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Just a Little Bit of History Repeating: The California Model of Marijuana Legalization and How it Might Affect Racial and Ethnic Minorities

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Just a Little Bit of History Repeating: The California Model of Marijuana Legalization and How it Might Affect Racial and Ethnic Minorities

Thomas J. Moran*

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Introduction

In January 2010, a California Assembly Committee passed Assembly Bill 390, entitled the Marijuana Control, Regulation, and Education Act.[1]

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* Juris Doctor, Washington and Lee University School of Law 2011; Bachelor of Arts, Santa Clara University 2007. Many thanks to Professor Erik Luna for his guidance and support throughout the research and writing process of this Note.

This successful committee vote signified the first time any legislative body in the United States had passed a bill to fully legalize marijuana.[2] When Assembly Bill 390 sputtered due to missing a filing deadline, it was reintroduced as California Assembly Bill 2254,[3] which was later approved to appear on the November 2010 ballot as Proposition 19.[4]

This ballot initiative's mission was to:

> [R]emove marijuana and its derivatives from existing statutes defining and regulating controlled substances. It would instead provide for regulation by the Department of Alcoholic Beverages of the possession, sale, cultivation, and other conduct relating to marijuana and its derivatives . . . by persons 21 years of age and older . . . .[5]

Unlike decriminalization,[6] the California initiative would essentially legalize marijuana in the same fashion as alcohol.[7] Ironically, California, along with Utah, was the first state to prohibit marijuana, creating antimarijuana laws in 1915.[8] By putting Proposition 19 to vote on the November 2010 ballot, California stood poised to bring the treatment of marijuana in this country full circle.

Yet, on November 2, 2010, the voters of California disrupted such a sea change by voting against legalizing marijuana by a margin of 7.8%

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1. Steve Harmon, *Committee Passes Marijuana Legalization Bill*, SAN JOSE MERCURY NEWS, Jan. 12, 2010.

2. *Id.*

3. Alison White, *Bill to Legalize, Regulate Marijuana Reintroduced into State Assembly*, CONTRA COSTA TIMES, Feb. 22, 2010, *available at* http://www.contracostatimes.com/california/ci_14447365?nclick_check=1 (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

4. Jessica Bennett, *Taking the High Road*, NEWSWEEK, Mar. 26, 2010, *available at* http://www.newsweek.com/2010/03/25/taking-the-high-road.html (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

5. Marijuana Control, Regulation, and Education Act, Assemb. B. 2254 (as introduced by Ammiano, Feb. 18 2010) [hereinafter Marijuana Control Act], *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2251-2300/ab_2254_bill_20100218introduced.html (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

6. *See* MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 268 (1992) (stating that decriminalization "means leaving production and distribution of the drug entirely illegal, but removing criminal penalties—that is, the threat of arrest and trial, though not necessarily the threat of monetary penalty—for possession for personal use").

7. *See* Marijuana Control Act § 1(i) (stating the intent of the legislature to "impose a set of regulations and laws concerning marijuana comparable to those imposed on alcohol").

8. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES 41 (1974).

points.[9] Although, for the time being, this vote stalled the legalization of marijuana, the issue is hardly dead and the likelihood of marijuana becoming legal, at least on the state level, will only increase with time.[10] Moreover, California's initiative, even though defeated, has already symbolized the opening of the floodgates of state-level marijuana legalization and the unraveling of a century of American prohibition.[11]

The prompting of this legal revolution comes largely from growing resentment toward federal and state governments' costly war on drugs.[12] Governments commit billions of dollars each year to stymieing drug use and drug flow, and the amount increases every year.[13] Further, in the last decade, the percentage of money allocated

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9. Mark Harper, *Chart: Prop. 19 Fails*, LOS ANGELES TIMES, Nov. 3, 2010, *available at* http://www.latimes.com/news/nationworld/nation/wire/la-me-pot-g,0,1060478.graphic (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

10. Proposition 19 failed largely because its strongest supporters, voters between the ages of eighteen and twenty-five, minimized their representation by not showing up to vote. Assuming such persons maintain their support for marijuana legalization and assuming that persons vote with more likelihood as they grow older, the fate of a future legalization bill rests on solid ground. *See* John Hoeffel, *Youth Vote Falters; Prop. 19 Falls Short*, LOS ANGELES TIMES, Nov. 3, 2010, *available at* http://www.latimes.com/news/local/la-me-pot-20101103-1,0,5135592.story (noting that while voters aged twenty-five and younger did not vote in high numbers, marijuana legalization legislation is likely to return to the California Ballot in 2012) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

11. *See id.* (reporting that legalization proponents in Washington, Oregon, and Colorado are planning similar measures for their respective 2012 ballots); s*ee also* Sandra Chereb, *New Initiative to Regulate Pot Use Filed in Nevada*, ASSOC. PRESS, Jan. 7, 2010, *available at* http://abcnews.go.com/Business/wireStory?id=9500241 (reporting that legislators in Nevada, following California's lead, filed a similar bill to legalize and regulate marijuana) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* Kurt A. Gardinier, *Washington State Voters Support Taxing and Regulating Marijuana*, MARIJUANA POLICY PROJECT BLOG (Jan. 18, 2010), http://blog.mpp.org/tax-and-regulate/washington-state-voters-support-taxing-and-regulating-marijuana/01182010/ (reporting that "54 percent of Washington [state] voters support taxing and regulating marijuana like alcohol, and selling the natural plant in state-run liquor stores [and that] . . . [in December 2009] Washington state legislators submitted a bill to tax and regulate marijuana like alcohol") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

12. *See generally Virtually Legal; Drugs*, THE ECONOMIST, Nov. 14, 2009 (U.S. Edition) ("[S]tretched budgets and a general weariness with the war on drugs have made prohibition harder to enforce.").

13. *See* OFFICE OF NAT'L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT, NAT'L DRUG CONTROL STRATEGY: FY 2009 BUDGET SUMMARY 13 tbl.3 (Feb. 2008), *available at* http://www.whitehousedrugpolicy.gov/publications/policy/09budget/fy09budget.pdf (showing that from 2002 to 2009 the federal funding for drug prevention increased from $10.8 billion to $14.1 billion annually).

to law enforcement has grown yearly while the percentage of money allocated to drug abuse prevention and research has contracted.[14] Of this money, funding toward marijuana prevention represents approximately twenty percent of the total funds.[15] Adding even more weight to the criticisms against spending, law enforcement and interdiction against marijuana has proved largely inefficient. For instance, the Office of Management and Budget, in its most recent assessment, graded the Drug Enforcement Agency (DEA) a mediocre "adequate."[16] While the DEA earned a one hundred percent score for its purpose, it only received twenty-six percent for its results.[17] Yet, in the face of such exorbitant spending and less-than-stellar law enforcement efforts, marijuana use in this country seems to be more popular than ever, represented by the 25,085,000 individuals aged twelve and older who used marijuana in 2007.[18]

Strangely, the general populace, who is obviously familiar with the use of marijuana, stands ignorant of the quasi-racism, xenophobia, and class oppression that lace the history of marijuana prohibition in this country. Another source of general ignorance is the fact that the continuation of marijuana prohibition has severely inhibited the growth of American racial and ethnic minority communities by disproportionately arresting and imprisoning their youth. In the face of the first potentially successful marijuana legalization movement in this country, it is highly important for minorities to grasp the history of marijuana and the possible effects of its legalization. It is the purpose of this Note to examine the racial aspects of both the history and status

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14. *See id.* (showing that the law enforcement budget jumped from 54.4% to 65.2% from 2002 to 2009, while the drug abuse and research budget contracted from 45.6% to 34.8% during that period).

15. *See* JEFFREY A. MIRON, THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION 10 (2005), *available at* http://www.prohibitioncosts.org/MironReport.pdf (finding that in 2003 approximately $2.6 billion of $11 billion was directed at marijuana prohibition, despite the federal government's unwillingness to break down its funding per drug).

16. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, PROGRAM ASSESSMENT RATING TOOL: PROGRAM SUMMARIES 254 (2005), *available at* http://www.whitehouse.gov/omb/budget/fy2005/pdf/ap_cd_rom/part.pdf.

17. *Id.*

18. *See* U.S. DEP'T OF JUSTICE, NAT'L DRUG INTELLIGENCE CTR., NATIONAL DRUG THREAT ASSESSMENT, MARIJUANA 17 (2009) [hereinafter NATIONAL DRUG THREAT ASSESSMENT], *available at* http://www.justice.gov/ndic/pubs 31/31379/31379p.pdf; *see also* JOSEPH A. CALIFANO, JR., HIGH SOCIETY 119 (2007) (finding that "95 million Americans have tried [marijuana], 25 million in [2004] alone").

quo of marijuana prohibition to inform and to illuminate how a future state initiative, using California's Assembly Bill 2254 as a model, would affect present day minority communities.

I. When Marijuana Was Marihuana, the "Killer Weed"

In the context of narcotics law, the first decades of the twentieth century culminated in the federal Marihuana Tax Act of 1937, completing a blitzkrieg across the United States that, while not technically criminalizing marijuana, created financial sanctions so outrageously expensive they might as well have been criminal. As one scholar explains:

> Under the [Marihuana Tax Act], any person cultivating, transporting, selling, prescribing or using marijuana had to be registered and pay a tax levy of one hundred dollars an ounce every time the drug changed hands. For industrial use, the level was set at one dollar an ounce. To give this some perspective, the price of a brand-new Ford Model-Y saloon car in 1937 was $205. In theory, the Act was a piece of revenue legislation and any infringement a tax violation not a narcotics one. Yet the aim was clear: to control the social use of marijuana. In effect, it was a prohibition and unconstitutional in that the substance itself was not proscribed, just made all but inaccessible by repressive taxation.[19]

Unfortunately a racist and xenophobic path stifled the route taken to this destination. Mexicans and West Indians first brought marijuana into this country through the Southwestern and Gulf states, respectively, in the early 1900s.[20] Along with the immigrating Mexicans and West Indians, African Americans and lower class whites primarily used marijuana.[21] Violent crime, largely induced by alcohol prohibition, obsessed the United States at this time, and because the majority white population automatically associated minority racial and socio-economic groups with criminal activity, the majority immediately presumed marijuana to be addictive, dangerous, and representative of evil.[22] Resulting from this (mis)conception, from 1914 to 1933 thirty-three states criminalized marijuana use for nonmedical purposes.[23]

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19. MARTIN BOOTH, CANNABIS: A HISTORY 156 (2003).

20. BONNIE & WHITEBREAD II, *supra* note 8, at 32.

21. *Id.* at 52.

22. *See id.* (noting that the American public viewed crime as a symptom of marijuana use and marijuana use a symptom of minority groups, including whites of the "underworld").

23. *See id.* at 32 (stating that marijuana "encountered a hostile political and social climate. Gradually during the ensuing quarter-century, criminal prohibitions appeared on

The vast increase of Mexican immigrants into the Southwestern states and the fear and resentment felt toward them and their culture by whites largely drove the antimarijuana platform.[24] The white population "exhibited considerable distaste for the new immigrants and their different habits of life[,]" and marijuana use exhibited one such habit.[25] This fear and dislike was extreme, placing "the Mexican . . . in the same position as the Negro in the South."[26] Thus, this country's original and immediate disdain for marijuana was not positioned against its mental or physical effects, but towards the ones using it—minority groups.[27] Interestingly, whites did not represent the only group disdaining marijuana for its lower class associations; wealthy Mexican-Americans viewed marijuana use as a badge of the inferiority of blacks.[28]

It should be noted that it was not completely unfounded to associate marijuana with crime. Although socially the authorities viewed marijuana as a "minority" habit and thus a taboo habit, marijuana came under legal fire because law enforcement found it associated with criminals and those viewed as morally reprobate.[29] However, use of marijuana and criminal or immoral acts, as critics today point out, do not necessarily have a causal connection, meaning that an association with crime does not necessarily prove a cause of crime.[30] Yet, because authorities already socially associated marijuana with lower class minorities, its legal association with criminality quickly attached to those minorities, and the people believed

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the statute books of nearly every state where the drug was used"); *see also id.* at 51 (noting that from 1914–1931 marijuana was prohibited in twenty-nine states, and four more did so in 1933).

24. *See id.* at 38–39 (noting that practically every state west of the Mississippi River prohibited marijuana due to the great influx of Mexican immigrants in the first thirty years of the twentieth century).

25. *Id.* at 45.

26. *Id.*

27. *See id.* at 36 (stating that "[c]lass consciousness was a recurrent element in marihuana prohibition even in its infancy").

28. *Id.*

29. *See id.* at 34 (stating that "[a] drug with such obnoxious properties soon attracted the attention of law enforcement officials . . . ."); *see also id.* at 43 ("The first market of white users were prostitutes, gamblers, pimps, and addicts").

30. *See, e.g.*, Judy Mann, *Misguided Laws Make Marijuana Deadly*, WASH. POST, May 23, 2001, at C15 ("Marijuana itself does not induce violence . . . . What produces the violence associated with marijuana is that it is illegal. The same dynamic caused the murderous Capone-style violence during Prohibition. And once Prohibition was repealed, the violence associated with the bootleg trade vanished, although the gangsters that it spawned did not.").

"tales of its destructive effects" without question.[31] Lawmakers therefore classified marijuana as a narcotic, unlike its counterpart drugs, alcohol, and cigarettes.[32]

The medical establishment, holding a much more inquisitive and much less inquisitorial perspective, complained that the illegalizing of marijuana was unfounded. The pharmaceutical drug industry in particular voiced that "cannabis was an insignificant medicine which had no place in antinarcotics legislation."[33] Unfortunately, their arguments were either never heard or never stated with significant conviction, and marijuana in the early 1900s found its destiny carved out by the bigotry, racism, and fear the majority harbored against racial and ethnic minorities.[34]

Yet, even though marijuana had been prohibited in many states by the 1930s, the general public did not view it as a national concern. But with the onset of the Great Depression, Southwestern states began pressuring for federal marijuana prohibition as a method of deporting "job-stealing" Mexican migrant workers.[35] To do so, marijuana needed a sensationalized portrayal as a critical, national threat.[36] In California, in 1935 the leader of the American Coalition of Patriotic Societies wrote, "Marijuana, perhaps now the most insidious of our narcotics, is a direct by-product of unrestricted Mexican immigration. Easily grown, it has been asserted that it has recently been planted between rows in a California penitentiary garden. Mexican peddlers have been caught distributing sample marijuana cigarettes to school children."[37] Such localized proclamations, by themselves, failed to rile-up federal legislation. To do so would take an effort backed by a federal agency.

Harry Anslinger, commissioner of the Federal Bureau of Narcotics (FBN) has become somewhat mythologized as the man who single-

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31. *Id.* at 37.

32. *See id.* at 51 ("[A]lthough use of some drugs—alcohol and tobacco—was indigenous to American life, the use of □narcotics' for pleasure was not. Evidently, drugs associated with ethnic minorities . . . were automatically viewed as □narcotics.'").

33. *Id.* at 48.

34. *See id.* at 51 ("The scientific community shared this social bias and therefore had little interest in scientific accuracy.").

35. *See* BOOTH, *supra* note 19, at 148 ("[A]nti-Mexican attitudes . . . were strengthened during the Depression when jobs were scarce and migrants were seen to be stealing work from the white work force. The Mexicans were accused, without any justification, of spreading marijuana across the nation.").

36. *Id.*

37. *Id.* (internal quotes omitted).

handedly outlawed marijuana in this country.[38] Even if he did not solely "instigate anti-marijuana policies or prohibition, . . . he did master mind a very efficient national campaign that was to do much to determine public attitudes towards marijuana . . . over three decades."[39] Racist, fear-mongering tactics supported the backbone of his campaign.

Upon taking the job as commissioner of the FBN, Anslinger did not regard marijuana as a threat.[40] It was only when Congress cut the FBN's budget that Anslinger began his crusade of marijuana demonization.[41] Marijuana, a drug already resented for its foreign origin, provided the perfect mechanism for Anslinger to push for federal legislation.[42] Federal laws would allow the FBN's arrest rate to rise, thereby increasing its clout as a federal agency deserving of federal funds.[43]

For the purposes of this Note, the end result of Anslinger's crusade, the Marihuana Tax Act of 1937, stands less important than how Anslinger went about passing it. To pass this legislation, Anslinger exploited the country's fear of minorities. Anslinger "regularly linked marijuana to unwelcome minorities. He wrote of 'ginger-colored niggers' using pot, an ethnic evil he viewed 'as hellish as heroin.' He told Congress that half the country's crime stemmed from 'Mexicans, Latin Americans, Filipinos, Negroes and Greeks whose civic aberrations flowed directly from marijuana use.'"[44] Although Anslinger faced outrage at his racist comments, his rhetoric remained powerful enough to maintain congressional and public support and keep him in office.[45] Headlines spanned the nation sensationalizing marijuana, making it synonymous with minorities and

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38. *See* John F. Galliher & Allynn Walker, *The Puzzle of the Social Origins of the Marihuana Tax Act of 1937*, 24 SOC. PROBS. 367, 374 (1976–77) (concluding that Harry Anslinger has been repeatedly characterized as the lone man responsible for illegalizing marijuana at the national level, even though other forces besides him were at work).

39. BOOTH, *supra* note 19, at 144.

40. *Id.* at 147.

41. *See id.* at 149 ("In order to boost his organization Anslinger had to find a new target—a new drug menace—upon which to peg a budget increase.").

42. *See id.* (stating that marijuana represented an easily exploitable target for Anslinger to attack because of its predominant use by minorities and foreigners).

43. *See id.* at 150 (noting how a positive public perception of the FBN would increase its budget).

44. RUDOLPH J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 19 (2004) (internal citations omitted).

45. *See* BOOTH, *supra* note 19, at 150 (noting that Anslinger survived protests from black community leaders "only because of his support base of editors, hardline congressmen, and some senior pharmaceutical industry figures").

violence.[46] As Martin Booth explains, "[Anslinger] had by his ranting alienated a large section of the ethnic-minority population of the USA which was, marijuana aside, largely law abiding. This in turn caused them to become secretive and closed."

When it came time for Congress to enact marijuana legislation, it turned to Anslinger, a charlatan expert with a political agenda, rather than an unbiased scientific body.[47] During the committee hearings Anslinger's testimony relied on newspaper articles and hearsay accounts reporting crimes and tragedies claimed to have been caused by marijuana.[48] Notably, a significant portion of this shady evidence occurred in newspapers owned by William Randolph Hearst, who had a sizable financial interest in the illegalizing of marijuana.[49] In fact, the Hearst papers contributed to the association of marijuana and minorities by replacing the non-volatile term "hemp" with the alien-sounding word "marihuana."[50] Anslinger's only real opposition at the hearings came from the well-respected lawyer-physician, Dr. William C. Woodward, legislative counsel to the American Medical Association.[51] Dr. Woodward sharply criticized the reliance on unverified newspapers accounts and called for a nonpartisan scientific body to perform a true investigation of the drug.[52] Yet, Congress dismissed Dr.

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46. *See, e.g. id*. at 151 ("Murders, slaughtering, cruel mutilations, done in cold blood, . . . much of this violence [is attributed] to what some experts call marihuana . . . . Those addicted . . . lose all restraint, all inhibitions. They become bestial demonics, filled with a mad lust to kill . . . ." (quoting Universal News)); *see also id.* (noting the presumption that a murderer in Colorado was on marijuana simply because he was a "Spanish-speaking person, most of whom are low mentally, because of social and racial conditions").

47. *See* JOHN KAPLAN, MARIJUANA: REPORT OF THE INDIAN HEMP DRUGS COMMISSION 1893–1894, at v (1969) (introduction) ("Instead of appointing an impartial commission to determine the facts, [Congress] permitted . . . the Bureau of Narcotics, to act as an advocate for the bill in a setting which lacked either the informed judgment of an expert body or the many guarantees of reliability which are built into our adversary system.").

48. Galliher & Walker, *supra* note 38, at 371.

49. *See* GERBER, *supra* note 44, at 7 (explaining that Hearst's extensive forest holdings would become the paramount west coast paper supply with an eradication of hemp, its main competitor).

50. BOOTH, *supra* note 19, at 148.

51. Galiher & Walker, *supra* note 38, at 360.

52. *See Taxation of Marihuana: Hearing on H.R. 6385 Before the Committee on Ways and Means*, 75th Cong. 92 (1937) (statement of Dr. William Woodward) ("The newspapers have called attention to it so prominently that there must be some grounds for their statements. It has surprised me, however, that the facts on which these statements have been based have not been brought before this committee by competent primary evidence.").

Woodward's arguments, and the bill easily became an act, and marijuana suddenly found itself effectively criminalized at the national level.[53]

Could this have happened if the irrational and racist fears of the American public had not been exploited through the press? If marijuana use would have been accepted by the majority as compatriot to alcohol use, would it have remained legal? With legislators in California and other states so recently instigating the movement to legalize marijuana, minority groups should recognize prohibition's history and understand its genesis of racially-motivated sensationalism and hysteria. Because minority groups were deeply rooted in the prohibition of marijuana, such groups should re-root themselves in the origins of its legalization.

II. The Whitening of Marijuana

From the passing of the Marihuana Tax Act of 1937 to the late 1960s, marijuana slinked away from national attention and became a drug little used and little publicized.[54] During World War II, for industrial purposes the federal government even issued a "Grow Hemp for Victory" campaign recognizing the cannabis plant's myriad industrial uses.[55] In the 1960s marijuana use expansively grew, yet a White House poll in May of 1969 showed that only three percent of Americans saw drugs as an important national issue.[56] The increase in use did however signify a change: marijuana use was no longer a minority-only habit; it had spread beyond the Mexican and black populations, outsourcing ever-rapidly, and becoming the drug of choice for the white youth of America.[57] With this whitening of marijuana use, the image of marijuana as the "killer weed" began to capitulate as did much of the already sparse scientific backing for

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53. *See* BOOTH, *supra* note 19, at 155 (explaining the passage of the Marihuana Tax Act, and noting that rather than voting, Congress passed the bill by "the teller system . . . whereby congressmen walked past a teller who counted the number of people going by him," illustrating the ease of its passage).

54. *See, e.g.* WILLIAM H JAMES & STEPHEN L. JOHNSON, DOIN' DRUGS: PATTERNS OF AFRICAN AMERICAN ADDICTION 83 (1996) (noting that from 1939 to 1940, less than two hundred people were arrested in New York City for possession and use of marijuana).

55. *See* BOOTH, *supra* note 19, at 159–60 ("Approximately twenty thousand farmers in the Midwestern states were registered under the federally funded War Hemp Industries Corporation to cultivate over 30,000 acres of cannabis producing 42,000 tons of fibre and 180 tons of seed annually throughout the war years.").

56. DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 93 (2007).

57. *Id.* at 96.

its prohibition.[58] America's youth started recognizing marijuana as an "American drug," and then, because a majority demographic found out they actually liked the drug's effects, battle cries sounded-out for its legalization.

President Lyndon Johnson's Commission on Crime concluded that drug abuse policy "often tends to discriminate against the poor and subcultural groups in the population."[59] Yet, President Johnson did not remain in office long enough to follow through with any action to fix such discrimination, and left marijuana use simply as another youthful indiscretion deserving of punishment.[60] But with whites enjoying pot, marijuana could no longer be synonymous with minority violence, rage, and lawlessness, risking destruction of the prohibition's very foundation.

So a new portrayal grew, and marijuana found itself symbolizing a new minority—the cultural rebel.[61] Office-seeking politicians now used marijuana as the symbolic destroyer of American values, creating an antidrug platform to present themselves as worthy leaders of America upholding a moral order.[62] Further exemplifying the symbolic change, the Federal Bureau of Investigation—still under its staunch founding leader, J. Edgar Hoover—arrested marijuana users, not because of any cognizant violent or criminal propensities, but because such arrestees were also often liberals, war protesters, and cultural deviants.[63]

By the 1970s when Richard Nixon took office, marijuana use had continued increasing, especially among college students, and could hardly remain classified as a "minority drug."[64] Nixon's core political base, the so-

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58. *Id.*

59. DAVID SADOFSKY BAGGINS, DRUG HATE AND THE CORRUPTION OF AMERICAN JUSTICE 89 (1998) (quoting Commission on Crime).

60. *See id.* ("□If the rest of the society wears short hair, the member of the youth culture wears his hair long. If others are clean, he is dirty. If others drink alcohol and illegalized marijuana, he denounces alcohol and smokes pot . . . by all these means, he declares himself an alien in a large society with which he is fundamentally at odds.'" (quoting President Johnson's Commission on Campus Unrest)).

61. *See* JEROME L. HIMMELSTEIN, THE STRANGE CAREER OF MARIHUANA: POLITICS AND IDEOLOGY OF DRUG CONTROL IN AMERICA 144 (1983) (explaining the "hippie hypothesis," and that "[m]arihuana became a symbol—an embodiment of the Counterculture . . . for policymakers and the media as well as for rebellious youth").

62. *See* BAGGINS, *supra* note 59, at 89 ("As the cultural challenge of the counter-culture failed, criminalization of their rebellious drug choice, marijuana, became politically savvy. Drugs became the means to criminalize the culture that challenged dominant orthodoxy.").

63. PROVINE, *supra* note 56, at 99.

64. *See id.* at 97 (explaining the Nixon Administration's view that the "problem was that drug use had moved out of the ghetto and into the suburbs, where harsh penalties were ruining promising young lives and creating disrespect for the law").

called "silent majority," was "angry at hippies, women's liberation activists, pot smokers, Black nationalists, and other rebellious elements."[65] Yet, because so many college students now used marijuana—and many of them the children of his political base—it was not feasible for Nixon to maintain measures that would continue putting thousands of such students at risk of incarceration.[66] Therefore in 1970, Nixon urged Congress to pass the Comprehensive Drug Abuse Prevention and Control Act (CDAPCA), an act which abrogated mandatory minimum sentences,[67] allowed minor criminal offenses to be stricken from records, and made first-time possession of marijuana a misdemeanor.[68] While the CDAPCA represented a mitigating step for Nixon's "whitening" of marijuana use dilemma, the Act also joined marijuana with the classes of controlled substances subject to strictest control—a classification scientifically unfounded, but socially acceptable.[69]

While the Nixon administration confronted the whitening of marijuana use legally, social explanation was still needed. In other words, how could a drug once accredited with causing insanity, terror, and superhuman strength in Hispanics, blacks, and Asian Indian users be causing mellowness, introspection, and an overbearing appetite in its white users? Instead of unverified newspaper accounts proclaiming the most recent tale of a marijuana-induced lunatic,[70] legitimate scientific studies emerged with colorful quotes of marijuana users such as this: "See, people I know, after they got hip to weed, they just climbed out of the rowdy trip. They squared off completely, you know, wanted to jump sharp, enjoy themselves and be mellow instead of getting all brutalized . . . ."[71] Even the Federal Bureau of Narcotics—the very same agency responsible for the marijuana plus

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65. *Id.* at 98.

66. *Id.*; *see also* GERBER, *supra* note 44, at 19 (reporting that from 1965 to 1970 marijuana arrests rose from 18,000 to 188,000).

67. Although the Marihuana Tax Act of 1937, through its exorbitant fines, effectively criminalized marijuana production, sale, and use, the 1951 Boggs Act provided technically criminal penalties. Most states copied this act, and its offspring, the Narcotics Act of 1956. *See* HIMMELSTEIN, *supra* note 61, at 23 (explaining the progression of federal marijuana law from the early 1900s to the 1960s).

68. *See* PROVINE, *supra* note 56, at 98 (explaining the enforcement provisions of the Comprehensive Drug Abuse Prevention and Control Act).

69. Pub. L. No. 91-513, § 202(a)(c), 84 Stat. 1236, 1247–49 (codified at 21 U.S.C. § 812(a)(c) (2006)) (classifying marijuana as a drug that has "a high potential for abuse, . . . no currently accepted medical use in treatment in the United States, . . . [and] a lack of accepted safety for use of the drug or other substance under medical supervision").

70. *See generally* BOOTH, *supra* note 19 and accompanying text.

71. *See* HERBERT BLUMER, ADD CENTER PROJECT FINAL REPORT: THE WORLD OF YOUTHFUL DRUG USE 30 (1967) (internal quotations omitted).

minority equals horrific crime equation—had changed its antimarijuana rhetoric to a more realistic form, associating the drug with sloth rather than violence.[72] The Ford Administration maintained the Nixonesque symbolic argument against marijuana use, particularly committing the country to becoming a national example for drug enforcement in the hopes of curbing the influx of marijuana from abroad.[73]

But when President Carter took office, pot—until the year of this writing—came the closest ever to being legalized. In his first year in office, President Carter addressed Congress concerning the ballooning arrest rate for marijuana users: "Penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself . . . . Nowhere is this more clear than in the laws against possession of marijuana in private for personal use."[74] By his second year in office two out of three of this country's young adults had used marijuana.[75] Further, by end of President Carter's term of office eleven states had passed some form of a marijuana decriminalization law.[76] But the silent majority that swayed Nixon, again found its voice, gnashing its teeth at Carter's proposal to remove criminal punishment for small possession of marijuana.[77] Significantly, as Provine explains, this majority was "indifferent to the problems of inner-city drug use and addiction."[78]

If the majority was indifferent in the 1970s, in the 1980s, with Ronald Reagan as president, it became vindictive. Reagan's stance invoking the

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72. *See* PROVINE, *supra* note 53, at 99 (noting that the FBN "no longer portrayed [marijuana users] as criminal, but rather as troubled and emotionally unstable, suffering from lack of motivation and alienation . . . . [I]ts officials stressed the potential for marijuana to serve as a gateway to more serious drug use"); *see also* BOOTH, *supra* note 19, at 253 ("A new phrase entered the anti-marijuana vocabulary: amotivational syndrome, a scientific-sounding phrase for feeling alienated and being lethargic as a result of using marijuana").

73. *See* RICHARD J. BONNIE, MARIJUANA USE AND CRIMINAL SANCTIONS 124 (1980) [hereinafter MARIJUANA USE] (noting that the Ford Administration declined to endorse marijuana law reform to prevent other countries from doubting the American commitment to drug prohibition).

74. Jimmy Carter, *Drug Abuse Message to the Congress*, Aug. 2, 1977, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=7908 (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

75. *See* PROVINE, *supra* note 56, at 99 ("By 1979, over two thirds of the nation's eighteen- to twenty-five-year-olds had tried marijuana at least once.").

76. KLEIMAN, *supra* note 6, at 268.

77. *See* PROVINE, *supra* note 56, at 99 (listing "newly formed white, middle-class parents' groups like the Parents' Resource Institute for Drug Education . . . and the National Federation of Parents for Drug-Free Youth" as examples of Carter's opposition).

78. *Id.*

war on drugs illustrated one of his strongest platforms and helped him attain his presidential nomination.[79] In his first year in office he initiated stringent sentencing requirements for drug offenses—including simple marijuana possession—and also introduced a bevy of collateral sanctions for drug users.[80] Illustrating how involved marijuana remained, in Reagan's first speech initiating the war on drugs, pot stood alone as the only drug specifically mentioned.[81]

The accomplishments of this war: over the twenty-four year period from 1970 to 1994 federal penitentiaries exploded in their holding of drug-related offenders from sixteen percent to sixty-two percent.[82] As one scholar explains the logic of the drug war: "Bad culture was the root cause of poverty, and so prison coupled with welfare reduction became essential domestic policy."[83] And, as the nonpartisan National Commission of Marihuana and Drug Abuse found, these very drug laws imposed racial and class oppression.[84]

III. The Present Day Costs of Marijuana Prohibition

As John Kaplan notes regarding the worthiness of a law, "the two crucial questions are: (1) what are the total social and financial costs attributable to the law, and (2) what are the benefits that flow from this outlay?"[85] The costs of illegalization have been grave—both on a general social level and on how they have affected minorities specifically.

A. Generally, Marijuana Prohibition Has Not Worked

As the historical study of marijuana illegalization has illustrated, marijuana prohibition is an American oddity in that "[n]o other law is both

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79. BOOTH, *supra* note 19, at 254.

80. *See id.* (documenting Reagan's creation of the White House Drug Policy Office and its many intolerant drug reforms, including the reintroduction of mandatory minimum sentencing and a sentencing schedule for marijuana offenders ranging from as little as probation to as harsh as life imprisonment).

81. BAGGINS, *supra* note 59, at 160.

82. BOOTH, *supra* note 19, at 254.

83. BAGGINS, *supra* note 59, at 89.

84. *Id.*

85. JOHN KAPLAN, MARIJUANA: THE NEW PROHIBITION 1 (1970) [hereinafter THE NEW PROHIBITION].

enforced so widely and harshly and yet deemed unnecessary by such a substantial portion of the populace."[86] Marijuana is the nation's third most popular drug, behind only alcohol and tobacco, with American users approaching 100 million in number.[87] Yet, marijuana, unlike legal alcoholic or tobacco-related vices, is a drug with very limited physical health risks.[88] At least one study has shown that marijuana use during pregnancy, while not good for fetuses, is not as bad for them as alcohol or cigarettes.[89] In effect, this country has prohibited a drug that, at least physically speaking, does not put individuals at high risk, nor mark them out as noticeably different than nonusers.[90] Yet, using this drug remains criminal, and hundreds of thousands of individuals are fined, incarcerated, and criminally sanctioned for their individual choice to use it. Ironically, drugs much more dangerous than marijuana, while not freely legal, are available through a pharmacy, and lack such a carte blanche incarceration threat.[91]

That the increasing number of arrests has had ostensibly no diminishing effect on use rates also demonstrates the failures of current marijuana prohibition law.[92] This "disappointing reality"[93] is not just sad,

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86. Ethan A. Nadelmann, *An End to Marijuana Prohibition: The Drive to Legalize Picks Up*, NAT'L REV. Jul. 12, 2004 at 1, *reprinted in* Ethan A. Nadelmann, DRUG WAR DEADLOCK 221 (2005).

87. THE NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, www.norml.org (last visited Jan. 10, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

88. *See* BAGGINS, *supra* note 56, at 72 (noting that there have been "zero fatalities in medical history for marijuana use"); *see also About Marijuana*, THE NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, http://www.norml.org/index.cfm?Group_ID=7305 (last updated Nov. 7, 2010) ("Marijuana is far less dangerous than alcohol or tobacco. Around 50,000 people die each year from alcohol poisoning. Similarly, more than 400,000 deaths each year are attributed to tobacco smoking. By comparison, Marijuana is nontoxic and cannot cause death by overdose.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

89. Bram Zuckerman et al., *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 NEW ENG. J. MED. 762, 764 (1989).

90. *See* MARIJUANA USE, *supra* note 73, at 24 ("[M]ost marijuana users *and* marijuana offenders as well, are not in need of treatment in any sense and are in fact indistinguishable from their peers in all respects other than their marijuana use. The vast majority of marijuana users do not use the drug heavily . . . .").

91. *See* CALIFANO, *supra* note 18, at 120 ("There are numerous addictive drugs—opioids and central nervous stimulants and depressants—[which have been authorized for use] by the Food and Drug Administration approval process.").

92. *See id.* at 124 ("[F]rom 1993 to 2005, a 107 percent increase in marijuana arrests was accompanied by a 100 percent increase in marijuana users.").

93. *Id.*

but bizarre, as is any argument that arresting marijuana users will contribute to the greater fight against other, harder drugs.[94] Further, at least one study has shown that criminal prosecution and incarceration does nothing to treat drug use—including that of marijuana—because using drugs is often caused by childhood or personal maladjustment, rather than a characteristic classic of criminal behavior.[95] And therein lies an even greater irony: "while marijuana laws are primarily designed to protect drug users from themselves, arrest and criminal justice processing is for many users the most substantial risk of using marijuana."[96] Moreover, if prison is not a bad enough consequence for use or possession, a person convicted of growing marijuana may face even harsher collateral sanctions.[97] Underscoring all of this is the fact that marijuana-related arrests far

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94. *See* Nadelmann, *supra* note 86, at 223–24 (conjecturing that "[trying] to reduce heroin addiction by preventing marijuana use . . . is like trying to reduce motorcycle fatalities by cracking down on bicycle riding").

95. *See* Jonathan Shedler & Jack Block, *Adolescent Drug Use and Psychological Health: A Longitudinal Inquiry*, AMERICAN PSYCHOLOGIST 612, 618 (May 1990) ("[T]he frequent [drug] users appear to be relatively maladjusted as children. As early as age 7, the picture that emerges is of a child unable to form good relationships, who is insecure, and who shows numerous signs of emotional distress."). As an interesting side note, this study found these qualities in the childhood personalities of those who abstained from using drugs:

> [R]elatively fearful and anxious, using and responding to reason, not physically active, not vital or energetic or lively, inhibited and constricted, not liking to compete, not curious and open to new experiences, not interesting or arresting, physically cautious, neat and orderly (implies fussiness), anxious in unpredictable environments, not having a rapid personal tempo, looking to adults for help and direction, not responsive to humor, not self-assertive, not self-reliant or confident, shy and reserved, . . . cold and unresponsive, immobilized under stress, obedient and compliant, not calm or relaxed, planful and likely to think.

Id. While one might wonder if the abstainers' childhood personalities aren't a bit maladjusted, comparing the two at least evidences that childhood disposition tends to predate the future decision to use drugs. This is a considerable finding in light of the fact that the choice to use drugs is an autonomous choice to hurt oneself rather than others: we have criminalized a choice that is not only a self-immolating choice, but one that is possibly predisposed through one's childhood experiences.

96. KLEIMAN, *supra* note 6, at 268; *see also* BAGGINS, *supra* note 59, at 74 ("[H]owever bad some illegal drugs may be for some people, prison is almost certainly worse."). It should also be noted that the then newly-elected President Carter used this same rationale when he attempted marijuana law reform in the late 1970s. *See* Jimmy Carter, *supra* note 74 and accompanying text.

97. *See* RICHARD G. BOIRE, CENTER FOR COGNITIVE LIBERTY & ETHICS, LIFE SENTENCES: THE COLLATERAL SANCTIONS ASSOCIATED WITH MARIJUANA OFFENSES 4–5 (2007) (finding that the collateral sanctions attached to a conviction for growing marijuana could be worse than those attached to a murder, rape, or robbery conviction).

outnumber arrests for other drugs—with simple possession being the dominant sin earning an individual a battle with the court system.[98]

Finally, current marijuana prohibition has diverted money into the hands of criminal drug dealers and by doing so has increased the potential for violence in our communities. The illegal drug business—particularly that of marijuana—is enormously profitable, reaching the hundred billion dollar mark in the 1990s.[99] With so much money at stake, it is no wonder more and more individuals become attracted to the drug trade, which maintains the flow of illegal drug consumption and sales, lowers the price, and makes it even easier for users to get their fix.[100] Even marijuana, a drug thats user is generally passive, has become a major source of violence because its seller is not generally passive, but dangerous and violent.[101]

B. The Cost of Prohibition on Minorities

While racial and ethnic minorities no doubt feel and experience the above general failures of the marijuana prohibition, these groups, particularly African Americans, are affected much more acutely than the white majority. This quote is powerfully illustrative: "In South Africa in 1993, under apartheid, they incarcerated 851 black males per 100,000. In the United States in 2004 *under [marijuana] prohibition*, we incarcerated 4,919 black males per 100,000. How anyone could look at this and not see institutionalized racism, I don't know."[102] In 2008 only eleven percent of

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98. *See* Federal Bureau of Investigation, *2008 Crime in the United States: Arrests for Drug Abuse Violations* (Sept. 2009), *available at* http://www2.fbi.gov/ucr/cius2008/arrests/index.html (showing that 82.3% of drug arrests were for possession, while only 17.7% were for sale/manufacturing. For possession, marijuana arrests were the clear majority at 44.3%.) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). For sale/manufacturing arrests, marijuana was second to heroin and cocaine, being only 5.5%. *Id.* The percentages do not equal 100 because of rounding.

99. *See* John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 556 (1991) (noting an estimated range of $80 to $100 billion in illegal drug sales per year).

100. *See id.* ("The profitability of the drug trade has attracted more dealers, a phenomenon that, when joined with the sustained flow of drugs into this country, has actually lowered the price of many drugs.") (internal citation omitted).

101. *See* BAGGINS, *supra* note 59, at 75 ("Even the most passive drug, marijuana, becomes a source of violence when prohibition causes the growers and distributors to become criminal. Thus as Campaign Against Marijuana Production (CAMP) targeted growers in Humboldt County, flower-children growers were replaced over time with armed, production aggressive-minded entrepreneurs.").

102. *Marijuana Prohibition & Minorities*, MARIJUANA POLICY PROJECT,

white arrests were for drug related offenses, while fifteen percent of black arrests were for drug offenses.[103] Further, approximately twenty percent of blacks receive jail time for their drug arrest, while only fifteen percent of whites are imprisoned for their drug arrest.[104] These statistics would all be fine and normal if the user percentages matched up. But they do not. The simple truth is that blacks get arrested almost three times as frequently as whites for marijuana possession offenses, while the user rates between the two groups stand close to equal.[105] Clearly then, the current status of marijuana laws affecting the minority communities in general, and the black community in particular, reflects a disadvantageous and unfair system.

Yet some argue that although the statistics show a disparity in arrest and incarceration rates for marijuana and drug-related offenses favoring whites over minorities, the disparity does not necessarily mean unfairness. For example, Rudolph Gerber provides that one possible explanation for the disparity is "because of [minorities'] concentration in inner cities and their relative scarcity on college campuses. These factors help explain why white high school and college-age students compose the highest number of pot users, but inner-city blacks and Hispanics compose the most numerous arrestees." [106] Yet, these arguments cannot overcome the actual difference in who gets arrested for committing the same acts, nor can they fix the devastating harm caused by the incarceration of thousands of individuals of a community.[107] As one scholar argues, "Selective prohibition would have

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http://www.mpp.org/assets/pdfs/download-materials/Minorities-Brochure_1106.pdf (quoting Norm Stamper, former Seattle police chief) (emphasis added).

103. *See* Federal Bureau of Investigation, *2008 Crime in the United States: Arrests by Race*, tbl.43 (Sept. 2009), *available at* http://www2.fbi.gov/ucr/cius2008/data/table_43.html (showing that 452,590 of 3,015,905 total arrests of black individuals were for drug related offenses, while only 829,432 of 7,382,063 total arrests of white individuals were drug-related) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

104. *See* Bureau of Justice Statistics, *Prison Inmate Characteristics*, tbl.11 (2005), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1572 (showing that 15.4% of whites are incarcerated for their drug offenses, while 22.5 percent of blacks are incarcerated for theirs).

105. *See* Rajeev Ramchanda et al., *Racial Differences in Marijuana-Users' Risk of Arrest in the United States*, 84 DRUG & ALCOHOL DEPENDENCE 264, 264 (2006) (noting that African Americans are 2.5 times more likely than whites to be arrested while having nearly identical user rates).

106. GERBER, *supra* note 44, at 63.

107. Essentially Gerber's argument communicates the idea that white "[p]arents who used the drug in the late 1960s and the late 1970s often see smoking pot as a benign rite of passage, a phase they passed through on their way to becoming business executives, lawyers, doctors, and teachers." CALIFANO, *supra* note 18, at 120. These ideas explain that high

vanished long ago if whites had been sent to prison for drug offenses at the same rate as blacks . . . . It is an objectionable compromise of *enacting* criminal laws against drug use for everyone, while *enforcing* them more vigorously in poor communities."[108]

It is no surprise then that the advocates for decriminalization have grown. As of this writing, thirteen states have laws on their books making possession of marijuana in small amounts for personal use a merely finable offense.[109] That number will likely rise because decriminalization is so facially attractive in that it saves state governments high amounts of money.[110] In fact, the states that decriminalized marijuana during the Carter administration managed to have their laws escape Reagan's drug war largely because not arresting people for possession did not clearly affect use or other drug-related problems, while the police did clearly save money.[111]

Yet national decriminalization is hardly the answer, particularly for minority groups. Even if arguing that decriminalization would not increase the use rate, one must still recognize that decriminalization would still not lower the illegal and dangerous supply networks. Because these networks predominately poison minority communities, for minorities decriminalization represents the "worst of all possible policies."[112]

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school and college is when and where whites consume the drug, and therefore get arrested less because those locations are less likely to attract policeman. Unlike those students, blacks and Hispanics live in poor, urban environments where police officers are more likely to patrol, thus more likely to arrest. This is a legitimate rationalization for *why* there is an arrest/user rate disparity—but it does nothing to show that the disparity is not highly unfair. It simply attaches the likelihood of being punished for an illegal act to the environment you happened to be born into.

108. DOUGH N. HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS 135–36 (2002).

109. *See States that Have Decriminalized*, THE NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, http://norml.org/index.cfm?Group_ID=6331 (last updated Nov. 8, 2004) (showing that Alaska, California, Colorado, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, and Oregon have all decriminalized marijuana) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

110. *See, e.g.*, *Virginia: Hearing Tomorrow on Decriminalization Bill*, MARIJUANA POLICY PROJECT, http://www.mpp.org/states/virginia/alerts/virginia-hearing-tomorrow-on.html (reporting that Virginia legislators in January 2010 introduced a decriminalization bill for the purpose of saving the money used to charge and possibly sentence individuals arrested for small marijuana possession).

111. *See* KLEIMAN, *supra* note 6, at 269 (noting that one factor allowing for the survival of state decriminalization laws was the lack of evidence showing those laws caused more marijuana consumption or other associated problems).

112. *See* KLEIMAN, *supra* note 6, at 2 ("Adding more demand to a multibillion-dollar illicit industry will have disadvantages: more untaxed income, more economic activity outside legal control, and probably more corruption and violence.").

Moreover, if use rates instead increased, decriminalization in doing nothing to destroy or fight the criminal organizations supplying marijuana would increase those organizations' profits.[113] A higher use rate under a decriminalized regime is not just likely but inevitable because decriminalization would eliminate the group of non-users who have refrained from using simply out of a fear of punishment. If that fear no longer has basis, then those non-users would no longer have a reason for abstaining. More users equals more profits, and because decriminalization bats an eye at the criminal organizations absorbing those profits, minorities would be faced with not only the same criminals besetting their communities, but financially strengthened ones.[114] While decriminalization may clear out the jails and prevent many minorities from being introduced to jails in the first place, minority groups would do well to consider whether increasing the wealth of criminal organizations is an acceptable side effect.

IV. Is Legislation such as California's Marijuana Control Act the Answer for Minority Communities?

The Marijuana Policy Project, perhaps the largest and most organized of all marijuana advocacy groups, makes these arguments for the legalization of marijuana in reference to minority groups:

> Drug abuse is a real problem for minority communities. But our current marijuana laws haven't helped — they've simply clogged our courts and jails with people of color. By taxing and regulating marijuana similarly to alcohol, we would:
>
> Make our communities safer. Removing marijuana from the criminal market would free up law enforcement resources so police can focus on serious and violent crimes.
>
> Reduce teen marijuana access. Unlike drug dealers, licensed vendors would work to prevent teens from buying marijuana— just as states that have implemented strict controls on underage

113. Rosalie Liccardo Pacula et al., *Risks and Prices: The Role of User Sanctions in Marijuana Markets* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 13415, 2007) (arguing that decriminalization would do "nothing to remove the criminal networks, it may increase their profits").

114. Robert Robb, *It's Time to Consider Legalizing Marijuana*, ARIZ. REPUBLIC, Oct. 5, 2007, at 137 *available at* http://www.azcentral.com/arizonarepublic/opinions/articles/1005robb05.html ("[R]emoving criminal sanctions for drug use won't dismantle the destructive and dangerous criminal supply networks that have taken deep root . . . in the United States.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

> tobacco purchases have seen sales of tobacco to minors fall dramatically.
>
> Save taxpayer dollars and generate revenue. Each year, the government spends $7.7 billion to arrest and lock up nonviolent marijuana users. Taxing marijuana would generate billions in tax revenues instead of profits for drug dealers.[115]

Others accompany these three arguments, such as the call for legalization to repair the fragmented and broken relationship between law enforcement officials and minority groups.[116] The idea that legalized marijuana will keep young men out of jail in minority communities is another argument raised.[117] Notably, however, none of the proponents of these arguments seems able to confidently argue that legalization of marijuana will not drastically increase the use of marijuana. As Mark Kleiman—a proponent of a qualified form of legalization—explains: "The serious question is not whether an increase in consumption would occur, but how large it would be and how much of it would reflect new heavy use."[118] For the white majority, a spurt in marijuana use may not cripple its population. Minority groups, however, should conduct serious inquiry into exploring what a higher use rate would mean for their communities and future. Otherwise, legalized marijuana might risk becoming the twenty-first century "gin" of the lower classes.[119] Highlighting the gravity of this problem, "marijuana legalization has one very serious drawback: virtual irreversibility if it goes badly wrong."[120]

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115. *Marijuana Prohibition & Minorities*, *supra* note 102.

116. *See* HUSAK, *supra* note 108, at 136 ("Repairing negative attitudes about law and authority among blacks is among the foremost challenges facing criminal justice policy in the twenty-first century. Ending prohibition would be a major step toward alleviating racism in the criminal law.").

117. *See id.* at 184 (noting that African American leaders such as Jesse Jackson are now denouncing the drug and marijuana prohibition because it has imprisoned so many of the black community's young).

118. KLEIMAN, *supra* note 6, at 274.

119. *See* Editorial, *The Case for Legalisation: Time for a Puff of Sanity*, THE ECONOMIST, Jul. 28, 2001, *reprinted in* DRUG WAR DEADLOCK: THE POLICY BATTLE CONTINUES 129 (questioning how to get from the current state of prohibition to a state of legalization and warning that if it is not done carefully, legalization could have effects comparable to the disastrous impact of gin on the British in the 18th century). Also, in light of the comparison to alcohol is the example of the prohibition of alcohol in the United States in the early 20th century. By now, almost everyone—scholar and lay person alike—agree that Prohibition was a foolish act. However, what is highly relevant here is that if use rate is the measure of success, alcoholic prohibition was by no means a failure. *See* HUSA*supra* note 108, at 159–60 (comparing alcoholic prohibition to marijuana laws).

120. KLEIMAN, *supra* note 6, at 275.

A. Productivity Concerns

The first area of concern for minorities regarding a higher consumption of marijuana within their communities is the association of marijuana use with lower productivity. If minority groups need anything, it is more opportunity for more productivity for further advancement, growth, and welfare. While some studies debate marijuana's general effect on productivity, minority groups' overall lower income makes them more vulnerable in this area, largely negating the general conclusions of those arguments.[121] Although not necessarily damaging the brain, marijuana use, particularly acute consumption, retards logical thinking, reasoning, and complex thought.[122] Further inhibiting effects, such as lesser hand-eye coordination, weaker driving performance, less ability to concentrate, and diminishing learning rates all relate to marijuana use.[123]

What does all this mean? It is hard to determine. As noted, one of the strongest arguments for the repeal of marijuana prohibition is to get the thousands of minority persons locked up for petty possession back into their communities. But assuming those returning keep using the drug, and considering the probability that legalization will increase use elsewhere, for

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121. *See* MARK A.R. KLEIMAN, COSTS OF ABUSE, COSTS OF CONTROL 14–15 (1989) [hereinafter COSTS OF ABUSE] (listing incompetence, vulnerability, escalation, misbehavior, and *poverty* as the five reasons "one person's marijuana smoking may be more harmful than another's" (emphasis added)); *see also* JAMES & JOHNSON, *supra* note 54, at 66 ("For many African Americans, marijuana represents a way of masking the pain of poverty, oppression, lack of hope, and lack of opportunities. Many African Americans try to fill the spiritual emptiness in their lives with the medicating effect of marijuana and other drugs."). That noted by James & Johnson seems similar to the situation of the wealthy prescription drug addicts, addicted to pills for the same depressing reasons. But while those financially solvent groups can "afford" to continue their addiction, low income minorities will have no such wealth as their crutch.

122. *See* JAMES & JOHNSON, *supra* note 54, at 66 ("[M]arijuana diminishes the left brain functions of logical thinking, reasoning, and rational processes and increases the right brain functions of emotions, creativity, and introspection. Marijuana also affects the ability of users to read and comprehend written material."); *see also* COSTS OF ABUSE, *supra* note 121, at 10 ("At the time of use, marijuana causes measurable deterioration in the ability to concentrate, to process complex information, and to coordinate eye and hand. Some studies have shown these effects persisting for months after extended periods of very heavy marijuana use, but none have shown permanent loss of function.").

123. *See* CHARLES R. SCHWENK & SUSAN L. RHODES, MARIJUANA AND THE WORKPLACE: INTERPRETING RESEARCH ON COMPLEX SOCIAL ISSUES 18 (1999) ("Most experiments have shown that marijuana intoxication reduces subjects' attention or concentration on tasks, their speed at learning new material and their short-term memory."); *see also* COSTS OF ABUSE, *supra* note 121, at 11 ("There is no doubt that marijuana impairs driving performance, and does so more than the average user is conscious of.").

minority groups, the effect of higher use on productivity should be of utmost concern. It is a tradeoff, but is it a valuable one?

For instance, one study finds that marijuana use does not substantially impair individuals' ability to perform general working tasks, but does impair them as far as managerial favor, raises, promotions, and the like.[124] Indirect effects such as these could severely inhibit the workforce and overall production of minority groups, by stunting their ability to move up the chain of responsibility and command. Further complicating this is the fact that with the legalization of marijuana, individuals would have less incentive to hide their habit, making it all the more easier to suffer remaining stigmatizing social consequences.[125] Compounding the problem is that in the legalized world "[e]ach new user would be at some risk of progressing to heavy, chronic use . . . ."[126]

B. What About Potency Regulation?

As shown, legalization of marijuana will almost certainly create a higher rate of consumption and create a higher demand for the drug. What has not been discussed is the level of potency in marijuana and the ever-increasing demand for stronger pot.[127] Not only does stronger marijuana have repercussions related to the productivity effects discussed above,[128] but it also creates a situation possibly undermining one of the main rationales for legalization—the lowering of drug-dealing related crimes.[129]

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124. *See* SCHWENK & RHODES, *supra* note 123, at 136 (finding the effect of marijuana use on work cannot be easily quantified in monetary terms, but "[i]f nonsmokers are consistently selected on the basis of alleged reliability or manageability over smokers for the most lucrative jobs, it would not be surprising if they failed to produce and earn more").

125. *See* KLEIMAN, *supra* note 6, at 271 ("It would be possible that smokers of legal marijuana would be less wary about letting their intoxication be seen, and therefore more apt to make nuisance of themselves, than today's smokers of illegal marijuana.").

126. *Id.* at 274.

127. *See* NATIONAL DRUG THREAT ASSESSMENT, *supra* note 18, at 18 ("According to law enforcement reporting, marijuana producers have consistently increased the average potency of marijuana through improved cultivation techniques . . . to meet rising demand for higher-potency marijuana.").

128. *See* CALIFANO, *supra* note 18, at 121 (noting how modern marijuana is much stronger than the marijuana of the 1960s and 1970s, having more potential to cause physical and mental harm); *see also id.* at 122 (commenting that stronger marijuana has—although only in rare cases—proven to be addictive).

129. In fact "making our communities safer" is listed first in the MPP's arguments for why marijuana legalization would be helpful to minorities. *See generally Marijuana Prohibition & Minorities*, *supra* note 102.

California's initiative, while claiming to regulate marijuana, was silent on how it planned to oversee the regulation of potency in legal marijuana growth. Because the bill planned to regulate marijuana in the manner of state regulation of alcohol, it can be assumed that those "licensed to grow and distribute" marijuana commercially would eventually face some sort of underlying potency regulation. Yet, the bill also would have legalized the individual growth of marijuana for personal consumption.[130] On the black market, marijuana increases every year in its potency.[131] If an eventual potency regulation curbed average marijuana potency, declining its strength and then leveling it out, it would be like the government slowly taking hard liquor off the market, leaving only beer and wine. But unlike alcohol, marijuana is much easier to produce or, colloquially speaking, to moonshine.

The scenario would result in either individuals growing their own personal marijuana at the potency level they like, or individuals going elsewhere—elsewhere meaning illegal drug dealers—resulting in an illicit market for marijuana all over again. While it is argued that the legalization of marijuana would mean "virtual abolition of the black market, with its associated violence and corruption,"[132] a weaker legalized drug incapable of competing with the strength and high of its illegal sibling seems pointless. The California bill indicated that by legalizing marijuana it would put the criminal networks out of business.[133] Those would have been empty words if in the legalized world illegal business continued to market a superior product. While majority group marijuana proponents may have little worry of such an offshoot higher-potency black market product, minority groups, those already dealing with the brunt of the crime, corruption, and violence

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130. *See* Marijuana Control Act § 11725(b) (stating that for persons twenty-one years of age or older "[m]arijuana may be cultivated only in a location in the home or yard in which the marijuana is not visible from any public place").

131. *See* NATIONAL DRUG THREAT ASSESSMENT, *supra* note 18, at 18 ("According to University of Mississippi Potency Monitoring Project (PMP) data, that average THC (delta-9-tetrahydrocannabinol) content in tested samples of marijuana in 2007 increased to the highest level ever recorded—9.64 percent in 2007, rising from 8.77 in 2006" and only 3.48 in 1985.").

132. KLEIMAN, *supra* note 6, at 270.

133. The Act specifically provided that by being enacted it would "deprive the criminal market of revenue derived from the cultivation, smuggling, and sale of marijuana . . . [and would] reduce the violence associated with the criminal market for marijuana." Marijuana Control Act §§ 1(d), (e).

of drug dealers, should be extremely careful that the proposed legalization does not simply spawn new, competing black market drug operations.[134]

C. The Money Drain from Minority Communities

Much is made by the proponents of marijuana legalization concerning marijuana's potential to become the next "cash crop" creating billions of dollars in both sales and tax revenue.[135] Particularly in the face of decriminalization proposals, which do nothing to divert money from the hands of drug dealers, legalization makes sense. The argument goes something like this: as history has shown, marijuana use will not stop; therefore, we might as well sell the drug legally, putting the money from drug dealers' wallets into those of the people.[136] Although this is generally a sound and sensible argument, for minority groups it might truthfully represent another tool of economic oppression bogging down their communities.

In the illegal market, high-quality marijuana costs, on average, over $4,000 per pound, while lower level marijuana nears $1,000 per pound.[137] As noted earlier, marijuana sales in the United States, top $100 billion

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134. Mark Kleiman argues that "[I]llicit marijuana of known provenance, potency, and freedom from adulteration would have a competitive advantage over black-market marijuana as long as the prices were comparable, so there would be little need to undercut current illicit prices as part of the anti-moonshining effort . . . ." This answers why legal marijuana would have a price advantage over illegally grown and distributed marijuana, but it does nothing to answer the problems arising with the potency advantage illegal marijuana would likely maintain over its legal counterpart. Noting the indisputable trend of increase in marijuana demand correlating with the increase in demand for higher potency marijuana, it is extremely hard to imagine that potency demand would subside with the opportunity to pay less for a weaker drug simply because it is legal.

135. *See, e.g.*, Jon Gettman, *Marijuana Production in the United States*, THE BULLETIN OF CANNABIS REFORM 3 (2006) ("Marijuana is the largest cash crop in the United States, more valuable than corn and wheat combined. Using conservative price estimates domestic marijuana production has a value of $35.8 billion.").

136. *See id.* at 4 ("As America's federal, state, and local governments strive to fund important services such as transportation, education, law enforcement and homeland security untaxed and unregulated domestic marijuana cultivation and distribution remains both an increasing challenge to policymakers and an untapped source of revenue for legislatures.").

137. *See* NATIONAL DRUG THREAT ASSESSMENT, *supra* note 18, at 19 (reporting that the "wholesale price for domestic high-potency marijuana ranges from $2,500 to $6,000 a pound . . . while the wholesale price for midgrade marijuana is approximately $750 a pound, according to the Los Angeles County Regional Criminal Information Clearinghouse (LACRCIC)").

annually.[138] As also noted, the highest concentration of drug dealers is found in lower income, urban environments prone to minority dwelling.[139] These figures tend to reflect that billions, and at the very least hundreds of millions, of dollars are funneled into such lower income communities each year. With the legalization of marijuana, money expended by consumers will be the same or higher, but minorities must ask where that money will drain. Meaning, will the billions or hundreds of millions of dollars continue their current flow into lower income communities, or will forces divert the money elsewhere?

The California initiative created licensing regulations for both the growing[140] and the selling[141] of marijuana. To the detriment of minorities, these licensing requirements required both money and a certain amount of business prowess: cultivating or growing marijuana would require 1) a maximum license fee of $5,000 paid by all applicants to "reasonably cover the costs of assuring compliance with the regulations to be issued";[142] 2) all license applicants to submit to a criminal history background check;[143] 3) appropriate security and security plans with "satisfactory proof of the financial ability of the licensee to provide for that security";[144] and 4) compliance with other employment,[145] inspection,[146] and recordkeeping[147] measures. These business and licensing regulations provided no assistance to entrepreneurs with little or no start-up capital.

Therefore, marijuana, if legalized in the California fashion, while becoming the nation's next cash crop and a tremendous source of wealth, could potentially be so for mainly non-minorities, ones who have the

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138. *See generally* Powell & Hershenov, *supra* note 99 and accompanying text.

139. *See generally supra* note 107 and accompanying text.

140. *See* Marijuana Control Act § 3-26020(a) ("The department shall license commercial cultivators of marijuana.").

141. *See id.* § 3-26040(a) ("The department shall license marijuana wholesalers, who shall be allowed to package and prepare marijuana for sale, and who shall be authorized to sell marijuana to licensed sales outlets.").

142. *Id.* §§ 3-26020(a), 3-26040(a).

143. *Id.* §§ 3-26020(b), 3-26040(b).

144. *Id.* §§ 3-26030(a), 3-26050(a).

145. *See id.* §§ 3-26030(b)-(d), 3-26030(b)-(d) (establishing employment rules to restrict persons under twenty-one years of age from accessing or transporting marijuana, and to ensure that marijuana is not consumed on the premises).

146. *See id.* §§ 3-26030(e), 3-26050(e) (requiring an appropriate inspection and tracking system for marijuana sold in compliance with the Revenue and Taxation Code).

147. *See id.* §§ 3-26030(f), 3-26050(f) (requiring "[r]ecordkeeping consistent with the regulatory needs of the department").

financial means and business savvy to initiate such production. Worsening this dilemma, most of the money flowing into the minority communities from the illegal sale of marijuana would be diverted into the bank accounts of the new class of "marijuana businessman."[148] Minority community leaders should be mindful of this potential money drain, and wary of its wide range of effects on their communities.[149]

D. Federal Collateral Sanctions Would Still Exist with State Legalization

Still, considering the impact greater marijuana use poses for the minority community, marijuana would continue to remain illegal under federal law. The California initiative wiggles past this federal hazard by stating its intent to "prevent state and local agencies from supporting any prosecution for federal or other crimes relating to marijuana that are inconsistent with those provided in this bill."[150] However, a wholesale

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148. Alcohol advertising provides a further harrowing analogy of the potential harm legalized marijuana will bring to minority groups regarding the flow of money.

> In the face of the [American Medical Association's] concern about vulnerable populations, alcohol merchants target blacks, who suffer disproportionately from higher rates of alcohol-related death, disease, and injury, and the rapidly growing Latino community. In San Francisco, 31 percent of billboards in neighborhoods of Latinos advertise alcohol, as do 23 percent in those of African-Americans, compared to only 12–13 percent in those of whites and Asian-Americans. There are also more liquor licenses granted in black and Latino city neighborhoods than in white ones[.]

CALIFANO, *supra* note 18, at 148. Since alcohol is advertised so disproportionately in minority communities, it is logical to predict that marijuana advertising would be conducted similarly. Therefore not only would there be a flow of the money spent on marijuana in minority communities into pockets elsewhere, but the unequal advertising and promotions in minority communities would exacerbate the cycle.

149. *See, e.g.*, *id.* at 144 ("To set the stage for an accommodating presidential administration, big tobacco—led by Philip Morris, the top donor, R.J. Reynolds, and Brown and Williamson—pumped almost $17 million into the 2000 Republican campaign in support of George W. Bush."). This important incidental political effect of legalized marijuana sales revenue actually has the potential for benefiting minority groups. Liberal groups are the biggest proponents of legalization thus there is potential that they will be the first ones to profit from it. However, just because these groups are left-leaning, does not guarantee that they will sympathize with minority issues. Further, just because these groups support marijuana legalization does not mean they will be the first groups to profit from it as a cash crop. Would a conjecture that the first groups to farm marijuana would be those companies already farming and marketing tobacco not be entirely reasonable? If so, that would mean historically right-leaning companies such as Philip Morris would be the first ones to stick their hands in the pot.

150. Marijuana Control Act § 1(k).

stoppage of state pursuit of marijuana violations will not render federal prosecution obsolete. In fact, the current federal stance reflects no intention of quitting its attack on marijuana offenses.[151] Thus, if state legalization instigates higher general use, then there will be that many more potential run-ins with federal law. While this obviously implicates the concerns with arrests and sentencing noted above, the collateral sanctions of a federal marijuana conviction—even if for a misdemeanor—can be hard. For minorities in particular the same sanctions can be devastating.

First, a run-in with federal law could effectively disable potential job applicants. An arrest—even without conviction—might be enough to prevent employers from hiring an applicant.[152] Furthermore, even if marijuana is legal on the state level, because few employers ask what the arrestee's offense was, any sort of "it was just marijuana possession" excuse will not necessarily earn employer sympathy.[153] Further, for any job requiring a license, professional or occupational, a possible consequence for even a misdemeanor conviction could be ineligibility.[154] Because a share of the job market is so absolutely crucial for the growth

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151. *See* David W. Ogden, Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, U.S. DEPT. OF JUST. OFF. OF ATT'Y GEN. 1 (Oct. 19, 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf ("The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives."); *see also* Hoeffel, *supra* note 10 (reporting that United States Attorney General Eric Holder "pledged to 'vigorously enforce' federal narcotics laws whatever California did").

152. *See* BOIRE, *supra* note 97, at 8 (noting that arrestees face the obstacle of a denial of employment regardless of conviction).

153. *See* MARIJUANA USE, *supra* note 73, at 30–31 ("Consider further the empirically-demonstrated consequences of criminal conviction in the private sector: many employers will not even consider applicants with a prior criminal record; and even if there is no per se exclusion, most employers systematically hire persons without criminal records in preference to persons with such records.").

154. *See id.* at 30 ("Possible loss of, or ineligibility for professional licenses (e.g. medicine, dentistry, law); possible loss of, or ineligibility for industrial or other occupational licenses (e.g. nursing, barbering, private investigation, notary public, insurance adjuster); possible loss of, or ineligibility for public employment."). It should be noted that many of these licenses are solely state-given, which brings up another oddity uncovered in California's proposed legislation. An arrest is an arrest, a conviction is a conviction, whether state or federally proffered. But if California has legalized marijuana, will those with a federal arrest or conviction be barred from state licenses such as these?

and success of minority communities, legalization of marijuana may be quite hazardous.

While one might argue that collateral work-related sanctions are equally abusive, other collateral sanctions exist that hurt minorities on a much harsher level: Students attending college on the basis of a federal loan or grant could lose their access to money for a year if they are convicted of possession or use, and for life if convicted of selling;[155] food stamps or welfare assistance could be denied or revoked;[156] eligibility or occupancy of public housing could be denied.[157] Each of these collateral sanctions affects minorities on a much worse level, stripping from them things of survival that the white majority simply has little worry to lose. Finally, collateral sanctions unassociated with a federal arrest are still out there, such as badges of workplace inferiority,[158] self-depreciating

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155. 20 U.S.C. § 109(r)(1) (2006); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS, No. GAO-05-238 at 12 (Sept. 2005), *available at* http://www.gao.gov/new.items/d05238.pdf (finding that approximately 17,000 to 20,000 persons lose access to Pell Grants and 29,000 to 41,000 lose access to student loans every year). Ironically the loss of student aid only applies to drug convictions, so theoretically, past convicted murders or rapists could be eligible for federal student aid but not a person arrested for marijuana possession in a state where it is legal. *See* BOIRE, *supra* note 97, at 10.

156. 21 U.S.C. § 862a(a) (2006) ("An individual convicted (under Federal or State law) of any offense which is classified as a felony . . . which has as an element the possession, use, or distribution of a controlled substance . . . shall not be eligible for (1) assistance under any State program funded under part A of title IV of the Social Security Act, or (2) benefits under the food stamp program . . . .").

157. 20 U.S.C. § 1437d(l)(6) (2006) ("[A]ny drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."). Notably the Supreme Court has implied that a conviction need not happen in order for eviction to take place. *See* Dep't of Housing & Urban Dev. v. Rucker, 535 U.S. 125, 128 (2002) ("Section 1437d(l)(6) requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should of known, of the drug-related activity." (emphasis added)). What is striking about this case is that the appellants had lost their tenancy because their grandson had been caught smoking marijuana in the parking lot of their apartment complex. Imagine *Rucker* being decided in California's proposed legalized environment. Now the appellants' grandson (assuming he is of age) would be smoking marijuana in the parking lot legally under state law, free from state law punishment. Yet this man, although partaking in an activity he now understands as perfectly legal, would still risk the eviction of his grandparents from their federal public housing whether they knew of his smoking pot or not. Only an eradication of federal law and an overruling of United States Supreme Court precedent would relieve Californians from this contradictory predicament. California's proposal makes no effort to do so.

158. *See* SCHWENK & RHODES, *supra* note 123, at 139 ("Beliefs about the effects of

acceptance of being a marijuana smoker,[159] or denial of health insurance.[160]

E. Will Legalization Predispose Minority Youth for Future Use?

If there is one thing the California ballot initiative proclaimed, it was its dedication to prevent underage children from accessing marijuana.[161] Besides fining anyone who sells or distributes marijuana to minors,[162] the initiative dedicated a special marijuana fee, the proceeds of which would solely benefit marijuana educational programs:

> Any amount required to be paid to the state under this [fee] shall be paid to the board in the form of a remittance payable to the State Board of Equalization. The board shall transmit the payments to the Treasurer to be deposited in the Drug Abuse Prevention Supplemental Funding Account, which is hereby created in the General Fund. Upon appropriation by the Legislature, the moneys in the fund shall be expended exclusively for drug education, awareness, and rehabilitation programs under the jurisdiction of the Department of Alcohol and Drug Programs, or any successor to that agency.[163]

Unfortunately, classroom education has been found highly ineffective as a tool for preventing marijuana use.[164] Instead, personal characteristics

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marijuana on job performance may become self-fulfilling prophesies. If employers believe that marijuana users are poor workers, and establish employment policies favoring nonusers, then users may in fact become poorer workers.").

159. *See id.* at 137 (finding that a significant percentage of continuation students—students who had failed levels of school—believed that their marijuana use would weaken their intelligence, indicating that one's belief of marijuana might affect them worse than marijuana's tangible consequences).

160. *See, e.g.*, Randy Cohen, *Smoke Screen*, N.Y. TIMES MAG., Jan. 15, 2010, *available at* http://www.nytimes.com/2010/01/17/magazine/17FOB-ethicist-t.html?emc=tnt&tntemail0=y (responding to a letter requesting advice on how to answer health insurance form inquiries into marijuana smoking when that will surely (and eventually did) result in a denial of health insurance) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

161. *See* Marijuana Control Act § 1(c) (proclaiming the intent of the Legislature in enacting the Act to "regulate marijuana in order to more effectively limit access to marijuana by minors").

162. *See* Marijuana Control Act § 11726(b) ("Providing or selling marijuana to, or purchasing or cultivating marijuana for a person under 21 years of age is an infraction, punishable by a fine of up to one hundred dollars."). A minor in possession of marijuana also will be subject to a $100 fine. *Id.* § 11726(d).

163. *Id.* § 34031.

164. *See* U.S. GEN. ACCOUNTING OFFICE, DRUG CONTROL: OBSERVATIONS ON

such as strong families, religion, or other commitments have the strongest effect on preventing marijuana use in our country's youth.[165] Thus, the California initiative's marijuana fee, while perhaps a worthy intention, would have been a lackluster mechanism for deterring young people from using marijuana.

Another pro-legalization argument concerning the issue of increased child use is that regulating marijuana will eliminate the black market, rendering marijuana as unattainable for young people as it is for them to purchase alcohol.[166] This argument, however, lacks persuasiveness, because 1) the black market will not simply dissolve,[167] 2) legal marijuana poses a much higher likelihood of children getting marijuana from parents or relatives,[168] and 3) under the California initiative parents with underage children would not even have been prohibited from growing their own pot, and could thus provide children with firsthand access to the drug and its

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ELEMENTS OF THE FEDERAL DRUG CONTROL STRATEGY, No. GA:/GGD-97-42, at 1, 3 (1997), *available at* http://www.gao.gov/archive/1997/gg97042.pdf (documenting heavy drug use despite drug control activities).

165. *See generally id.*

166. *See* LLOYD D. JOHNSTON ET AL., 1 MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2007, at 208, *available at* http://www.monitoringthefuture.org/pubs/ monographs/vol1_2007.pdf (finding that eighty-four percent of twelfth graders report that marijuana is "fairly" or "very" easy to obtain); *but see id.* ("The great majority of teens also see alcohol as readily available: in 2007, 62% of 8th graders, 83% of 10th graders, and 92% of 12th graders said it would be 'fairly easy' or 'very easy' to get."). Thus, perhaps the most comprehensive study about youth and drug availability undercuts the argument that regulated marijuana would be less easy to obtain, because regulated alcohol is *already* easier to obtain than unregulated marijuana.

167. As previously noted, legalization and regulation of marijuana will not necessarily eliminate the black market. *See supra* note 134 and accompanying text. Further, the black market would have even more incentive to target young people if their adult business is cut into because of legalized pot stores.

168. Furthermore, even if the black market ceased to exist there always remains the opportunity for parents, older siblings, or older friends to supply the drug, as this colorful anecdote relates:

> Shawnda thought about it. Before she could decide, April said, 'Hey, my parents share a joint every night after being stressed with work all day and it mellows them right out!' Shawnda said, 'Do your parents smoke in front of you?' April said. 'Sure, how do you think I got this stuff?' Shawnda thought again and reached for the joint, figuring that if it was cool for April's mom and dad, then it was cool for her.

JAMES & JOHNSON, *supra* note 54, at 61. While this account is somewhat plastic, it does bring up a peculiar issue with the marijuana smoking of parents. While it is somewhat easy to drink in front of one's child, what kind of message will it tell children, who are being "educated" by California's new programs, when they see their father and mother ripping bong tokes after work?

source.[169] Moreover, these facts only exacerbate the worthlessness of any educational program instituted by the marijuana fee.[170]

Finally, and perhaps most damning to the California legalization bill, high school student marijuana use is actually decreasing.[171] The prospect of making marijuana legal, albeit regulated like alcohol, would be tantamount to "making marijuana use another badge of adulthood [that] would increase its attractiveness to adolescents."[172] The fight for many minority parents is to put their children in schools and communities where they will not be exposed to drugs, crime, and the like. If marijuana use is actually *decreasing* in our nation's high schools, all parents—and especially those who are minorities in low income areas—should be wary of its legalization.

While increased use in the adult community may be an acceptable tradeoff for the ills of prohibition, even the writers of the California bill viewed increased use by young people as unacceptable. Because studies "suggest that reducing the use of marijuana in a culture is a relatively straightforward . . . matter of changing the values among members of the society," it would appear then that the values within U.S. high school students are changing.[173] If that is true, then legalizing marijuana for adult use could possibly be a value-shaking statement to our youth, destroying their current antismoking trend.

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169. Originally, the Marijuana Control Act specifically stated that "[t]he presence of persons younger than 21 years of age in a household *does not* affect the lawfulness of the cultivation of marijuana [at one's residence]." Marijuana Control, Regulation, and Education Act, Assem. B. 390, at § 11725(f) (as amended by Ammiano, Jan. 4, 2010), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0351-0400/ab_390_bill_20090223_ introduced.pdf (emphasis added). While such blatantly "non-criminalizing" words were noticeably deleted from the updated version of the Act, no provision has been included to make such behavior illegal. *See generally* Marijuana Control Act § 11725.

170. For example, the following scenario would be quite possible: a teenager comes home from a high school that has just "educated" her concerning the ills of marijuana to a home with a backyard full of marijuana plants.

171. *See* JOHNSTON ET AL., *supra* note 166, at 208 tbl.5–5a (showing that although marijuana is the most used illegal substance among high school students, there has been a general decline in its use over the past decade among those students); *see also* NATIONAL DRUG THREAT ASSESSMENT, *supra* note 18, at 17 ("[R]ates of past year use for adolescents aged 12 to 17 declined from 15.0 percent in 2003 to 12.5 percent in 2007. [Further] data shows that the rates of past year use among eighth, tenth, and twelfth graders have decreased overall since 2003.").

172. KLEIMAN, *supra* note 6, at 275.

173. SCHWENK & RHODES, *supra* note 123, at 142.

V. Conclusion

In this country, marijuana has always been attached with underlying symbolism. "So long as people are reacting to the symbolic content of marijuana use, they will regard marijuana smoking as morally wrong. And as long as they regard marijuana smoking as morally wrong, at least some of them will seek the aid of the law to prohibit the activity."[174] Minority groups must understand that the symbolic history of marijuana, and therefore its moral history, has roots strongly tied with racism, xenophobia, and class oppression. In the face of the potential legalization of this drug through legislation similar to or modeled after California's Marijuana Control, Regulation, and Education Act, minority groups must personally consider the likely outcomes such legalization would have in their communities.

When Mexicans and West Indians first brought marijuana into this country, it became steadily entrenched in outrageous tales of story and fiction, egged on by a pervasive fear and resentment of racial and ethnic minorities. When white young adults, in the 1960s and 1970s, began using marijuana en masse, an utter lack of scientific research and study of the drug confronted the nation and its political leaders. Yet, the disdainful image of marijuana prevailed and its prohibition grew even stronger.

Today, the consequences of marijuana prohibition seem far worse than the actual effect of the drug. The black community, which has felt these consequences at a disproportional rate, now lacks many of its young adults because they have simply possessed or smoked pot. Rather than contributing something to their community, these individuals remain locked away in jail cells contributing nothing. California's Marijuana Control, Regulation, and Education Act proposed to solve these and other problems by legalizing marijuana.

Yet, on closer inspection, California's bill, while potentially solving some harms, seems to create new ones. Because the prohibition of marijuana in this country is inextricably tied to the heritage of racial and ethnic minority groups, these groups must analyze the California bill and others like it so as to not once again be disserved by a legislative mechanism. Therefore, minority groups should look to how the legalization of marijuana will affect their neighborhoods, their children, their economies, and their safety. While inequality exemplifies the current

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174. THE NEW PROHIBITION, *supra* note 85, at 17.

situation, minority groups may find that legalization of marijuana, under California's terms, would provide nothing better than a history repeated.

Perhaps minority groups should seek other solutions. Perhaps minorities should create an initiative maintaining marijuana prohibition, but rather than incarcerating its violators, promising to rehabilitate them with treatment.[175] Maybe, as Mark Kleiman suggests, minorities could lobby for a qualified form of legalization in which consumers could only buy pot with a highly-monitored personal license.[176] Or, perhaps, the California initiative is perfectly workable and would in fact rescue minority communities from their struggles with the current state of law. Whatever the proper solution may be, the class oppressive history of marijuana prohibition in this country has hurt minority groups in lasting ways. Heeding that history and its effects, minority groups must be ready to voice their opinions, thoughts, and suggestions in the face of the potential legalization of marijuana in the states of this country.

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175. *See* GERBER, *supra* note 44, at 64 (explaining the proposition to replace drug incarceration with treatment in hopes of rehabilitating addicts and users).

176. *See* KLEIMAN, *supra* note 6, at 277 ("A personal license to use marijuana with a quantity limit could help remedy [marijuana legalization] failures without imposing unworkable administrative burdens or greatly expanding the market for illicitly produced marijuana.").