impact of allowing the medicinal and recreational marijuana industries to compete.¹⁹⁶ The new tax structure imposed under I-502 in Washington levies an effective 44% tax on recreational marijuana,¹⁹⁷ but only a local sales tax up to 8.88% is collected on medicinal marijuana due to its medical nature.¹⁹⁸ Similarly in Colorado, voters approved a 25% retail and excise tax on recreational marijuana,¹⁹⁹ but medicinal sales are only subject to a lower 2.9% state sales tax plus any local sales tax.²⁰⁰ Comparing these rates, it is clear the states earn considerably less tax revenue on each medicinal marijuana sale.²⁰¹ The fiscal impacts are concerning to lawmakers who were relying on increased revenues from marijuana sales to offset budget deficits.²⁰²

In the first six months of tax collection from recreational marijuana sales in Colorado, the proceeds were just over \$12 million, more than 60% below the predicted \$33.5 million.²⁰³ The disparity is due to the cheaper medicinal marijuana market, and very likely, the black

¹⁹⁵ *Id.*

¹⁹⁶ John Ingold, *Colo. Lawmaker Seeks Marijuana Tax Review Amid Disappointing Sales*, THE DENVER POST (Aug. 12, 2014),

http://www.denverpost.com/news/ci_26323416/amid-disappointing-sales-colorado-lawmaker-seeks-marijuana-tax.

¹⁹⁷ Niraj Chokshi, *Moody's: Washington Might Not See the Marijuana Tax Windfall Previously Projected*, WASH. POST, July 22, 2014,

<http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/22/moodys-washington-might-not-see-the-marijuana-tax-windfall-previously-projected/>.

¹⁹⁸ *Are Sales of "Medical Cannabis" Subject to Sales Tax?*, WASH. STATE DEP'T OF REVENUE,

<http://dor.wa.gov/content/getaformorpublication/publicationbysubject/taxtopics/medicannabis.aspx> (last visited Nov. 23, 2014).

¹⁹⁹ *Colo. Marijuana Tax Data*, COLO. DEP'T OF REVENUE (2014),

<https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> (follow "Total Marijuana Taxes, Licenses, and Fees" hyperlink; then follow "2014 – September" hyperlink) (Sept. Sales Tax Report lines 1-3).

²⁰⁰ LIGHT ET AL., *supra* note 117.

²⁰¹ *Compare supra* notes 197-200.

²⁰² Ingold, *supra* note 196 (noting marijuana will provide \$67 million in tax revenue in Wash.).

²⁰³ *Id.*

market.²⁰⁴ Comparing only the sales tax revenue in fiscal year 2014, medicinal marijuana outpaced the retail sales by nearly \$8 million out of a total of approximately \$13 million.²⁰⁵ Even with the upswing in licensing and new retail operations, medicinal marijuana still outpaced retail sales nearly three-to-one.²⁰⁶

Although Washington had a six-month delayed start, the first month of operation yielded \$3.8 million in retail sales, generating approximately \$1 million in tax revenue.²⁰⁷ In November of 2014, the state reported \$40 million in revenue for recreational marijuana sales.²⁰⁸ Based on its scheme for distribution of marijuana tax revenue,²⁰⁹ this \$40 million will generate approximately \$6.4 million for Washington’s state general fund.²¹⁰ While this is no small amount, it will hardly make a dent in the state’s current \$4.4 billion budget deficit.²¹¹

If the medicinal marijuana markets continue to stay regulated and taxed as they are today, people will continue to buy from the cheaper medicinal market and produce less tax revenue for states.²¹² If a consumer does not have a medicinal marijuana card, they can still resort to the black market where the price per ounce decreases by 50% from retail costs.²¹³ Comparing the contrast in price, it is reasonable to

²⁰⁴ *Id.* (noting Colo. officials admit there is not enough supply to meet demand without the black market).

²⁰⁵ *Colo. Marijuana Tax Data*, *supra* note 199.

²⁰⁶ *Id.* (noting Sept. Sales Tax Report lines 13-15).

²⁰⁷ Donna Gordon Blankinship, *State’s Marijuana Sales Reach \$3.8 Million in 1st Month*, KOMONEWS.COM (Aug. 8, 2014), <http://www.komonews.com/news/local/38-million-in-1st-month-of-states-marijuana-sales-270514341.html>.

²⁰⁸ Rachel LaCorte, *Wash. Marijuana Tax Revenue More Than Predicted*, KING 5 (Nov. 20, 2014, 8:47 AM), <http://www.king5.com/story/news/local/2014/11/20/washington-state-marijuana-tax-revenue/19325309/>.

²⁰⁹ *See generally* Initiative Measure No. 502 Part IV § 28 (Wash. 2012), *available at* <http://lcb.wa.gov/publications/Marijuana/I-502/i502.pdf>.

²¹⁰ *See generally id.* (calculating the revenue by the percentages allocated in the law).

²¹¹ Kim Justice, *Revenue Forecast Shows it’s Time to Get Real: We Can’t Cut Our Way to McCleary*, WASH. BUDGET & POLICY CENTER (Nov. 19, 2014, 3:20 PM), <http://budgetandpolicy.org/schmudget/new-revenue-would-be-needed-to-fund-class-size-initiative>.

²¹² Ross, *supra* note 194 (noting that in Washington the price difference of 1/8 of an ounce of marijuana is \$20 cheaper than buying it at retail; in Colorado it is half the price for medicinal marijuana).

²¹³ *Id.*

assume that without a price adjustment, consumers will in fact resort to the black market as they have done all along under prohibition.²¹⁴

Reflecting on the history of marijuana, the current fragmented approach is reminiscent of the years leading up to the passage of the CSA.²¹⁵ Without a uniform approach, whether enforcing prohibition or allowing some level of marijuana use, states will continue to operate in a way that appeases citizens while avoiding federal penalties as best they can.²¹⁶ This will be true even if it means relying on the black market to meet product demand, and perpetuate social harm, rather than eliminate it.²¹⁷

IV. DUTY TO MITIGATE SOCIAL HARMS AND COSTS

The federal government has a duty to promote the general welfare of the public through legislation.²¹⁸ One of the most challenging issues regarding marijuana is that if legalizing and taxing recreational use will not even generate the revenue expected by lawmakers, why add to the legal drug epidemic already devastating this nation?²¹⁹

Washington and Colorado are charged with regulating marijuana like alcohol²²⁰ and have also looked to tobacco regulations to create their guidelines.²²¹ It is reasonable that legalizing recreational marijuana like alcohol and tobacco will also cause harm to society; this is counter intuitive to the purpose of creating legislation.²²² Alcohol and tobacco

²¹⁴ See generally *id.*

²¹⁵ See *supra* Part II.

²¹⁶ See The Associated Press, *Legal Pot Shops Crippled by Black Market, Medical Marijuana*, MASHABLE (Jan. 2, 2015), <http://mashable.com/2015/01/03/washington-colorado-marijuana-challenges/>.

²¹⁷ See *id.*

²¹⁸ See U.S. CONST. pmbl.

²¹⁹ See Ellen E. Bouchery et al., *Excessive Alcohol Consumption in the U.S.*, 2006, 41 AM. J. OF 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).

²²⁰ See *supra* Part II.E.1-2.

²²¹ Scott Kotchko, *Commentary: After Legalization, Regulation*, PARTNERSHIP FOR DRUG FREE KIDS (July 16, 2013), <http://www.drugfree.org/join-together/commentary-after-legalization-regulation/>.

²²² See *Locke's Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/locke-political/> (last updated July 29, 2010) (statement of philosopher John Locke) (“governments exist by the consent of the people in order to protect the rights of the people and promote the public good”).

are the most prevalent legal, recreational drugs in the United States.²²³ Combined, they kill an estimated 559,000 people each year²²⁴ and cost billions of dollars annually in prevention, law enforcement, healthcare, and loss of productivity.²²⁵ Research shows that the regulation of these legal drugs is not solving any problems.²²⁶

A. Scope Of Use - Comparison Of Tobacco, Alcohol, and Marijuana

Despite educational and preventative efforts, “[i]n 2013, an estimated 66.9 million Americans aged twelve or older were current (past month) users of a tobacco product”, representing 25.5% of that age range.²²⁷ Approximately seventeen million adults, and 855,000 adolescents, were diagnosed with Alcohol Use Disorder (“AUD”),²²⁸ and 52.2% of Americans twelve and older were admittedly current drinkers of alcohol.²²⁹ This equates to 136.9 million drinkers in the United States, with nearly half admitting to being binge alcohol users.²³⁰

In 2013, 19.8 million people admitted to current marijuana use, making it the illegal drug most commonly used that year.²³¹ While this number looks small in comparison to the number of alcohol and tobacco users, legalizing marijuana will only increase public access and social acceptance, potentially leading to an increased number of users, health problems, and societal costs analogous to alcohol and tobacco.²³²

²²³ *Commonly Abused Drugs Chart*, NAT’L INSTITUTE ON DRUG ABUSE, <http://www.drugabuse.gov/drugs-abuse/commonly-abused-drugs-charts/commonly-abused-drugs-chart> (last updated Mar. 2011).

²²⁴ *See infra* note 241, 244 (calculating the combined number of deaths from alcohol and tobacco).

²²⁵ *See infra* Part IV.

²²⁶ *See CDC Reports Excessive Alcohol Consumption Cost the U.S. \$224 Billion in 2006*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 17, 2011), http://www.cdc.gov/media/releases/2011/p1017_alcohol_consumption.html.

²²⁷ 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 182, at 47.

²²⁸ *Alcohol Use Disorder*, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, <http://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-use-disorders> (last visited Nov. 24, 2014).

²²⁹ 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 182, at 35.

²³⁰ *See id.* at 3.

²³¹ *Id.* at 15.

²³² *See generally* D. Mark Anderson and Daniel I. Rees, *The Legalization of Recreational Marijuana: How Likely Is The Worst Case Scenario?* 33 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 221, Oct. 22, 2013.

B. Impact on Health

Marijuana is projected to follow the same path as alcohol and tobacco in both usage and costs.²³³ In 2009, prior to recreational legalization efforts, the Drug Abuse Warning Network estimated marijuana was a contributing factor in over 376,000 emergency department visits in the United States.²³⁴ In 2014, with legal recreational marijuana, at least two Colorado deaths were caused by an overdose from edible marijuana products.²³⁵ New research shows that even casual use of marijuana can cause brain abnormalities in the areas that impact emotion and motivation;²³⁶ long-term use is now linked to significant brain damage.²³⁷

The tobacco industry spent decades advertising their products, claiming little to no harm, just as marijuana advocates do today.²³⁸ Tobacco smoke is believed to have at least 250 harmful carcinogens²³⁹ and studies show marijuana smoke contains even more carcinogens

²³³ See generally *id.*

²³⁴ The DAWN Report: Highlights of the 2009 Drug Abuse Warning Network (“DAWN”) Findings on Drug-Related Emergency Department Visits, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (Dec. 28, 2010), http://www.cfbhn.org/Documents/RX/DrugAbuseWarningNetwork_DrugRelated%20EmergencyDepartmentVisits.pdf.

²³⁵ *Two Denver Deaths*, *supra* note 128 (stating a woman was killed by her husband, who was hallucinating after eating marijuana candy where the wrapper indicated it contained 100 milligrams of THC, when a serving size is only 10 milligrams; a Wyo. college student, visiting Colo. for the purpose of obtaining legal marijuana, jumped to his death after eating an entire marijuana cookie with enough servings for six people despite a warning label).

²³⁶ Karen Weintraub, *Casual Marijuana Use Linked to Brain Changes*, USA TODAY (Apr. 15, 2014), <http://www.usatoday.com/story/news/nation/2014/04/15/marijuana-brain-changes/7749309/>; see also Jodi M. Gilman et al., *Cannabis Use is Quantitatively Associated with Nucleus Accumbens and Amygdala Abnormalities in Young Adult Recreational Users*, 16 THE JOURNAL OF NEUROSCIENCE, Apr. 2014 at 34, available at <http://www.m.jneurosci.org/content/34/16/5529.full>.

²³⁷ See Amen Clinics, *supra* note 7.

²³⁸ Liz Szabo, *Tobacco Company Will Say They Lied, Via Advertising*, USA TODAY (Jan. 10, 2014), <http://www.usatoday.com/story/news/nation/2014/01/10/tobacco-corrective-statements/4409501/>.

²³⁹ *Harms of Smoking and Health Benefits of Quitting*, NAT'L CANCER INSTITUTE, <http://www.cancer.gov/cancertopics/factsheet/Tobacco/cessation#r1> (last updated Jan. 12, 2011).

when smoked like cigarettes.²⁴⁰ Health care costs and loss of productivity attributable to tobacco are more than \$289 billion a year.²⁴¹ Tobacco also claims the lives of approximately 480,000 people each year from direct and second-hand smoke.²⁴²

In comparison, the Center for Disease Control reported that in 2006, the cost to society for consumption of alcohol was \$223.5 billion per year, mostly due to loss in workplace productivity, health problems, and crime.²⁴³ Alcohol also accounts for an estimated 79,000 deaths annually.²⁴⁴ These concerning trends led to states collectively spending over \$488 million in tobacco prevention campaigns in 2014 alone.²⁴⁵ An additional \$25.4 billion for drug and alcohol prevention was requested by the Obama Administration in fiscal year 2015.²⁴⁶ Despite these extraordinary price tags, overconsumption remains a serious concern for community leaders who are grasping at new interventions to rein in excessive use.²⁴⁷

Combined, medicinal and recreational marijuana is projected to generate general fund dollars of \$179 million in Washington over the next four years,²⁴⁸ and \$96.8 million in Colorado by 2017.²⁴⁹ Increased

²⁴⁰ *Health Hazards of Smoking Marijuana*, AMERICAN LUNG ASSOC., <http://www.lung.org/stop-smoking/about-smoking/health-effects/marijuana-smoke.html> (last updated Nov. 27, 2012).

²⁴¹ *Smoking and Tobacco Use*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 24, 2014), http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm#cost.

²⁴² *Id.*

²⁴³ *CDC Reports Excessive Alcohol Consumption Cost the U.S. \$224 Billion in 2006*, *supra* note 226.

²⁴⁴ *The Econ. Costs of Excessive Alcohol Consumption*, RESEARCH INTO ACTION (Cmty. Anti-Drug Coal. of Am. Nat'l Coal. Inst., Alexandria, Va.), Feb. 28, 2012 at 1, available at <http://www.cadca.org/resources/detail/economic-costs-excessive-alcohol-consumption>.

²⁴⁵ See *Smoking and Tobacco Use*, *supra* note 241.

²⁴⁶ OFFICE OF NAT'L DRUG CONTROL POLICY, NAT'L DRUG CONTROL BUDGET 2 (Mar. 2014), available at http://m.whitehouse.gov/sites/default/files/ondcp/about-content/fy_2015_budget_highlights_-_final.pdf.

²⁴⁷ *The Econ. Costs of Excessive Alcohol Consumption*, *supra* note 244 (noting that new interventions such as increased excise taxes, limiting alcohol sale hours and locations, increased law enforcement to prevent under-age drinking, and regular sobriety checkpoints for drivers).

²⁴⁸ *Econ. Review Meeting Minutes*, WASH. STATE ECON. AND REVENUE FORECAST COUNCIL, 17 (2014), www.erfc.wa.gov/forecast/documents/rev20140918_bw.pdf

²⁴⁹ COLO. LEGISLATIVE COUNCIL STAFF, FOCUS COLO.: ECON. AND REVENUE FORECAST, 31 (2014), available at

marijuana use is projected to increase the cost of prevention, health care, and loss of productivity.²⁵⁰ If this indeed occurs, based on the projected tax income, the marijuana industry will not pay its own expenses, but instead will shift those costs onto society, just like alcohol and tobacco.²⁵¹

C. Impact on Youth

Beyond the financial costs of prevention, of even more importance is the issue of how to keep marijuana out of the hands of youth.²⁵² Both supporters and opponents of legalization generally agree on at least one point: marijuana is bad for youth.²⁵³ Studies show a person's brain is not fully developed until age twenty-five, and smoking marijuana before that age will permanently destroy portions of the brain.²⁵⁴ Unfortunately, 7.1% of youth between twelve and seventeen years old admitted to current use of marijuana in 2013;²⁵⁵ from 2007-2013, teen perception that marijuana posed a great risk to them decreased by 15%.²⁵⁶

A study released in September of 2014 revealed that teens who use marijuana daily are 60% less likely to graduate from high school, eighteen times more likely to become dependent on marijuana, and

[www.leg.state.co.us/lcs/econforecast.nsf/vwfile/1409/\\$file/2014SeptemberForecast.pdf#page=25](http://www.leg.state.co.us/lcs/econforecast.nsf/vwfile/1409/$file/2014SeptemberForecast.pdf#page=25).

²⁵⁰ David G. Evans, *Marijuana Legalization's Costs Outweigh Its Benefits*, U.S. NEWS & 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>.

²⁵¹ See generally *U.S. Taxpayers Bear 60% of the Cost of Smoking-Related Diseases, Study Finds*, NEWS MEDICAL (Dec. 11, 2014, 4:21 AM), <http://www.news-medical.net/news/20141211/US-taxpayers-bear-6025-of-the-cost-of-smoking-related-diseases-study-finds.aspx>.

²⁵² Cole, *supra* note 17 (noting that one of the stipulated priorities of the federal government was to prevent marijuana use by minors).

²⁵³ *Children, Teens and Pot*, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS (Nov. 18, 2014, 10:50 PM), <http://norml.org/about/item/children-teens-and-pot>.

²⁵⁴ Madeline H. Meier et al., *Persistent Cannabis Users Show Neuropsychological Decline from Childhood to Midlife*, 109 No. 40 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. E2657 (2012), available at www.pnas.org/content/early/2012/08/22/1206820109.abstract.

²⁵⁵ 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 182, at 21, 37 (showing that the statistic is lower for youth aged twelve to seventeen were current, regular users of alcohol at 11.6%).

²⁵⁶ *Id.* at 6.

seven times more likely to attempt suicide, among other findings.²⁵⁷ Even monthly users are at risk of underachievement, being 38% less likely to graduate high school or earn a college degree, and four times more likely to be dependent on marijuana as an adult.²⁵⁸ With the number of youth already using marijuana, these findings show the potential for a grievous impact on the productivity and health of society in the near future.²⁵⁹

The National Drug Control Policy is required by law to conduct annual youth anti-drug media campaigns at a cost of up to \$2 million per year.²⁶⁰ The Federal Drug Administration is currently launching a \$400 million anti-tobacco campaign aimed at teenagers who are open to, or already using cigarettes.²⁶¹ With nearly the same number of tobacco and marijuana users amongst teens,²⁶² it is reasonable to infer that a similar prevention tactic will be needed to combat youth marijuana use.²⁶³

Each of these human and financial costs must be considered if the federal government is going to legitimately de-schedule marijuana under the rules of the Controlled Substances Act.²⁶⁴ These costs far outweigh revenue generation or a person's desire to use marijuana freely. Prevention costs for youth alone could consume the bulk of any profits seen by states from marijuana sales.²⁶⁵

²⁵⁷ Edmund Silins et al., *Young adult sequelae of adolescent cannabis Use: An Integrative Analysis*, 1 THE LANCET PSYCHIATRY, Sept. 2014 at 289.

²⁵⁸ *Id.*

²⁵⁹ See generally 2013 NAT'L SURVEY ON DRUG USE AND HEALTH, *supra* note 182; see also Meier, *supra* note 254.

²⁶⁰ 21 U.S.C.A. § 1708(b)(2)(A)(ii) (West 2014).

²⁶¹ Toni Clarke, *FDA Launching Major Anti-Tobacco Campaign Aimed At Youth*, CHICAGO TRIBUNE (Feb. 3, 2014), http://articles.chicagotribune.com/2014-02-03/lifestyle/sns-rt-us-fda-tobacco-20140203_1_mitch-zeller-cigarettes-tobacco.

²⁶² 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 182, at 38 (stating 7.8% of 12-17 year olds were users of tobacco in 2013).

²⁶³ See generally John Ingold, *Colorado Ad Campaign Tests New Message to Prevent Teen Marijuana Use*, THE DENVER POST (Aug. 9, 2014), http://www.denverpost.com/marijuana/ci_26308424/colorado-ad-campaign-tests-new-message-prevent-teen.

²⁶⁴ See 21 U.S.C.A. § 811 (West 2014).

²⁶⁵ Compare Part III.C with *Smoking and Tobacco Use*, *supra* note 241 (estimating tobacco prevention at \$488 billion) and with NAT'L DRUG CONTROL BUDGET, *supra* note 246 (showing a requested \$25.4 billion for drug and alcohol prevention in 2015).

D. Impact on Crime

The White House director on national drug-control policy released a study showing the strong link between drugs and crimes, and found that marijuana was the most common drug detected in arrestees.²⁶⁶ While proponents of marijuana often assert people are criminalized only for use or possession of marijuana,²⁶⁷ the study was conducted across five major cities and revealed that a range of 37% to 58% of men tested positive for marijuana at post-arrest drug testing.²⁶⁸ This indicated that a high proportion of crimes were conducted while under the influence of marijuana use, and arrestees were not being punished merely for the marijuana itself.²⁶⁹

Admittedly, legalizing marijuana and eliminating enforcement costs could produce a savings when looking at enforcement alone.²⁷⁰ A 2010 study by the American Civil Liberties Union²⁷¹ indicated just how diverse the estimates of marijuana enforcement might be.²⁷² New York and California spent over \$1 billion, with the remaining states spending a combined \$2.6 billion on marijuana enforcement.²⁷³ If a prime motivation for legalization is to reduce costs of enforcement, this provides a strong argument; however, similar savings can be

²⁶⁶ Rob Hotakainen, *Marijuana is Drug Most Often Linked to Crime, Study Finds*, McCLATCHYDC (May 23, 2013), <http://www.mcclatchydc.com/2013/05/23/192101/marijuana-is-drug-most-often-linked.html>.

²⁶⁷ See Dan Schneider, *Pot Economics*, DOLLARS & SENSE (March/April 2014), <http://dollarsandsense.org/archives/2014/0314schneider.html> (indicating in 2011, 1.5 million people were incarcerated in the U.S. for drug offenses, most commonly marijuana; in 2011, 750,000 people were arrested for marijuana related crimes).

²⁶⁸ OFFICE OF NAT'L DRUG CONTROL POLICY, ARRESTEE DRUG ABUSE MONITORING PROGRAM II 2012 ANNUAL REPORT 17-19 (May 2013) available at http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/adam_ii_2012_annual_rpt_final_final.pdf.

²⁶⁹ See *id.* at 17-19 (indicating that while the study did not disclose THC levels tested, arrestees each admitted regular use ranging from thirteen to twenty-one of the past thirty days, which does not necessarily indicate intoxication at time of arrest).

²⁷⁰ Jeffrey A. Miron, *The Budgetary Implications of Drug Prohibition*, CAMBRIDGE: DEP'T OF ECON., Feb. 2010, available at <http://scholar.harvard.edu/miron/publications/budgetary-implications-drug-prohibition-0> (providing an analysis projecting cost savings of legalizing marijuana).

²⁷¹ See *The War on Marijuana in Black and White*, THE AM. CIVIL LIBERTIES UNION at 10 (June 2013), <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

²⁷² See *id.* at 22.

²⁷³ *Id.* at 10.

found by implementing decriminalization models, which many states are already beginning to do.²⁷⁴

What is lacking in most studies touting a reduction of enforcement costs is the realization that legalizing marijuana is not synonymous with eliminating enforcement.²⁷⁵ The regulations for the various approaches discussed above indicate a maximum legal amount of marijuana, restrictions on public use and home growth, as well as distribution and sales;²⁷⁶ these regulations still require enforcement.²⁷⁷ While the costs of enforcement may decrease, they will not be eliminated.²⁷⁸

Perhaps the most challenging aspect of combatting crime with legal marijuana will be curbing the instances of driving under the influence of drugs (“DUID”).²⁷⁹ As of yet, there is no efficient way to measure drugged driving.²⁸⁰ According to leading toxicologists in the field, when it comes to marijuana, roadside-testing technology is not quite available.²⁸¹ Blood and urine tests are currently the best measure, but they pose difficulties for officers on the scene.²⁸²

Prior to Amendment 64, Colorado did not have a threshold in place for driving while under the influence of marijuana, because it was blatantly against the law.²⁸³ The limit is now set to 5 nanograms (“ng”) of THC per milliliter (“ml”) of blood.²⁸⁴ Washington has set the same

²⁷⁴ See *supra* Part II.D.

²⁷⁵ See generally Kyla Calvert, *Would Legalizing Marijuana Cut Law Enforcement Costs?* KPBS PUBLIC BROADCASTING (Oct. 2010), <http://www.kpbs.org/news/2010/oct/08/will-prop-19-cut-law-enforcement-costs/>.

²⁷⁶ See *supra* Part II.

²⁷⁷ See generally Calvert, *supra* note 275.

²⁷⁸ *Id.*

²⁷⁹ See *infra* Part IV.B-C.

²⁸⁰ See *Final Report: State of Knowledge of Drug-Impaired Driving*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., (Sept. 2003), available at <http://www.nhtsa.gov/people/injury/research/stateofknwlegedrugs/stateofknwlegedrugs/pages/3Detection.html>.

²⁸¹ Clay Dillow, *How Will Police Regulate Stoned Driving?*, POPULAR SCIENCE, June 4, 2014, <http://www.popsci.com/science/article/2013-05/now-recreational-marijuana-now-legal-two-states-how-will-police-regulate-stoned-driving>.

²⁸² *Id.*

²⁸³ See Amendment No. 64 § 16(1)(b)(III) (Colo. 2012) (stating driving under the influence of marijuana remains illegal, thus there was no prior threshold allowable).

²⁸⁴ Matt Ferner, *Marijuana DUI Bill Passes In Colo. Senate, Appears Poised to Become Law*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2013/05/07/marijuana-dui-bill-passes_0_n_3230947.html (last updated May 7, 2013, 3:14 PM).

limit in a per se drugged driving law where motorists with detectable levels of THC in their blood above 5ng/ml will be guilty of driving under the influence of drugs.²⁸⁵ These measurements pose a level of difficulty for consumers who will not be able to measure their level of intoxication by the amount of marijuana they ingest, as is done with alcohol.²⁸⁶

A recent national survey indicates the trend of driving under the influence of drugs is extending to younger drivers.²⁸⁷ The study revealed that driving after using marijuana has surpassed drunk driving amongst college students;²⁸⁸ nearly one in three drove after marijuana use, and nearly one in two rode with a driver who had recently used marijuana.²⁸⁹ In 2013, after legalization of recreational marijuana in Washington, the number of drivers who tested positive for marijuana increased nearly 25%.²⁹⁰ Both Colorado and Washington have already seen an increase in marijuana driving related accidents.²⁹¹

V. RECOMMENDATIONS

Before considering whether to make sweeping change to federal drug laws by passing H.R. 499, or similar future measures, the federal government needs to stop allowing social experiments to dictate

²⁸⁵ WASH. REV. CODE § 46.61.502(1)(b) (2012).

²⁸⁶ See Dillow, *supra* note 281.

²⁸⁷ *Drugged Driving*, NAT'L INST. ON DRUG ABUSE (Aug. 2014), <http://www.drugabuse.gov/related-topics/trends-statistics/infographics/drugged-driving>.

²⁸⁸ *Id.*

²⁸⁹ *Id.* (noting that among high school seniors, one in eight drove after marijuana use and one in five rode with a driver who had been using marijuana, although the study did not publish the length of time between use and driving).

²⁹⁰ Associated Press, *Will Legal Marijuana Mean More Traffic Deaths?*, CBS NEWS, Sept. 1, 2014, <http://www.cbsnews.com/news/will-legal-marijuana-mean-more-traffic-deaths/>.

²⁹¹ *Study: Fatal Car Crashes Involving Marijuana Have Tripled*, CBS SEATTLE, Feb. 4, 2014, <http://seattle.cbslocal.com/2014/02/04/study-fatal-car-crashes-involving-marijuana-have-tripled/>; see also *More Colo. Drivers in Fatal Car Crashes Testing Positive For Marijuana*, COMMUNITY ANTI-DRUG COALITION OF AMERICA (May 29, 2014), <http://www.cadca.org/resources/detail/more-colorado-drivers-fatal-car-crashes-testing-positive-marijuana>.

policy.²⁹² Instead, they should follow the guidelines set forth for scheduling, or de-scheduling, drugs within the CSA.²⁹³

First, the President should respond to the request by SAM to host a national summit with public health researchers and federal agencies to better understand the realities of today’s marijuana, its potential harms, benefits, and fiscal impacts on state and federal resources.²⁹⁴ It is unacceptable that a nation spending billions of public dollars²⁹⁵ on drug prevention and enforcement cannot provide clear, local, and unbiased research so consumers and lawmakers can make informed decisions.

Second, the government needs to address the medicinal marijuana regulations uniformly. Congress passing a spending bill that defunds federal enforcement of medicinal marijuana is a shortcut, not a solution.²⁹⁶ It fails to do the one thing most needed, which is to allow legitimate prescriptions, for specified medicinal strands of marijuana, for specific ailments.²⁹⁷ Otherwise, loose regulations will continue to permit most anyone to qualify for a medicinal marijuana card.²⁹⁸ Without reducing the number of spurious medicinal users, states will not fiscally withstand regulating a recreational industry, and the black market will not be contained.²⁹⁹

Third, and prior to legalization, lawmakers must address public safety concerns. Such efforts must include creation of accurate roadside testing for drugged driving.³⁰⁰ Scientific research is needed to develop a method to measure individual consumption, much like alcohol where the industry standard estimates one drink is equal to approximately .03 in blood alcohol level.³⁰¹

Policies must be adopted to address concerns of secondhand smoke exposure, including: stronger civil penalties to actually deter public

²⁹² See *supra* Part III.A.

²⁹³ 21 U.S.C.A. § 811(c) (West 2014) (outlining a process to reclassify or remove marijuana from the CSA).

²⁹⁴ See Sabet, *supra* note 162.

²⁹⁵ See *Economics*, DRUG WAR FACTS, <http://www.drugwarfacts.org/cms/Economics#sthash.o6W0W2RU.oC8492Bl.dpbs> (last visited Dec. 15, 2014).

²⁹⁶ See *HISTORIC VICTORY*, *supra* note 184.

²⁹⁷ See *supra* Part III.A.

²⁹⁸ See *supra* Part II.C.

²⁹⁹ LIGHT ET AL., *supra* note 117 at 7.

³⁰⁰ See generally Dillow, *supra* note 281.

³⁰¹ Elizabeth Hartney, *Number of Drinks and Blood Alcohol Content*, ABOUT HEALTH (June 5, 2014), <http://addictions.about.com/od/substancedependence/a/BACmen.htm>.

consumption;³⁰² establish rights of non-users to avoid noxious smells from marijuana;³⁰³ and ordinances against the general odor of marijuana.³⁰⁴ Regardless of the inconsistent studies showing whether secondhand marijuana smoke causes a high³⁰⁵ or merely a trace level of exposure,³⁰⁶ the public needs to clearly understand the risk for personal health concerns, and most importantly for the risk to their children.³⁰⁷

Regulators must address edible marijuana products and how to increase safety and reduce the risk of overdose and access to children.³⁰⁸ Colorado did not implement early regulations regarding marijuana edibles and in turn, saw the first marijuana deaths due to overdose,³⁰⁹ as well as an increase in emergency room visits for accidental edible marijuana ingestion by children.³¹⁰ It has proven to be irresponsible of lawmakers to overlook the harms associated with edibles. This is a critical consideration for the federal government and other states looking to legalize marijuana, and can be addressed by using guidelines within the Federal Poison Prevention Packaging

³⁰² See *Wash. Laws and Penalties*, *supra* note 103.

³⁰³ See generally, *When Secondhand Smoke Invades Your Home*, NOLO, <http://www.nolo.com/legal-encyclopedia/when-secondhand-smoke-invades-home-29946.html> (last visited Nov. 24, 2014).

³⁰⁴ Jeremy P. Meyer, *Legal Marijuana: Denver Backpedals on Banning Pot Smell*, MERCURY NEWS (Oct. 30, 2013), http://www.mercurynews.com/marijuana/ci_24415915/legal-marijuana-denver-backpedals-banning-pot-smell.

³⁰⁵ Edward J. Cone and Rolley E. Johnson, *Contact Highs and Urinary Cannabinoid Excretion After Passive Exposure to Marijuana Smoke*, 40 CLINICAL PHARMACOLOGY & THERAPEUTICS 247 (1986), available at <http://www.nature.com/clpt/journal/v40/n3/pdf/clpt1986171a.pdf> (showing that inhaling passive smoke from sixteen marijuana cigarettes was similar to effect of smoking one).

³⁰⁶ See J. Rohrich et al., *Concentration of THC and THC-COOH in Blood and Urine After Passive Exposure To Cannabis Smoke in a Coffee Shop*, JOURNAL OF ANALYTICAL TOXICOLOGY, 34, May 2010, at 196, 203, available at <http://jat.oxfordjournals.org/content/34/4/196.full.pdf>.

³⁰⁷ David Sheff, *Marijuana Should Be Legal, But . . .*, TIME (Aug. 4, 2014), <http://time.com/3079707/marijuana-legalization-teens-health/>.

³⁰⁸ See H.B. 14-1366, 69th Gen. Assemb., Second Reg. Sess. (Colo. 2014).

³⁰⁹ See *Two Denver Deaths*, *supra* note 235.

³¹⁰ John Ingold, *Children's Hospital Sees Surge In Kids Accidentally Eating Marijuana*, THE DENVER POST (May 21, 2014), http://www.denverpost.com/news/ci_25807342/childrens-hospital-sees-surge-kids-accidentally-eating-marijuana.

Act,³¹¹ or allowing only single serving edible products so consumers will know exactly how much marijuana they are ingesting.³¹²

Fourth, more targeted prevention tactics are necessary to deter adolescents from using marijuana.³¹³ As of 2012, 36% of high school seniors had used marijuana in the past year.³¹⁴ If two legal drugs, alcohol and tobacco,³¹⁵ are the most widely used amongst teenagers,³¹⁶ there is cause for concern that marijuana use will increase if legalized.³¹⁷ Due to the impact of marijuana on a developing brain,³¹⁸ prevention efforts must be a priority. Instead of repeating the history of combatting “Big Tobacco,”³¹⁹ it would be much more prudent to invest in collaborative research before legalizing marijuana nationwide.

VI. CONCLUSION

The pendulum of public opinion appears to be in full swing toward legalization of marijuana, but blindly allowing such substantial shifts in federal policies would be irresponsible and detrimental to the foundation that guides the United States. The precedent setting nature of allowing a social experiment to dictate which laws should be

³¹¹ See generally, Poison Prevention Packaging, 16 C.F.R. §§ 1700-1700.20 (2014) (showing that established standards already exist for dangerous substances to have “special packaging”).

³¹² See generally, Kristen Wyatt, *Task Force Mulls Best Options for Edible Marijuana*, ASSOCIATED PRESS THE DENVER POST (Apr. 30, 2014), http://www.denverpost.com/marijuana/ci_25671581/task-force-mulls-best-options-edible-marijuana.

³¹³ Seattle Times Editorial Board, *Editorial: Leg. Should Find The Will To Fund Teenage Marijuana-Use Prevention*, THE SEATTLE TIMES (June 28, 2014, 4:08 PM), http://seattletimes.com/html/editorials/2023943945_editmarijuanaprevention29.xml.html.

³¹⁴ *Regular Marijuana Use by Teens Continues to be a Concern*, NAT’L INST. OF HEALTH (Dec. 19, 2012, 10:00 AM), <http://www.nih.gov/news/health/dec2012/nida-19.htm>.

³¹⁵ See *id.*

³¹⁶ *Underage Drinking*, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, (Nov. 28, 2014, 12:02 PM), <http://www.niaaa.nih.gov/alcohol-health/special-populations-co-occurring-disorders/underage-drinking> (showing 70% of youth have used alcohol by age 18).

³¹⁷ *Contra Gail Sullivan, Study: Legalizing Medical Marijuana Has Not Increased Teen Pot Use*, THE WASH. POST (Apr. 24, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/04/24/study-legalizing-medical-marijuana-has-had-zero-impact-on-teen-pot-use/>.

³¹⁸ See Silins *et al.*, *supra* note 257.

³¹⁹ See generally Szabo, *supra* note 238.

followed is dismissive of the fact that the United States is a nation of laws, with an infrastructure in place to address these very issues.³²⁰ If selective disregard for federal law is permitted concerning something as sacred as public health and safety, imagine what will be next. It is foreseeable that if the federal government abandons the current stance of “proceed with caution” and chooses to reinforce federal prohibition of marijuana, it will be at the expense of states and individual taxpayers. With plenty of indicators that marijuana should remain illegal for recreational use, elected officials must, at the very least, take a stance and either enforce current law, or address the schedules and implement uniform regulations to protect the most precious commodity in this country – not marijuana, but people.

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³²⁰ Tanya Somanader, “*We Were Strangers Once, Too*”: *The President Announces New Steps on Immigration*, THE WHITE HOUSE BLOG (Nov. 20, 2014, 9:25 PM), <http://www.whitehouse.gov/blog/2014/11/20/we-were-strangers-once-too-president-announces-new-steps-immigratio>.

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