

Legalization of Marijuana and the Conflict with International Drug Control Treaties

Biju Panicker*

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Professor Jalila Jefferson-Bullock

Abstract

The present system of worldwide drug control is based upon three international conventions: the Single Convention on Narcotic Drugs as amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances, and the 1988 Convention Against Illicit Trafficking of Narcotic Drugs and Psychotropic Substances. These treaties require participating nations to limit and even criminalize the possession, use, trade, and distribution of drugs outside of medical and scientific purposes, and work together to stop international drug trafficking. This paper argues that the recent move toward legalization of use, possession, and sales of marijuana in the United States (U.S.) and other foreign nations is in conflict with international treaty obligations. While each state in the U.S. has its own drug laws and controlled substances acts, the Supremacy Clause of the U.S. Constitution places international treaties on the same legal footing as federal law. Under this argument, Alaska, Colorado, Oregon, Washington, Washington D.C., as well as Uruguay and The Netherlands' legalization of marijuana for recreational use, allowance of possession and sales, is in contravention of U.S. federal law and international treaties. Finally, this paper will also look at Portugal's 2001 decision to decriminalize all drug use to answer the question as to whether the international drug treaties place a "firm limitation" on the legal, "non-medical" sale of schedule drug or truly obligate countries to penalize drug use.

Keywords: Marijuana Legalization, International Conventio

* © Biju Panicker, J.D. 2015, Arizona Summit Law School; M.S. 2013, Grand Canyon University, Leadership, with a concentration in Disaster Preparedness & Executive Fire Leadership, B.S. 2000, Quinnipiac University, International Business. While at Arizona Summit Law School, Biju interned for the Maricopa County Attorney's Office, US Department of State, and the Tempe City Attorney's Office to name a few. Biju aspires to become a prosecutor upon passing the Bar. The author would like to extend a special thanks to Professor Jalila Jefferson-Bullock for her guidance and support while researching this topic. The author would also like to thank Samantha Gaul and the staff of the Chicago Kent Journal of International and Comparative Law for their valuable input and editorial assistance.

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INTRODUCTION

Few topics of current interest are as controversial and evoke as much passion and emotion when discussed as that of the debate on marijuana.¹ There has been a growing awareness of the issue in recent years, as well an increasing discontent over what is being deemed as a failure on the global campaign to eradicate drug use, otherwise known as the “War on Drugs”.² As international and domestic pressure increases, drug reform in the form of liberal marijuana legislation is being discussed and implemented around the globe. The prohibitionist approach to marijuana use, enshrined in U.S. law and in the UN drug control regime, is facing unprecedented challenges. As of August 2012, seventeen states in the U.S. have passed laws legalizing the medical use of marijuana, while four states—including Alaska, Colorado, Oregon, and Washington, D.C.—have voted to “introduce initiatives to outright legalize the use of recreational marijuana.”³

In late 2013 Uruguay’s parliament approved a bill to legalize and regulate the production and sale of marijuana, making it the first country to legalize the use of recreational marijuana.⁴ Increasingly other nations are beginning to consider introducing new legislation that would decriminalize consumption, possession, and purchase of marijuana and would implement a licensing system for legal cultivation.⁵ The opinions on drug reform are all similarly limited in scope to domestic factors but miss an important legal analysis: the discussion about the international legal system as embodied in the three international drug control treaties to which the U.S. and many other nations are signatories.⁶

¹ Mark A. Leinwand, *The International Law of Treaties and United States Legalization of Marijuana*, 10 COLUM. J. TRANSNAT’L L., 413 (1971).

² HEATHER J. HAASE, NICOLAS EDWARD EYLE & JOSHUA RAYMOND, N.Y. CITY BAR ASS’N COMM. ON DRUGS AND LAW, *THE INT’L DRUG CONTROL TREATIES: HOW IMPORTANT ARE THEY TO US DRUG REFORM?* 1 (Aug. 2012), <http://www2.nycbar.org/pdf/InternationalDrugControlTreatiesArticle.pdf>.

³ Steven W. Bender, *Joint Reform: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV’T L. REV. 359, 360, 372 (2013).

⁴ Frederick Dahl, *U.S. States’ Pot Legalization Not in Line with International Law: U.N. Agency*, REUTERS (Nov. 12, 2014), <http://www.reuters.com/article/2014/11/12/us-usa-drugs-un-idUSKCN0IW1GV20141112>.

⁵ HAASE, *supra* note 2, at 1.

⁶ *See id.* at 2.

This paper argues that the recent shift toward legalizing marijuana by the United States (U.S.) and other foreign nations is in conflict with their obligations to the international drug enforcement treaties. Part I of this paper begins by examining the international drug treaties: The Single Convention on Narcotic Drugs as amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances, and the 1988 Convention Against Illicit Trafficking of Narcotic Drugs and Psychotropic Substances. Subsequently, Part II provides an overview of the history of U.S. marijuana regulation, analysis of federal regulation of marijuana, and an analysis of legislative measures for each of the states that have chosen to legalize marijuana. Part III focuses on specific nations that have developed nationally appropriate controlled substances policies that shift away from the prohibition approach. Part IV covers the grey area, which includes the legal ambiguities and offers evidence on the impact of alternative reforms of marijuana under the UN treaties. Part V covers the clear limits that cannot be crossed without violating international treaties while suggesting a framework for reform and rational drug policy. Finally, this paper encourages an intelligent and open dialogue towards the future of global drug control policies.

I. INTERNATIONAL DRUG CONTROL TREATIES

Due to the concern that threat drugs pose to children and society as a whole globally, the United Nations adopted international conventions focusing on the criminalization and punishment aspect of the sale of illicit drugs as well restricting individual nations from developing their own solutions to a global problem.⁷ Under international law, there are no traditional or customary norms regarding drugs.⁸ The international legal norms that exist are within the context of international agreements and treaties.⁹ Examining the UN Drug Treaties and establishing which nations are signatories to the agreements is the first step in understanding how these treaties are binding under international law.¹⁰ The next step would be to determine how the U.S. can legalize marijuana without violating the treaties, and how legalization applies to U.S. federal law.¹¹ The

⁷ Melissa T. Aoyagi, *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, 37 N.Y.U. J. INT'L L. & POL. 555 (2006).

⁸ Leinwand, *supra* note 1, at 414.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 418.

final step would be to review the conventions and determine how these treaties are being challenged today. The three UN Drug Conventions constitute the main international laws concerning the control of narcotic drugs and psychotropic substances.¹² The treaties are not “self-executing,” meaning that each signatory country must enact laws implementing the treaties in their own jurisdictions.¹³ The Conventions are legally binding pursuant to the 1969 Vienna Convention on the Law of Treaties, which states that a country “may not circumscribe its obligations under the treaties by enacting a conflicting domestic law.”¹⁴

A. 1961 Single Convention

The Single Convention on Narcotic Drugs of 1961 (hereinafter “Single Convention”) forms the framework for global drug control as it exists today.¹⁵ Prior to the Single Convention, there were a number of earlier treaties, beginning in 1912 with the International Opium Convention,¹⁶ the 1925 Geneva Opium Convention,¹⁷ the 1931 Convention for Limiting the Manufacture and Regulating Distribution of Narcotics.¹⁸ The 1931 Convention was implemented as an answer to the failure of the 1925 Geneva Convention, by restricting the quantity of manufactured drugs available for each country for medical and scientific purposes.¹⁹ Finally, between World War I and World War II, the Illicit Traffic in Dangerous Drugs Treaty was adopted. The Treaty emphasizes the importance of implementing increased punishment provisions for illicit drug trafficking into their domestic laws.²⁰ After World War II, the administration of

¹² HAASE, *supra* note 2, at 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ David R. Bewley-Taylor, *Challenging the UN Drug Control Conventions: Problems and Possibilities*, 14 INT’L J. DRUG POL’Y, 171, 172 (2003).

¹⁶ Daniel Heilmann, *The International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights Violations*, 19 CARDOZO J. INT’L & COMP. L. 237, 241 (2011) (citing *1912 Hague Int’l Opium Conv.*, 8 L.N.T.S. 187) (Jan. 23, 1912) (This Convention stipulated that the manufacture, trade and use of narcotic drugs should be limited to medical and scientific purposes. This was ratified by the U.S., China, Norway, the Netherlands, and Honduras and later changed to include the losing parties of World War I under the Versailles Treaty of 1919).

¹⁷ *Id.* at 242 (citing *Int’l Opium Conv.*, 81 L.N.T.S. 317) (Feb. 19, 1925) (The Convention required States to annually submit statistics on the production of opium and coca leaves to the Permanent Central Opium Board (PCOB)).

¹⁸ *Id.* (citing *Conv. For Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs*, 139 L.N.T.S. 301) (Jul. 13, 1931).

¹⁹ *Id.*

²⁰ *Id.* (citing *Conv. for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs*, 139 L.N.T.S. 301) (Jul. 13, 1931).

drug control was transferred from the League of Nations to the United Nations by the Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs.²¹ In 1948, the U.N. Economic and Social Council adopted the “Paris Protocol” to supplement the 1931 Convention and to incorporate the existing international conventions.²² Finally, in 1953 the Opium Protocol was signed in New York.²³ The intention of the protocol was to eliminate the overproduction of opium by allowing only seven states to produce opium for export: Bulgaria, India, Iran, Greece, the Soviet Union, Turkey and Yugoslavia.²⁴ However, due to the increasing complexity of designer drugs and drug control, the international community felt the need to combine the array of conventions under one treaty.²⁵ The result of that effort are the three international drug treaties that exists today.²⁶

The Single Convention was established not only to centralize the various international agreements regarding narcotics drugs, but also to streamline the control mechanisms, the use and trafficking of substances with abuse potential while assuring the availability of these drugs for scientific and medical purposes.²⁷ The goal of the Single Convention was to eliminate opium over a 15-year period, and coca and marijuana within 25 years.²⁸ The scope of the Single Convention included substances derived from plants (i.e. opium, heroin, cocaine, and marijuana).²⁹ The Single Convention consists of fifty-one articles and four schedules with drugs grouped according to their addictive

²¹ *Id.* at 243. (citing *Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs*, 12 U.N.T.S. 179) (Dec. 11, 1946).

²² *Id.* (The Paris Protocol was adopted to close any loopholes brought on by the rise of “designer drugs” (i.e. methadone and opiate derivatives) through the introduction of the “similarity concept” which was to prevent drug manufacturers from producing similar drugs).

²³ *Id.* (citing *Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of International and Wholesale Trade in, and Use of Opium*, 456 U.N.T.S. 3) (Jun. 23, 1953).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 244.

²⁷ Aoyagi, *supra* note 7, at 577.

²⁸ MARTIN JELSMA, GLOB. COMM’N ON DRUG POLICIES, THE DEVELOPMENT OF INTERNATIONAL DRUG CONTROL: LESSONS LEARNED AND STRATEGIC CHALLENGERS FOR THE FUTURE 4 (2011), http://www.globalcommissiondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Com_Martin_Jelsma.pdf.

²⁹ Heilmann, *supra* note 16, at 244.

properties.³⁰ Following the Conventions provisions, marijuana use became subject to criminal controls in nations that subscribed to the Geneva Convention.³¹ This included making illegal the production, distribution and sale of marijuana, and also the purchase, possession and use.

Article 2 of the Convention addresses control measures and the action of two agencies, the World Health Organization (WHO) and the Commission on Narcotics and Drugs (CND). The WHO determines whether a substance has dangerous properties and should therefore be listed on one of the schedules.³² The CND will then act upon the recommendation of the WHO, or take no action at all.³³ Article 28(3) of the Convention, discusses the prevention of the misuse, and illicit traffic of cannabis leaves.³⁴ Cannabis leaves are not included in the Convention except in Article 28(3), which can be argued that it is broad enough to be very loosely interpreted, and the basis by which some states in the U.S. and other foreign nations are looking at legalizing marijuana.³⁵ However, Article 4 of the Convention provides that the parties must take the legislative and administrative action necessary to carry out the provisions of the treaty.³⁶ Article 4, specifies that the parties may not permit the production, export, import, or possession of the listed drugs, including marijuana, except for medical purposes.³⁷ The leaves of the hemp plant were excluded from the definition of marijuana for purposes of the Convention and included in the less stringent

³⁰ *Single Convention on Narcotic Drugs* (1961), as amended by the *Protocol Amending the Single Convention on Narcotic Drugs*, 976 U.N.T.S. 105 (Aug. 8, 1975) (Schedule I drugs are deemed to be illegal because of their high abuse potential, lack of medical use properties, and severe safety concerns; for example (i.e. heroin, LSD, cocaine). Marijuana remains to be a Schedule I drug, despite it being legal in some states and it being used a medicinal drug in some states. Schedule II drugs includes drugs have a high potential for abuse and dependence, an accepted medical use, and the potential for severe addiction, (i.e. fentanyl, oxycodone, morphine, etc.), Schedule III drugs have a lower potential for abuse than drugs in the first two categories, accepted medical use, and mild to moderate possible addiction, (i.e. low dose codeine and hydrocodone), and finally Schedule IV drugs have an even lower abuse potential than Schedule 3 drugs, accepted medical use, and limited addiction potential, (i.e. anti-anxiety meds, sedatives and sleeping agents).

³¹ ROBIN ROOM, ET AL., BECKLEY FOUNDATION, GLOBAL CANNABIS COMMISSION REPORT: CANNABIS POLICY: MOVING BEYOND STALEMATE 95 (2008), <http://www.beckleyfoundation.org/cannabis-policy-moving-beyond-stalemate>.

³² *Id.* at 91.

³³ *Id.*

³⁴ Leinwand, *supra* note 1, at 418

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

provisions of Article 28,³⁸ because the leaves were considered to contain less of the “narcotic” substance than the flowers and resin of the plant.³⁹ Article 33, provided that “the parties shall not permit possession” of marijuana “except under legal authority.”⁴⁰ Under Article 36, each party is required to establish penal provisions for all quantities of possession.⁴¹ Under Article 39, each State is allowed to adopt stricter laws than those provided under the Single Convention.⁴²

B. 1971 Convention on Psychotropic Substances

In 1971, the Single Convention was amended by the 1972 protocol to bring into conformity with the 1971 Convention of Psychotropic Substances (hereinafter “1971 Convention”).⁴³ The CND drafted the 1971 Convention as a response to the increasing concern over the diversifying pattern of and expansion of psychotropic drug trafficking and usage.⁴⁴ The Single Convention was limited in scope to marijuana and thus due to the increasing demand for psychotropic substances the 1971 Convention extended the control system to include more than a hundred psychotropic substances (i.e. methamphetamine and LSD),⁴⁵ which are distributed into four lists.⁴⁶ The 1971 Convention also provided technical and financial assistance toward scientific research and education for combating the illegal trafficking of drugs, the destruction of illegally cultivated marijuana, and extradition provisions were added to the penal provisions of the Convention.⁴⁷ The 1971 Convention was fairly similar to the Single Convention in its general purpose to limit the manufacture, trade and use of psychotropic substances, however in contrast to the Single Convention which focused on the “serious evil” of drug addiction, the 1971

³⁸ Single Convention on Narcotic Drugs, *supra* note 30 at art. 28 (Marijuana is covered under art. 28, whereas in other articles, it is just one of the many drugs discussed).

³⁹ Leinwand, *supra* note 1, at 417.

⁴⁰ ROOM, *supra* note 31, at 95.

⁴¹ Aoyagi, *supra* note 7, at 578.

⁴² *Id.* (citing *Protocol Amending the Single Convention on Narcotic Drugs*, 1961, art. 36, 976 U.N.T.S. 3) (Mar. 25, 1972).

⁴³ *Id.*

⁴⁴ JELSMA, *supra* note 28, at 4.

⁴⁵ *Id.*

⁴⁶ *Id.* at 5 (The controlled psychotropic substances are categorized similar to the four schedules under the Single Convention).

⁴⁷ Heilmann, *supra* note 16, at 246 (In the absence of an extradition treaty, the Single Convention can be used in place of) (citing Single Convention, art. 36(2)(b)(2)).

Convention described drug abuse as a public health problem.⁴⁸ Additionally, the 1971 Convention focused on drug manufacturing instead of agricultural states.⁴⁹ The overarching premise of the 1971 Convention was the ... “concern for public health and social problems resulting from the abuse of certain psychotropic substances”.⁵⁰

The Convention consists of thirty-three articles and four schedules.⁵¹ Any substance included in the schedules were to be licensed by the federal government for manufacture, trade and distribution.⁵² However, in comparison to the strict controls of the Single Convention, the 1971 Convention imposed a weaker control structure due to significant pressure from U.S. and European pharmaceutical industries.⁵³ The main difference between the Single Convention and the 1971 Convention is that under the 1971 Convention a medical prescription is required for individual use of all psychotropic substances, whereas under the Single Convention, a medical prescription is only required for certain Schedule I drugs.⁵⁴ According to Article 10 of the 1971 Convention, directions for use, warnings and cautions need only be given when necessary for the safety of the patients using them.⁵⁵ Article 20 addressed measures to be taken against the abuse of psychotropic substances, including treatment, education, rehabilitation and reintegration into society.⁵⁶ Article 20 also acknowledged the need for drug users to have a way to be rehabilitated and not just penal sanctions to keep drugs from users.⁵⁷ The 1961 and 1971 Conventions were aimed at limiting the cultivation of opium and marijuana to amounts

⁴⁸ Aoyagi, *supra* note 7, at 579.

⁴⁹ *Id.* at 578.

⁵⁰ *Id.* (citing *Convention on Psychotropic Substances*, 1019 U.N.T.S. 175) (Feb. 21, 1971).

⁵¹ See Heilmann, *supra* note 16, at 247 (The controlled psychotropic substances are grouped in the same manner as they are under the Single Convention) (citing *Convention on Psychotropic Substances*, 1019 U.N.T.S. 175) (Feb. 21, 1971).

⁵² *Id.*

⁵³ JELSMAN, *supra* note 28, at 4.

⁵⁴ ADOLF LANDE, UNITED NATIONS FUND FOR DRUG ABUSE CONTROL, COMMENTARY ON THE CONVENTION ON PSYCHOTROPIC SUBSTANCES 189 (March 25, 1972), https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_protocol_1961.pdf.

⁵⁵ Heilmann, *supra* note 16, at 248 (citing *Convention on Psychotropic Substances*, 1019 U.N.T.S. 175) (Feb. 21, 1971).

⁵⁶ *Id.*

⁵⁷ See *id.* (Article 20 was written broadly as to provide states with guidelines to follow rather than mandatory rules for states to adopt).

needed for medical purposes and to curb the diversion of psychoactive pharmaceutical drugs as well as marijuana and opium for illicit purposes.⁵⁸ However, during the 1970's and 1980's the demand for nonmedical use of marijuana, cocaine and heroin, exponentially increased.⁵⁹ Large-scale illicit production to supply that market developed in the countries where the plants had been grown traditionally.⁶⁰ International illicit drug trafficking rapidly expanded into a multi-billion dollar business under control of criminal groups.⁶¹

C. 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs

By the mid 1980's it was apparent that global drug use had reached unprecedented proportions and the need to combat all the ever-growing illicit production, possession and trafficking of drugs had reached its peak.⁶² In response, the UN convened another conference, and requested the Commission on Narcotic Drugs (CND) to draft another convention against illicit cultivation, production and trafficking of drugs.⁶³ This convention became the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter "1988 Convention").⁶⁴ The Convention consists of thirty-four articles with an annex containing two lists of substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances.⁶⁵ The 1988 Convention significantly reinforced the obligation of countries to apply criminal sanctions to combat all aspects of global drug trafficking from production, possession and trafficking to anti-money laundering measures.⁶⁶ Although money laundering was already a punishable offense under the Single Convention, the provisions of the 1988 Convention were more specific.

⁵⁸ JELSMA, *supra* note 28, at 5.

⁵⁹ *Id.* (citing Jay Sinha, *The History and Development of the Leading International Drug Control Conventions*. Report prepared for the Canadian Senate Special Committee on Illegal Drugs (2001); William B. McAllister, *Drug Diplomacy in the Twentieth Century: An International History* (2000)).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² DAVID R. BEWLEY-TAYLOR & CINDY S.J. FAZEY, FORWARD THINKING ON DRUGS, THE MECHANICS AND DYNAMICS OF THE UN SYSTEM FOR INTERNATIONAL DRUG CONTROL 3 (Mar. 14, 2003), <http://www.forward-thinking-on-drugs.org/review1.html>.

⁶³ JELSMA, *supra* note 28, at 5.

⁶⁴ *Id.*

⁶⁵ Heilmann, *supra* note 16, at 249 (citing 1988 Convention, arts. 5 & 12).

⁶⁶ JULIA BUXTON, THE WORLD BANK DEV. AND RES. GROUP, THE HISTORICAL FOUNDATIONS OF THE NARCOTIC DRUG CONTROL REGIME 25 (2008), <https://openknowledge.worldbank.org/handle/10986/6571>.

Article 3(1)(b) establishes drug related money laundering as a criminal offense, and in targeting criminal proceeds, the 1988 Convention asks parties to confiscate proceeds from drug related offenses, to include banking and financial records.⁶⁷ Article 12 extended criminal offenses for which extradition could be sought, to include drug related money laundering and the manufacture, transport and distribution of equipment and chemicals used to make psychotropic drugs and narcotic drugs.⁶⁸ The main point of the 1988 Convention was to reach a political balance between consumer and producer countries, while also trying to suppress the demand for drugs.⁶⁹ In comparison to the previous two Conventions, which focused on the supply of illicit production and trafficking, the 1988 Convention sought to oblige States to extend stricter controls on the demand for illicit drugs by making all ends of the “market chain” a criminal offense instead of just punishable offenses.⁷⁰ In turn, the consequence of the 1988 Convention under Article 3(2) was to make the possession, purchase, and cultivation of illicit drugs for personal consumption a criminal offense.⁷¹

The relevant oversight and compliance of the UN international drug control system is managed by: the CND, the International Narcotics Control Board (INCB), and the UN Office on Drugs and Crime (UNODC).⁷² Other UN

⁶⁷BEWLEY-TAYLOR, *supra* note 62, at 3 (The development of comprehensive domestic legislation for seizure and forfeiture of proceeds from drug trafficking and money laundering were in its infancy in the early 1980's. As a result the CND was unsure as to the amount of detail that would be necessary and appropriate in drafting this Convention).

⁶⁸ *Id.*

⁶⁹ *Id.* at 14.

⁷⁰ WILLIAM C. GILMORE, ET AL., UNITED NATIONS FUND FOR DRUG ABUSE CONTROL, COMMENTARY ON THE UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES 49 (1988), https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_united_nations_convention_1988_E.pdf.

⁷¹ *Id.* (The underlying idea of article 3 was to improve the effectiveness of the criminal justice system as it applied to drug trafficking. Although the 1988 Convention as a whole looks to establish a minimum standard for implementation, parties are not prevented from adopting stricter laws than those mandated in the Convention, so long as the stricter measures are within the norms of international law) (*See also* Heilmann, *supra* note 16, at 253).

⁷² Heilmann, *supra* note 16, at 253 (The CND, formed in 1946 is comprised of 53 UN member States is a functional commission of the Economic and Social Council (ECOSOC). The UN Charter entrusts ECOSOC with international economic, social, cultural, educational, health and related matters The CND advises ECOSOC "and is the central policy making body concerning all drug related matters in the UN. The UNODC is responsible for the coordination of the UN anti-drug programs, with its mission involving close cooperation and assistance to national governments on the domestic and

related agencies are also involved, in the coordination and development of drug control policies, to include the WHO, and the United Nations Educational, Scientific and Cultural Organization (UNESCO).⁷³ The UN guided drug control effort is interdependent with unilateral efforts at the domestic level and with many bilateral initiatives.⁷⁴ In the U.S., the President submits to Congress a report identifying the major drug producing and drug transit countries. Every country from that list which has failed to make substantial efforts to adhere to substantial international counter-narcotics agreements may then be subject to sanctions, such as loss of U.S. economic aid.⁷⁵

II. U.S. STATES LEGALIZING MARIJUANA FOR RECREATIONAL USE

Marijuana is the most commonly used illicit drug in the U.S.⁷⁶ The availability of marijuana in the U.S. can be attributed to rising marijuana production in Mexico and increased cultivation and trafficking in the U.S. led by criminal syndicates has also been a factor in the increase in use.⁷⁷ Until 1937, the growth and use of marijuana was legal under federal law. The federal government unofficially banned marijuana under the Marijuana Tax Act of 1937.⁷⁸ The MTA imposed a strict regulation requiring a high-cost transfer tax stamp for every sale of marijuana, and these stamps were rarely issued by the federal government.⁷⁹ Later the 1951 Boggs Act and the 1956 Narcotics Control Act established and increased federal penalties for marijuana offenses,⁸⁰ with the former prompting several states to increase their own penalties under

regional level. INCB is the independent and quasi-judicial control organ for the implementation of the drug control treaties).

⁷³ *Id.*

⁷⁴ *Id.* at 257.

⁷⁵ Kal Raustiala, *Law, Liberalization and International Narcotics Trafficking*, 32 N.Y.U.J. INT'L & POL. 89, 110-13 (1999).

⁷⁶ LISA N. SACCO & KRISTIN FINKLEA, CONGR. RES. SERV., STATE MARIJUANA LEGALIZATION INITIATIVES: IMPOSSIBLE FOR FEDERAL LAW ENFORCEMENT 1 (2014), <https://www.fas.org/sgp/crs/misc/R43164.pdf>.

⁷⁷ *Id.*

⁷⁸ Marijuana Tax Act of 1937, Public Law No. 75-238, (1937).

⁷⁹ SACCO, *supra* note 76, at 3. (See statement by H.J. Anslinger Commissioner of Narcotics, Bureau of Narcotics, Department of Treasury, House Committee on Ways and Means, *Taxation of Marijuana*, 75th Cong. 1st sess.).

⁸⁰ JEROME L. HIMMELSTEIN, *THE STRANGE CAREER OF MARIJUANA: POLITICS AND IDEOLOGY OF DRUG CONTROL IN AMERICA*, 23, 90 (Greenwood Press, 1983).

existing marijuana and narcotics laws. Today, marijuana is classified as a Schedule I controlled substance under the Controlled Substances Act of 1970.⁸¹

A. Controlled Substances Act

In 1970 Congress enacted the Controlled Substances Act (CSA) (21 U.S.C. §801) as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L 91-513), and placed the control of marijuana and other plant, drug, and chemical substances under federal jurisdiction regardless of state regulations and laws.⁸² Under the CSA there are five schedules which substances may be classified under, Schedule I being the most restrictive.⁸³ Marijuana is designated as a Schedule I controlled substance under the CSA in which the federal government has determined that marijuana (1) has a high potential for potential for abuse, (2) has not met certain medicinal standards to be declared safe, and (3) has no currently accepted medical use in treatment in the U.S. The CSA was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁸⁴ In designating marijuana as a Schedule I controlled substance, this legislation officially prohibited the manufacture, distribution, dispensation and possession of marijuana.⁸⁵ As part of the CSA, the National Commission on Marijuana and Drug Abuse, also known as the Shafer Commission, was established to study marijuana usage in the U.S., examining such issues as:

1. The extent of use of marijuana in the U.S. to include its various sources of users, number of arrests, number of convictions, amount of marijuana seized, type of user, nature of use;

⁸¹ 21 U.S.C. § 811(a) (2014)(Changing the schedule of a drug may be initiated by the Attorney General (via the DEA), the Secretary of Health and Human Services (HHS) or by any interested person. Congress may also change the scheduling of a drug through legislation).

⁸² Nat'l Org. for Reform of Marijuana Laws (NORML) v. Drug Enforcement Administration, U. S. Dept. of J., 559 F.2d 735, 737 (D.C. Cir. 1977) (A controversy surrounding federal control of dangerous drugs and groups seeking to effect change in the controls applicable to marijuana under the CSA eventually developed into a court case heard by the U.S. Cir. Ct. App. – CA. The DEA has resisted those efforts by citing U.S. treaty obligations under the Single Convention).

⁸³ *Id.* (Substances placed onto one of these five schedules are evaluated based on: actual or relative potential for abuse, known side effects, history and current pattern of abuse, significance of abuse; risk to public health, physiological dependency, and whether the substance is an immediate precursor of an already scheduled substance); SACCO, *supra* note 76, at 1.

⁸⁴ *Id.* at 754 (citing BRIAN T. YEH, CONGR. RES. SERV., THE CONTROLLED SUBSTANCES ACT: REGULATORY REQUIREMENTS (2012)).

⁸⁵ SACCO, *supra* note 76, at 1 (citing 21 U.S.C. § 812 and § 841).

2. Evaluation of the efficacy of existing marijuana laws;
3. A study of the immediate and long-term effects, both physiological and psychological of marijuana use;
4. Relationship of marijuana use to aggressive behavior and crime.
5. Relationship between marijuana and other drug use, and;
6. International control of marijuana.⁸⁶

Over the past few decades, some states have deviated from an across the board prohibition of marijuana.⁸⁷ Evolving state-level positions on marijuana include decriminalization initiatives, legal exceptions for medical use, and legalization of certain quantities for recreational use.⁸⁸ “A state decriminalizes conduct by removing the accompanying criminal penalties; however, civil penalties remain.”⁸⁹ Under the CSA, a person convicted of simple possession (1st offense) of marijuana may be punished with up to one-year imprisonment and/or fines not less than \$1,000.⁹⁰ Under Massachusetts state law, a person in possession of an ounce or less of marijuana is subject to a civil penalty of \$100.⁹¹ However, the CSA does not distinguish between the medical and recreational use of marijuana.⁹² Under the CSA, marijuana has “no currently accepted medical use in treatment in the U.S.,” and states’ allowance of its use for medical purposes appears to be at odds with the federal position.⁹³ The CSA explicitly prohibits the cultivation, distribution, and possession of marijuana for any purpose other than to conduct federally approved research.⁹⁴ Under the Supremacy Clause of the Constitution,⁹⁵ state laws that conflict with federal law

⁸⁶ NAT’L COMM’N ON MARIJUANA AND DRUG ABUSE, MARIJUANA: A SIGNAL OF MISUNDERSTANDING: CHAPTER II, MARIJUANA USE AND ITS EFFECTS (1972), <http://www.druglibrary.org/schaffer/library/studies/nc/ncchap2.htm>.

⁸⁷ SACCO, *supra* note 76, at 5.

⁸⁸ *Id.* “Decriminalization initiatives by the states do not appear to be at odds with the CSA because both maintain that the mere possession of marijuana is in violation of the law.”

⁸⁹ *Id.* For instance, “individuals in possession of small amounts of marijuana in Massachusetts, a state that has decriminalized possession in small amounts are in violation of the CSA and Massachusetts state law.

⁹⁰ 21 U.S.C.A. § 822 (2014).

⁹¹ M.G.L. c.942, s.32L, and M.G.L. c.40, s.21D (Under Massachusetts state law, possession of an ounce or less of marijuana is a civil offense for persons over the age 18, however offenders under the age of 18, must also complete a drug awareness program).

⁹² SACCO, *supra* note 76, at 6.

⁹³ 21 U.S.C.A. §812(b)(1) (2012).

⁹⁴ *Id.*

⁹⁵ U.S. CONST., art. VI, cl. 2.

are generally preempted and therefore are void.⁹⁶ However, 18 states and the District of Columbia have enacted exceptions in contrast to the complete federal prohibition.⁹⁷

B. State Marijuana Legalization Initiatives

The three levels of government that regulate nearly every human activity in this country are local, state, and federal.⁹⁸ The disparity in the way the subject of marijuana is treated at these three different levels is what is most interesting.⁹⁹ At the federal level, possession of marijuana is considered a serious felony, while some states view it as a constitutional right.¹⁰⁰ At the local level, some view marijuana as a nuisance and others think it should be regulated to exploit it as a tax source.¹⁰¹ Despite the disparity on the subject of marijuana provisions at all three levels, nearly one third of states, plus the District of Columbia, now have medical marijuana provisions.¹⁰² Most of these provisions require a doctor's diagnosis and recommendation to qualify someone for an exception from enforcement of the state's marijuana prohibition laws. "Even in those states that have legalized marijuana for medical purposes, there is often a tension between state and municipal governments over whether and to what extent the drug may be regulated at the local level."¹⁰³ Some local counties have asked to be excused from their state obligations, arguing that participation in the state regulatory standards would make them complicit in the violation of federal marijuana laws.¹⁰⁴ However, allowing for a "localist" parallel would open the door for municipalities to subvert state wide policy.¹⁰⁵

⁹⁶ *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) ("No form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress." The "aggregate impact on the national market" would be "substantial," and within Congress's power to regulate). (See also *Gonzalez v. Raich*, 545 U.S. 1 (2005)).

⁹⁷ TODD GARVEY, CONGR. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 1 (2012), <https://www.fas.org/sgp/crs/misc/R42398.pdf>.

⁹⁸ Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 151 (2012).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 152.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See 18 U.S.C.A § 2(a) (West 1999) ("Whoever commits an offense against the U.S. or aids, abets, counsels, commands, induces, or procures its commission, is punishable as principal").

¹⁰⁵ Kamin, *supra* note 98, at 162-63.

The increased willingness of the states to experiment with alternative ways of regulating marijuana stands in strong contrast to the total prohibition on marijuana that has existed at the federal level.¹⁰⁶ Over the years, voters in a few states considered, but rejected, ballot initiatives legalizing recreational use of marijuana.¹⁰⁷ As of late 2012, there was a noticeable upswing in support of the legalization of marijuana, with even greater support for medical marijuana.¹⁰⁸ In 2012, Colorado and Washington voters passed referendums, becoming the first states to legalize the recreational use of marijuana.¹⁰⁹ Following Colorado's lead, Alaska voters passed the Alaska Marijuana Legalization ballot measure in November 2014, allowing adults 21 and older to transport, buy or possess up to an ounce of marijuana in public and four ounces in their homes.¹¹⁰ Oregon voters approved a similar measure, set to take effect in 2016, which allows adults to possess up to an ounce of marijuana in public and eight ounces in their homes.¹¹¹ Officials in D.C. are also moving ahead with plans to implement a marijuana initiative approved by voters. D.C.'s proposal, while more reserved than others, allows for people 21 or older to possess up to two ounces of marijuana for personal use and grow up to six marijuana plants in their home.¹¹²

1. Analysis of Oregon Measure 91 (2014)

Oregon was the first state to decriminalize marijuana possession in 1973.¹¹³ Within five years Alaska, California, Colorado, Mississippi, New York, Nebraska, North Carolina, and Ohio, decriminalized marijuana.¹¹⁴ By the end of the 1990's, many states had adopted a medical marijuana program.¹¹⁵ California

¹⁰⁶ *Id.* at 152.

¹⁰⁷ Uelmen, *supra* note 103, at 8.

¹⁰⁸ Connor Adam Sheets, *Marijuana Legalization Inevitable: But How & When Will Weed Become Hassle-Free?*, INT'L BUS. TIMES (Apr. 19, 2013), <http://www.pbl.com/uploads/23/doc/media335.pdf>.

¹⁰⁹ Christina Ng, Abby Phillips & Clayton Sandell, *Colorado & Washington Become First States to Legalize Recreational Marijuana*, ABC NEWS (Nov. 7, 2012), <http://abcnews.go.com/Politics/OTUS/colorado-washington-states-legalize-recreational-marijuana/story?id=17652774>.

¹¹⁰ Greg Botelho, *Alaska Becomes Latest State to Legalize Marijuana Use*, CNN (Feb. 25, 2015, 1:24 AM), <http://www.cnn.com/2015/02/24/us/alaska-marijuana>

¹¹¹ Chris Boyette & Jacque Wilson, *It's 2015: Is Weed Legal In Your State?*, CNN (Jan. 7, 2015, 8:09 AM), <http://www.cnn.com/2015/01/07/us/recreational-marijuana-laws>

¹¹² *Id.*

¹¹³ LEGIS. REVENUE OFF., ST. OF OR., RESEARCH REPORT NO. 3-14 2 (2014), <https://www.oregonlegislature.gov/lro/Documents/RR%203-14%20Measure%2091.pdf>

¹¹⁴ *Id.*

¹¹⁵ *Id.*

became the first state to legalize medical marijuana under Proposition 215 in 1996.¹¹⁶ Subsequently, 23 states, including Oregon in 1998, and the District of Columbia have adopted medical marijuana programs.¹¹⁷

Between 2011 and 2012, voters in Washington (Initiative 502) and Colorado (Amendment 64) passed ballot measures legalizing recreational marijuana.¹¹⁸

On November 4, 2014, Oregon voters approved the *Oregon Legalized Marijuana Initiative under Measure 91*.¹¹⁹ This new state statute makes it legal for people ages 21 and older to possess of up to eight ounces of “dried” marijuana and up to four plants for recreational purposes.¹²⁰ Prior to the success of measure 91, voters in Oregon had rejected a similar, but less stringent, marijuana legalization measure: Measure 80.¹²¹ If passed, Measure 80 would have allowed adults over the age of 21 to possess an unlimited supply of marijuana and given an industry-dominated board permission to regulate sales.¹²² The provisions under Measure 91 relating to cultivation, possession, delivery, and sale of marijuana will not become operative until July 1 2015.¹²³ The business licensing provisions will not become operative until January 2016 to give local jurisdictions time to consider their regulation procedures under the new law.¹²⁴ Under Measure 91, a person 21 years of age or older may produce, make, process, keep or store, per household:

- 4 marijuana plants;
- 8 ounces of useable marijuana (dried marijuana flowers and leaves);
- 16 ounces of solid homemade marijuana products; and
- 72 ounces of liquid homemade marijuana products.¹²⁵

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ H.B. 3400, 78th Leg. Assemb., Reg. Sess. (Or. 2014).

¹²⁰ Jeff Mapes, *With National Backing, Marijuana Advocates File Legalization Measure*, OREGON LIVE (Oct. 25, 2013), http://www.oregonlive.com/mapes/index.ssf/2013/10/with_national_backing_marijuan.html.

¹²¹ H.B. 3371, 78th Leg. Assemb., Reg. Sess. (Or. 2014).

¹²² Mapes, *supra* note 123.

¹²³ LEAGUE OF OR. CITIES, MEASURE 91: WHAT IT MEANS FOR LOCAL GOV'T, 5 (Nov. 2014), <http://www.cottagegrove.org/CCagendaitems/Staff%20memos/7bLOC%20report.pdf>.

¹²⁴ *Id.* at 2.

¹²⁵ S. Measure 91 § 6, 78th Leg. Assemb. (Or. 2014).

A citizen can have those quantities of marijuana and marijuana products at home; however, homegrown marijuana or homemade marijuana cannot be produced, processed, or stored in a location that can be seen from a public place.¹²⁶ Although the measure prohibits marijuana use in a public place, a person may possess up to one ounce of “personal use” marijuana on their person while in a public place.¹²⁷ Additionally, individuals without a license can transfer certain quantities of marijuana and marijuana products to others.¹²⁸ In particular, a person can deliver up to one ounce of homegrown marijuana, sixteen ounces of solid homemade marijuana products, and seventy-two ounces of liquid homemade marijuana products to another person of legal age for non-commercial purposes.¹²⁹ The Measure does allow production, processing, delivery, possession, and sale of marijuana to adults, licensed and regulated by the Oregon Liquor Control Commission (OLCC).¹³⁰

Measure 91 creates four types of licenses: producers, processors, wholesalers and retailers which are all required to apply for OLCC licenses.¹³¹ Marijuana producers, processors, and wholesalers may deliver “marijuana items” only to licensed retail premises, and individuals would also be able to carry multiple licenses.¹³² OLCC collects tax imposed on marijuana producers at different rates for marijuana flowers, leaves, and immature plants.¹³³ Under Measure 91, Oregon recreational marijuana will be taxed, “\$35 per ounce of flowers and \$10 for leaves, at the producer level.”¹³⁴ Tax revenues and fees fund an OLCC suspense account, the Oregon Marijuana Account which is then distributed for state wide necessities: 40% to Common School Fund, 20% for mental health/alcohol/drug services, 15% for state police, 10% for local law enforcement, and 5% to the Oregon Health Authority.¹³⁵ “The Legislative Revenue Office (LRO) estimates that in fiscal year 2017, the revenue from legal

¹²⁶ S. Measure 91 § 57, 78th Leg. Assemb. (Or. 2014).

¹²⁷ S. Measure 91 § 79, 78th Leg. Assemb. (Or. 2014).

¹²⁸ *Id.*

¹²⁹ S. Measure 91 §§ 3-70, 78th Leg. Assemb. (Or. 2014).

¹³⁰ Mapes, *supra* note 123.

¹³¹ LEAGUE OF OR. CITIES, *supra* note 126, at 2.

¹³² LEGIS. REVENUE OFF., ST. OF OR., *supra* note 117, at 2.

¹³³ Or. S. Measure 91, 78th Leg. Assemb. (Or. 2014).

¹³⁴ LEGIS. REVENUE OFF., ST. OF OR., *supra* note 117, at 5.

¹³⁵ LEGIS. REVENUE OFF., ST. OF OR., *supra* note 117, at 13.

marijuana is expected to be \$16.0 million,” with an expected growth to approximately \$40.9 million by fiscal year 2018-19.¹³⁶

Section 59 of Measure 91 recognizes that local governments can adopt “reasonable time, place and manner regulations” of the “nuisance aspects” of businesses that sell marijuana to consumers.¹³⁷ “In enacting those regulations, cities and counties must make specific findings that the regulated businesses would create adverse effects.”¹³⁸ “Although Measure 91 allows cities and counties, through the initiative process, to ban OLCC licensees from operating within the jurisdiction, a local ban does not impair the right of an individual person to possess homegrown marijuana or homemade marijuana products for personal use as provided in Measure 91.”¹³⁹ Measure 91 charges state police, local police and sheriffs with enforcing the new law and the OLCC to regulate all other production, processing and sales of marijuana.¹⁴⁰ However, Measure 91 does not disturb existing employment laws.¹⁴¹ “Employers could take the appropriate adverse employment action against an employee who was found to be using marijuana or tested positive for marijuana use in violation of the employer’s policies.”¹⁴² Notwithstanding Measure 91, marijuana remains a Schedule I controlled substance under federal law, which prohibits the production, possession, delivery and use of marijuana. 21 U.S.C. § 801, *et seq.*¹⁴³

2. Analysis of Colorado Initiative, Article 18, Section 16 (2012)

In November 2012, Colorado became the first state in the world to vote in favor of ending marijuana prohibition with the Colorado electorate voting in favor Amendment 64.¹⁴⁴ Amendment 64 made Colorado the first state to regulate the cultivation, manufacture and sale of marijuana for adults over 21.¹⁴⁵ Amendment 64 requires the state to construct legal, regulatory, and tax frameworks that would allow businesses to cultivate, process, and sell marijuana

¹³⁶ *Id.* at 1.

¹³⁷ LEAGUE OF OR. CITIES, *supra* note 126, at 2.

¹³⁸ *Id.*

¹³⁹ *Id.* at 3.

¹⁴⁰ *Id.* at 1, 4.

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* at 6.

¹⁴³ *Id.* at 1.

¹⁴⁴ H.B. 13-1317, 69th Leg. Assemb., Reg. Sess. (Co. 2012).

¹⁴⁵ LEGIS. REVENUE OFF., ST. OF OR., *supra* note 117, at 2-3.

not only to medical patients, as had been happening in Colorado for over a decade, but to anyone 21 and older.¹⁴⁶ Amendment 64 also gives individuals the constitutional right to grow marijuana plants at home.¹⁴⁷ Home growing provides additional benefits by allowing Coloradans a legal basis for growing marijuana in communities in which it cannot be purchased, or for individuals who prefer home cultivation to commercial marijuana.¹⁴⁸

The following are six regulatory actions that have gone into effect in response to Amendment 64:

1. *Seed-to-Sale Tracking System.* In an effort to track and monitor supply and prevent diversion, the state implemented a Marijuana Inventory Tracking Solution (MITS) to track every plant in every cultivation facility with a barcode-tagging system that is computerized and accessible to Marijuana Enforcement Division (MED) regulators.¹⁴⁹

2. *Vertical Integration.* With vertical integration, “cultivation, processing and manufacturing, and retail sales must be a common enterprise.”¹⁵⁰ Vertical integration and inventory tracking work in concert to limit diversion and complexity of the market, to allow for increased enforcement capacity of regulators.¹⁵¹

3. *Temporary Barriers to New Entry and Preferences for Existing Producers.* This move increased enforcement capacity and ensured that as implementation began, state regulators would be dealing only with enterprises and owners with whom they were already familiar, creating a key advantage for regulators adjusting to a new policy environment and learning along the way.¹⁵²

4. *Limits on Quantities Purchased.* Amendment 64 and subsequent state regulations put limits on the quantity of marijuana that could be sold to

¹⁴⁶ *Id.* at 3.

¹⁴⁷ COLO. CONST, art. 18, §16(3)(b) (2012) (Affirms the right of “possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale”).

¹⁴⁸ *Id.* (Restrictions on home grows were written into art. 18, §16(3)(c), limiting how much personal harvest can be transferred and to whom).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 10.

¹⁵² *Id.*

individuals: one ounce of flower for Coloradans and a quarter ounce for visitors.¹⁵³ While other regulations like vertical integration and inventory tracking seek to deal with diversion risks during production, quantity limits are a means of preventing consumer—rather than producer—based diversion.¹⁵⁴ They are complemented by possession limits to discourage marijuana's resale on the Colorado black market or its transfer to other states.¹⁵⁵

5. *Video Surveillance Requirements.* MED regulators required that cultivation, processing and retail facilities be extensively monitored with video surveillance.¹⁵⁶ The benefits of this regulation are twofold.¹⁵⁷ First, video surveillance aims to prevent diversion and, in case of theft, help police investigate.¹⁵⁸ Second, MED regulators expect the system to be cash-only for some time, and surveillance may reduce the risks that cash-dependent enterprises face.¹⁵⁹ The surveillance requirements will not stop all crime or limit every risk, but they will reduce the incentives for illegal activity by increasing the odds of detection.¹⁶⁰

6. *Marijuana Revenue and Funding Distribution.* This system provides marijuana tax revenue to fund MED, as well as funding related policy areas like education, prevention, and public safety.¹⁶¹ It also delivers a portion of funds to unrelated policy areas like school construction.¹⁶² In Colorado, the taxation structure of Amendment 64 imposes a fifteen percent excise tax at the wholesale level.¹⁶³ The rate for July 1, 2014 to December 31 2014 was \$1,876 per pound, or \$117.25 per ounce.¹⁶⁴ The wholesale tax for this period was \$17.59 per ounce, which included a ten percent sales tax that was specific to recreational marijuana, and a 2.9% statewide sales tax.¹⁶⁵

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 11.

¹⁶² *Id.*

¹⁶³ Joseph Henchman, *Taxing Marijuana: The Washington and Colorado Experience*, TAX FOUND. (Aug. 25, 2014), <http://taxfoundation.org/article/taxing-marijuana-washington-and-colorado-experience>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Although the sale of recreational marijuana is legal in Colorado, businesses have had limited, if any, access to banking services.¹⁶⁶ “The federal government considers marijuana illegal and so traditional banks, fearing prosecution for aiding and abetting illegal drug dealers, have shut down pot-business accounts and declined to give loans.”¹⁶⁷ Without a bank account, marijuana dispensaries are dealing in large amounts of cash, which are then being held in safes, and being carried in brown paper bags to the tax office and the utility company.¹⁶⁸ Without access to banking services, businesses are also paying huge premiums.¹⁶⁹ “The reality in Colorado is that it is legal to grow pot but extremely hard to grow a pot business.”¹⁷⁰

3. *Analysis of Washington State Initiative 502 (2011)*

In 2012, voters in Washington State passed Initiative 502, which legalizes, taxes, and regulates marijuana for adults age 21 and older.¹⁷¹ The Washington State Liquor Control Board (WSLCB) was tasked with implementing the licensing process of this new marijuana market and regulating the production, processing, and sale of recreational marijuana.¹⁷²

This new process included creating three separate tiers: marijuana producer, marijuana processor, and marijuana retailer, with specific licensing requirements for each tier.¹⁷³ In addition, a licensure fee of \$250 and a \$1,000 renewal fee for each of the three licenses was also put into place.¹⁷⁴ A licensee may hold both a producer and a processor license simultaneously, however having all three licenses is not permitted under the licensing guidelines.¹⁷⁵ The guidelines also does not allow a producer to be a retailer or vice versa.¹⁷⁶

¹⁶⁶ Matt Richtel, *The First Bank of Bud: Marijuana Industry in Colorado, Eager for Its Own Bank, Waits on the Fed*, N.Y. TIMES (Feb. 5, 2015), <http://www.nytimes.com/2015/02/08/business/marijuana-industry-in-colorado-eager-for-its-own-bank-waits-on-the-fed.html>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ H.B. 2000, 64th Leg. Assemb, Reg. Sess. (Wa. 2011).

¹⁷² Ken Steinmetz, *Everything You Need to Know About Buying Legal Weed in Washington State*, TIME, July 8, 2014. <http://time.com/2955024/washington-where-to-buy-pot>.

¹⁷³ Initiative 502, No. 63-502, Reg. Sess., (Wash. 2011).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Unlike Oregon, Colorado and Alaska, Washington State made very direct attempts in Initiative 502 to ensure marijuana would be kept out of kids' hands.¹⁷⁷ Marijuana dispensaries cannot be established or advertise marijuana/infused product in any form within "1000 feet of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, library, or game arcade that allows minors to enter."¹⁷⁸ Moreover, in Washington, marijuana can neither be consumed nor can a package of marijuana be opened in sight of the general public.¹⁷⁹ Consumers can only buy marijuana in retail shops licensed by the state and delivery services are not allowed under the current rules.¹⁸⁰ Taxing on marijuana includes state and local sales tax, plus a 25% retail excise tax.¹⁸¹ Producers and processors will also pay a 25% excise tax when they sell to retailers.¹⁸² Washington courts ruled that cities can choose not to participate in the state's regulated marijuana system.¹⁸³ Washington State residents involved in marijuana production retailing could also still be subject to prosecution if the federal government chooses to do so as Initiative 502 does not preempt federal law.¹⁸⁴

4. *Analysis of Alaska Ballot Measure 2 (2015)*

On February 24, 2015, Alaska became the third U.S. state to legalize recreational marijuana.¹⁸⁵ The state's Alcoholic Beverage Control Board was charged with setting up the state's legal marijuana market.¹⁸⁶ Alaska Gov. Bill Walker would later introduce a bill that would set up a new Marijuana Control Board to oversee and enforce the law, rather than leaving it to the board that

¹⁷⁷ Evan Bush & Bob Young, *Everything You Want to Know About Legal Pot in Washington*, THE SEATTLE TIMES (Mar. 28, 2015), <http://www.seattletimes.com/pot/2014/06/30/everything-you-want-to-know-about-legal-pot-in-washington>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Evan Bush, *How Alaska and Washington Pot Laws Compare*, THE SEATTLE TIMES (Feb. 24, 2015), <http://www.courts.wa.gov/content/publicupload/eclips/2015%2002%2024%20How%20Alaska%20and%20Washington%20marijuana%20laws%20compare.pdf>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Initiative 502, No. 63-502.

¹⁸⁵ H.B. 75, 29th Leg. Assemb., Reg. Sess. (Ak. 2015).

¹⁸⁶ Katy Steinmetz, *Marijuana is Now Officially Legal in Alaska*, TIME (Feb. 24, 2015), <http://time.com/3719828/marijuana-legal-alaska>.

oversees liquor licenses.¹⁸⁷ Alaska Ballot Measure 2 would allow validly registered marijuana-related entities and persons 21 years of age or older who own or are employed by these entities to make, possess, buy, distribute, sell, show, store, transport, deliver, transfer, receive, harvest, process, or package marijuana and marijuana products, subject to certain restrictions.¹⁸⁸ The bill makes the manufacture, sale, and possession of marijuana paraphernalia legal for registered dispensaries.¹⁸⁹ Adult residents are allowed to possess up to one ounce of marijuana and up to six plants, three of which can be flowering in their homes.¹⁹⁰ Smoking in public and buying and selling the drug by individuals, as well as possession on federal property, including park and forest lands, however, remains illegal.¹⁹¹ The bill also imposes a \$50 per ounce excise tax on the sale or transfer of marijuana from a cultivation facility to a retail store or marijuana product manufacturing facility.¹⁹² The marijuana cultivation facility would pay the tax and send monthly tax statements to the Department of Revenue.¹⁹³ For now, the sale of marijuana in Alaska will not be allowed until 2016.¹⁹⁴ Alaska state law has not defined the definition of “public,” allowing local jurisdictions to define what “public” is in their communities.¹⁹⁵ Alaska has nine months to develop a regulatory structure for commercial marijuana licenses.¹⁹⁶ Currently, the language written into the marijuana legalization initiative will allow communities to opt out of the commercial marijuana

¹⁸⁷ *Id.*

¹⁸⁸ ALASKA STAT. § 17.38.030, *Restrictions on Personal Cultivation, Penalty*. (Restrictions on personal cultivation: (a) The personal cultivation of marijuana described is subject to the following terms: (1) Marijuana plants shall be cultivated in a location where the plants are not subject to public view without the use of binoculars, aircraft, or other optical aids. (2) A person who cultivates marijuana must take reasonable precautions to ensure the plants are secure from unauthorized access. (3) Marijuana cultivation may only occur on property lawfully in possession of the cultivator or with the consent of the person in lawful possession of the property. (b) A person who violates this section is guilty of a violation punishable by a fine of up to \$750).

¹⁸⁹ See Steve Quinn, *Alaska Allows Recreational Marijuana as Legalization Campaign Spreads*, REUTERS (Feb. 24, 2015, 2:50 PM), <http://www.reuters.com/article/2015/02/24/us-usa-alaska-marijuana-idUSKBN0LS0ZH20150224>.

¹⁹⁰ Bush, *supra* note 184.

¹⁹¹ Bush, *supra* note 180.

¹⁹² Bush, *supra* note 184.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

system, once it exists.¹⁹⁷ Additionally, Alaska law does not protect marijuana-consuming employees from discrimination by their employers.¹⁹⁸

5. *Analysis of Washington D.C. Initiative 71 (2015)*

At 12:01 a.m. on Thursday, February 19th, 2015, Initiative 71, legalizing recreational marijuana took effect in the nations capital, Washington D.C.¹⁹⁹ However, the Congressional House Oversight Committee, headed by Representative (Rep.) Jason Chaffetz (UT), threatened to derail the controversial move.²⁰⁰ The House Oversight Committee, which has authority over D.C. government, began investigating the District of Columbia's move to legalize marijuana, demanding documents showing how money was spent to change the city's marijuana laws.²⁰¹ Rep. Chaffetz also sent a letter to Mayor Muriel Bowser, asking her to reconsider moving forward with legalization, advising that legalizing Initiative 71 would clearly be illegal.²⁰²

In December 2014, Congress passed a federal spending bill, signed by the president that explicitly prohibited the District from enacting new laws to reduce penalties for drug possession.²⁰³ D.C. government leaders argued the Initiative was enacted a week before Congress passed the spending bill, and despite Congressional disapproval, the District went ahead with legalizing Initiative 71.²⁰⁴ D.C.'s mayor and police chief outlined a plan to educate the public regarding Initiative 71.²⁰⁵

In addition, Mayor Bowser's administration created a Task Force, led by Chief Lanier and the Department of Health (DOH) Director LaQuandra

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Aaron Davis & Peter Hermann, *Lawmakers Encourage Bowser to Reconsider Declaring Pot Legal In D.C.*, WASH. POST (Feb. 24, 2015), http://www.washingtonpost.com/local/dc-politics/dc-mayor-despite-legal-pot-city-will-not-become-like-amsterdam/2015/02/24/c34a4d3a-bb9b-11e4-b274-e5209a3bc9a9_story.html.

²⁰⁰ *Id.*

²⁰¹ Matt Ackland, *DC Leaders Outline Marijuana Laws as Congress Investigates Move to Legalize*, FOX NEWS (Feb. 25, 2015, 9:42 AM), <http://www.myfoxdc.com/story/28187387/dc-pot-initiative>.

²⁰² *Id.*

²⁰³ Aaron Davis & Ed O'Keefe, *Congressional Spending Deal Blocks Pot Legalization in D.C.*, WASH. POST (Dec. 9, 2014), http://www.washingtonpost.com/local/dc-politics/congressional-budget-deal-may-upend-marijuana-legalization-in-dc/2014/12/09/6dff94f6-7f2e-11e4-8882-03cf08410beb_story.html.

²⁰⁴ Ackland, *supra* note 204.

²⁰⁵ *Id.*

Nesbitt, to lead implementation and public information efforts on Initiative 71.²⁰⁶ Under Initiative 71, individuals 21 years of age or older will be able to lawfully possess two ounces or less of marijuana, use marijuana on private property, transfer one ounce or less of marijuana to another person, as long as no money, goods or services are exchanged, and the recipient is 21 years of age or older.²⁰⁷ Finally, marijuana can be cultivated within one's primary residence; up to six marijuana plants, no more than three of which are mature.²⁰⁸ However, under Initiative 71, it will remain a crime for anyone to possess more than two ounces of marijuana, smoke, or otherwise consume marijuana in public spaces or anywhere the public is invited; including restaurants, bars, coffee shops and private clubs. It will also remain a crime to sell any amount of marijuana to another person, or operate a vehicle or boat under the influence of marijuana.²⁰⁹

Although the legalization of Initiative 71 has been passed, there is one small problem: there still is no legal way to purchase marijuana in D.C.²¹⁰ Congress has final say over the laws in D.C., and the two sides disagree about whether Congress acted quickly enough to block an initiative legalizing pot, subsequently leaving D.C. without a system to dictate how marijuana can be bought and sold.²¹¹ Unlike the first four states that have legalized the drug, D.C. has set up a marijuana marketplace without outlining an economic plan to coincide with the legalization, or a formal system to regulate the manufacture, sale, and tax of marijuana.²¹² As Congress and D.C.'s government sit in a dead lock over the situation, an ungoverned system will set the stage for many to take advantage of the situation. Entrepreneurs or corporations may form marijuana social clubs, where organizers charge admission to private event spaces where

²⁰⁶ *Id.*

²⁰⁷ *Id.* (An individual over the age of 21 can smoke outside on their porch, but cannot grow marijuana there. Smoking is also allowed in the homeowners yard, however if they are to step out on the sidewalk or any public property, they will be in violation of the law. Marijuana cannot be grown in a detached garage of a home).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Alex Altman, *D.C.'s Weird New Free Weed Economy*, TIME (Feb. 26, 2015), <http://time.com/3722789/dc-marijuana-legalization-congress/>.

²¹¹ William Cummings, *Pot Now Legal in D.C. Despite Threats from Congress*, USA TODAY (Feb. 26, 2015, 10:33 PM), <http://www.usatoday.com/story/news/nation/2015/02/25/dc-marijuana-legalization/24033803>.

²¹² Altman, *supra* note 213.

growers may freely exchange their “greenery.”²¹³ Others might attempt to skirt the sales prohibition by offering health seminars, massages or other services for a fee and then hand out “free greenery” as a perk.²¹⁴

C. Constitutional Challenges to Marijuana Legalization

In 2005 the Supreme Court decided *Gonzales v. Raich*, upholding the broad reach of Congress’s power to regulate commerce.²¹⁵ The *Raich* Court held that the Necessary and Proper Clause permits Congress to criminalize possession of marijuana for personal medical use in the exercise of its Commerce Clause powers, even if the marijuana has never actually traveled in interstate commerce.²¹⁶ The Court went on to say that California’s medical marijuana laws did not immunize citizens from federal prosecution for violating the federal Controlled Substances Act.²¹⁷ The *Raich* majority did not create a CSA “exemption” for medicinal marijuana, reasoning that “a nationwide exemption for the vast quantity of marijuana locally cultivated for personal use may have a substantial impact on the interstate market for this extraordinarily popular substance.”²¹⁸ The Court concluded that the CSA was a valid exercise of the congressional power to regulate interstate commerce and that “marijuana possession and cultivation ‘in accordance with state law’ cannot serve to place respondents’ activities beyond congressional reach.”²¹⁹

In theory, the argument can be made that states cannot be compelled by Congress to use their legislative powers to criminalize and prosecute drug offenses under state law.²²⁰ Such “commandeering” was ruled unconstitutional in *New York v. United States*, even where Congress is exercising its Commerce Clause powers.²²¹ Congress cannot make states pass a law criminalizing marijuana possession and use, even if one state’s failure to do so affects other

²¹³ *Id.* at 2.

²¹⁴ *Id.*

²¹⁵ *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

²¹⁶ *Id.* at 2216.

²¹⁷ Randy Barnett, *Another Misbegotten Reliance on Gonzales v. Raich*, WASH. POST (Dec. 31, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/31/another-misbegotten-reliance-on-gonzales-v-raich>.

²¹⁸ David B. Rivkin Jr. & Elizabeth Price Foley, *Federal Antidrug Law Goes Up in Smoke*, WALL ST. J. (Dec. 28, 2014, 6:52 PM), <http://www.wsj.com/articles/david-b-rivkin-jr-and-elizabeth-price-foley-federal-antidrug-law-goes-up-in-smoke-1419810742>.

²¹⁹ *Id.*

²²⁰ Barnett, *supra* note 220.

²²¹ *Id.*; See also *N.Y. v. U. S.*, 488 U.S. 1041 (1992).

states.²²² In *Printz v. U.S.*, the Supreme Court held that the federal government cannot “commandeer” states into enacting a certain law, and that Colorado, Washington, Alaska, and Oregon used their police powers to regulate the sale of marijuana.²²³ As such, legalizing marijuana use would conform with each respective states regulatory procedures versus how the federal government would want the states to enforce marijuana usage.²²⁴ Whatever effect completely unregulated regulation may have on other states is diminished, rather than increased, by a state’s intrastate regulation and restriction of the marijuana trade.²²⁵ The counter argument is that states such as Colorado are actively “aiding and abetting” the violation of federal law under the CSA, rather than merely passively permitting such violations.²²⁶

While Congress may not mandate that states criminalize marijuana, it could still prohibit states from regulating, and thereby “facilitating,” marijuana possession, use, and sale.²²⁷ However, in *Gregory v. Ashcroft*, the Supreme Court ruled that states’ power to prescribe the qualifications of their officers should be free from external interference, but should Congress preempt the powers of the states, they should make their intention “clear and manifest.”²²⁸ States that feel the “legalization” of marijuana has affected them negatively could argue that the Department of Justice has failed to enforce the CSA.²²⁹ However, *Raich* does not create a remedy against a sister state for the “legalization” and sale of marijuana, which has indirectly affected another state.²³⁰ Congress has determined that the introduction of marijuana into commerce constitutes a public nuisance, and it remains the Court’s duty to determine what remedy, if any, is available to Colorado’s neighbors.²³¹ Rather

²²² *Id.*

²²³ *Printz v. United States*, 521 U.S. 898 (1997).

²²⁴ *N.Y.*, 488 U.S. 1041 (1992).

²²⁵ Barnett, *supra* note 220.

²²⁶ Jonathan Keim, *Say Hello to the Interstate Marijuana Lawsuit*, NAT’L REV. (Jan. 14, 2015, 2:50 PM), <http://www.nationalreview.com/bench-memos/396378/say-hello-interstate-marijuana-lawsuit-jonathan-keim>.

²²⁷ *Id.*

²²⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see also* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

²²⁹ Barnett, *supra* note 220.

²³⁰ *Id.*

²³¹ Eugene Volokh, *A Defense of the Nebraska & Oklahoma v. Colorado Marijuana Lawsuit*, WASH. POST (Dec. 20, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/19/ferris-buellers-day-in-the-texas-supreme-court>.

than issuing injunctive relief, the traditional remedy in original nuisance actions, the Court could instead award damages to prevailing sister states by compensating them for the injuries inflicted by the spread of marijuana into their territory.²³²

III. INTERNATIONAL STATES LEGALIZING MARIJUANA

Outside the United States, the approaches to marijuana legalization vary.²³³ In the blink of an eye, global debates about marijuana regulation have shifted from “whether” to “how.”²³⁴ In 2014, Uruguay became the first nation to explicitly regulate marijuana from seed to sale.²³⁵ Their strategy was to implement state regulation of marijuana production, allow marijuana clubs to operate, and allow for personal growing of marijuana.²³⁶ Jamaica is in the midst of a policy reevaluation, beginning with a recent legislative shift toward the decriminalization of consumption, and the legalization of personal cultivation of up to five plants.²³⁷ The new law contains provisions for regulating medical and religious uses of the plant, and it remains to be seen whether these provisions will form a mechanism for broader commercialization or state monopolization, and thus a new source of revenue for the government.²³⁸

Countries such as Morocco and Zambia have also begun warming to the idea of legalized marijuana production.²³⁹ The Czech Republic also began efforts to secure new sources of supply to lower the domestic price of its medical marijuana.²⁴⁰ In the Netherlands, marijuana products are only sold in “coffee shops,” and possession of up to 5 grams for personal use is legal. Other types of sales and transportation however, are illegal. Spain remains the best case study of gray-market systems for recreational marijuana.²⁴¹ As in Holland, marijuana is illegal in Spain, but the government doesn’t prosecute anyone for personal consumption, and there’s no implicit limit on the number of plants a

²³² *Id.*

²³³ John Collins, *Lessons from Marijuana Legalization Around the Globe*, FOREIGN AFFAIRS (Mar. 22, 2015), <https://www.foreignaffairs.com/articles/2015-03-22/weed-world>.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 1.

²³⁷ *Id.* at 3.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 5.

²⁴¹ *Id.* at 4.

person can grow.²⁴² With no profit motive to increase marijuana consumption, or initiate new users, marijuana social clubs in Barcelona offer a more cautious, public health-centered alternative to large-scale retail marijuana markets dominated by commercial enterprises,” and a way to subvert the marijuana laws of Spain.²⁴³ Barcelona is now developing the reputation as the “new Amsterdam,” as stricter drug laws in the Netherlands are creating a loss to the city’s significant source of revenue from drug tourism.²⁴⁴

In Norway, there is a sliding scale approach to marijuana possession.²⁴⁵ Less than 15 grams is considered “for personal use,” and could invite a fine between 1,500-15,000 kroner (\$209 - \$2,235). Carrying more is considered dealing and punished much more harshly, including jail.²⁴⁶ In Switzerland, growing up to four marijuana plants is legal, but sale or transport is illegal.²⁴⁷ However, citizens can be arrested or forced into rehab if caught several times while in possession.²⁴⁸ In Peru, possession of marijuana under eight grams is considered legal for personal use.²⁴⁹ Finally, in 2001, Portugal became the first country in the world to legalize the use of all drugs, and started treating drug users as sick people, instead of criminals.²⁵⁰ The international trend is clear: countries are openly approving policies that would have been unthinkable just five or ten years ago.²⁵¹ The nations that legalize marijuana first will provide, perhaps at some risk to their own populations, an external benefit to the rest of the world in the form of knowledge, however the experiments turn out.²⁵²

A. Analysis of Uruguay Marijuana Bill

On December 23, 2013, Uruguay became the first country in the world to completely legalize, regulate and tax marijuana in a move that has since been

²⁴² Winston Ross, *Holland's New Marijuana Laws Are Changing Old Amsterdam*, NEWSWEEK (Feb. 22, 2015), <http://www.newsweek.com/marijuana-and-old-amsterdam-308218>.

²⁴³ Collins, *supra* note 236, at 6.

²⁴⁴ Ross, *supra* note 245.

²⁴⁵ Emma Brant, *Where in the World Can You Legally Smoke Cannabis?*, BBC (Oct. 30, 2014), <http://www.bbc.co.uk/newsbeat/article/29834450/where-in-the-world-can-you-legally-smoke-cannabis>.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Collins, *supra* note 236.

²⁵² *Id.*

labeled the “great experiment.”²⁵³ The new law regulates the amount of marijuana a citizen is able to purchase.²⁵⁴ The Uruguayan government regulates marijuana by setting up a network of dispensaries, determining prices, and acting as the main producer and distributor of the drug.²⁵⁵ Each customer must register with a database run by the Ministry of Health, and will be restricted to buying 40 grams at \$1 a gram, which is close to the street price of illicit marijuana imported from Paraguay.²⁵⁶ Smoking marijuana on the job remains illegal, as does operating any kind of vehicle while high. Violators will be punished with fines ranging from \$2 to \$87, with other penalties including the destruction of weed stashes and expulsion from the registry.²⁵⁷ If any one person is making too many requests, health services will be alerted to provide treatment.²⁵⁸ In order to avoid drug trafficking to other nations, marijuana can only be purchased by Uruguayan citizens; it cannot be sold to tourists or exported.²⁵⁹ Violators of the law face sentences of 20 months to 10 years in prison.²⁶⁰ Unlike the U.S., the legal purchasing age has been set at 18 years of age or older, as opposed to 21 years or older.²⁶¹ The drug will be sold at state regulated pharmacies and small one-stop shops.²⁶² Those claiming to use marijuana for medical reasons would have to show a doctor's prescription.²⁶³ Additionally, the law allows adult residents to grow six plants in their houses and backyards, or they can form private grow clubs that produce significantly

²⁵³ Ken Parks, *Uruguay Awards Two Marijuana Permits to Investors*, BLOOMBERG BUS. (Oct. 2, 2015), <http://www.bloomberg.com/news/articles/2015-10-02/uruguay-awards-two-marijuana-permits-to-investors>.

²⁵⁴ *Id.*

²⁵⁵ Associated Press, *Uruguay To Sell Legal Marijuana For \$1 A Gram*, THE GUARDIAN (Oct. 22, 2013), <http://www.theguardian.com/world/2013/oct/22/uruguay-legal-marijuana-drug-traffickers>.

²⁵⁶ *Id.*

²⁵⁷ Tom McKay, *One Year After Uruguay Legalized Marijuana, Here's What It's Become*, WORLD MIC (Dec. 9, 2014), <http://mic.com/articles/106094/one-year-after-uruguay-legalized-marijuana-here-s-what-it-s-become>.

²⁵⁸ *Id.*

²⁵⁹ Jeffrey Miron, *International Analysis: Uruguay and Marijuana Legalization*, HUFF. POST (Jan. 7, 2014), <http://www.cato.org/publications/commentary/international-analysis-uruguay-marijuana-legalization>.

²⁶⁰ Dario Klein, Catherine E. Shoichet & Rafael Romo, *Uruguay to Legalize Marijuana, Senate Says*, CNN (Dec. 10, 2013, 9:42 PM), <http://www.cnn.com/2013/12/10/world/americas/uruguay-marijuana-legalization/index.html>.

²⁶¹ *Id.*

²⁶² Miron, *supra* note, 262.

²⁶³ Klein, *supra* note 263.

more, but with strict limitations.²⁶⁴ Each club is limited to a maximum number of 45 members, and each member is limited to taking 480 grams of marijuana home with them each year.²⁶⁵

The purpose of the new Uruguayan law is to seize the market from illegal drug dealers, and to discourage people from smoking weed.²⁶⁶ Secretary-General Julio Calzada of the National Drug Council, who spearheaded the reform, is convinced that having a legal source of marijuana will do more to fight the illegal marijuana trade than cracking down on dealers.²⁶⁷ Secretary-General Julio Calzada went on to say that “in Uruguay, there are about 120,000 daily-to-occasional marijuana users. At present, these people are buying from criminals and strengthening local mafia.”²⁶⁸ “If the government can take control of that market, criminal organizations will lose their main source of income.”²⁶⁹

B. Analysis of Portugal Law 30/2000

In July 2001, Portugal passed Law 30/2000, which decriminalized the personal use and possession of all illicit drugs.²⁷⁰ Although possession of drugs for personal use is no longer a criminal offense, it is still a minor violation, which carries penalties such as fines or community service.²⁷¹ Persons 16 years of age or older caught using, or in possession of limited quantities of hard or soft drugs, are referred to the nearest Commissions for the Dissuasion of Drug Addiction (CDT) by the police or the courts.²⁷² The police do not make arrests

²⁶⁴ Tom McKay, *One Year After Uruguay Legalized Marijuana, Here's What It's Become*, WORLD MIC (Dec. 9, 2014), <http://mic.com/articles/106094/one-year-after-uruguay-legalized-marijuana-here-s-what-it-s-become> (Those who want to grow more than the six-plant limitation can join or form a marijuana growing club, which has a much higher, 99-plant limit. An experienced marijuana farmer managing the crop, is capable of producing a very large amount of premium marijuana from the ninety-nine plants. For that reason, some clubs have hired premium, experienced producers).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Hannah Laqueur, *Uses and Abuses of Drug Decriminalization in Portugal*, LAW & SOCIAL INQUIRY, J. OF AM. BAR FOUND., Summer 2015, at 749, [https://www.law.berkeley.edu/files/Laqueur_\(2014\)_-Uses_and_Abuses_of_Drug_Decriminalization_in_Portugal_-_LSI.pdf](https://www.law.berkeley.edu/files/Laqueur_(2014)_-Uses_and_Abuses_of_Drug_Decriminalization_in_Portugal_-_LSI.pdf).

²⁷¹ *Id.*

²⁷² CASILVIA M. MENDES, ALCOHOL AND SUBSTANCE ABUSE AMONG ADULTS AND JUVENILES IN PORTUGAL: FACTS, POLICY, AND ATTITUDES 5 (Univ. of Minho, 2012), <http://www.aaprevent.eu/doc/PortugalNP.pdf>.

of alleged consumers, but only can only cite them.²⁷³ The role of the courts is strictly limited to a referral. Minors are subject to the same process, but are referred to child protection services.²⁷⁴ One gram of heroin, two grams of cocaine, 25 grams of marijuana leaves, or five grams of hashish are the drug quantities one can legally purchase, possess, and carry through the streets of Lisbon without fear of repercussion.²⁷⁵ MDMA, the active ingredient in ecstasy and amphetamines, including methamphetamine, is also permitted in amounts up to one gram.²⁷⁶ Portugal refers cases of consumption, purchase, or possession of up to a ten days' supply of an illicit drug to the Commissions for the Dissuasion of Drug Addiction.²⁷⁷ The Commissions take the referred cases and make appropriate recommendations for treatment, fines, warnings, or other penalties.²⁷⁸ In reality, the vast majority of those referred to the Commissions by the police have their cases voided.²⁷⁹ People who are dependent on drugs are encouraged to seek treatment, but are rarely sanctioned if they choose not to.²⁸⁰ The Commissions' aim is for people to enter treatment voluntarily, and users are not forced them to do so.²⁸¹ At the recommendation of the Commission, jail time was replaced with the offer of therapy.²⁸² The argument was that the fear of prison drives addicts underground, and that incarceration is more expensive than

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Wiebke Hollersen, *This Is Working: Portugal, 12 Years after Decriminalizing Drugs*, SPIEGEL INT'L (Mar. 27, 2013), <http://www.spiegel.de/international/europe/evaluating-drug-decriminalization-in-portugal-12-years-later-a-891060-2.html>.

²⁷⁶ *Id.*

²⁷⁷ Office of National Drug Control Policy, Executive Office of the President, *Drug Decriminalization in Portugal: Challenges and Limitations*, <https://m.whitehouse.gov/ondcp/ondcp-fact-sheets/drug-decriminalization-in-portugal-challenges-and-limitations> (last visited July 30, 2015).

²⁷⁸ REITOX NAT'L FOCAL POINT, NATIONAL REPORT 2012: PORTUGAL 20 (Eur. Monitoring Ctr. for Drugs and Addiction, 2013), http://www.emcdda.europa.eu/attachements.cfm/att_214060_EN_Portugal_NR2012.pdf. (The Commissions for the Dissuasion of Drug Addiction are regional panels made up of legal, health and social work professionals).

²⁷⁹ *Id.*

²⁸⁰ ARTUR DOMOSLAWSKI, DRUG POLICY IN PORTUGAL: THE BENEFITS OF DECRIMINALIZING DRUG USE 30 (Open Society Foundations, 2011), <http://www.opensocietyfoundations.org/reports/drug-policy-portugal-benefits-decriminalizing-drug-use>.

²⁸¹ *Id.*

²⁸² Maia Szalavitz, *Drugs in Portugal: Did Decriminalization Work*, TIME (Apr. 26, 2009), <http://content.time.com/time/health/article/0,8599,1893946,00.html>.

treatment, so why not give drug addicts health services instead?²⁸³ Under Portugal's new regime, people found guilty of possessing small amounts of drugs are sent to a panel consisting of a psychologist, social worker, and legal adviser for appropriate treatment, which may be refused without criminal punishment, instead of jail.²⁸⁴

The goal of the decriminalization policy was to tackle the severely worsening health of Portugal's drug-using population; particularly those who inject drugs.²⁸⁵ In the years leading up to the reform, the number of drug-related deaths had increased exponentially due to the rapidly increasing rates of HIV, AIDS, Tuberculosis, and Hepatitis B and C among people who injected drugs.²⁸⁶ There was a growing consensus among law enforcement and health officials that the criminalization and marginalization of people who use drugs was contributing to this problem, and that under a new, more humane, legal framework it could be better managed.²⁸⁷ Portugal complemented its policy of decriminalization by allocating greater resources across the drugs field, expanding and improving prevention, treatment, harm reduction, and social reintegration programs.²⁸⁸ The introduction of these measures coincided with an expansion of the Portuguese welfare state, which included a guaranteed minimum income.²⁸⁹ While decriminalization played an important role, it is likely that the positive outcomes described below would not have been achieved without the wider health and social reforms.²⁹⁰ Following Portugal's drug reform, levels of drug use have dropped below the European average, drug use has declined among those aged 15-24, the population most at risk of initiating drug use. Between 2000 and 2005, rates of problematic drug use and injecting drug use decreased.²⁹¹ With the re-categorization of low-level drug possession

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ GEORGE MURKIN, DRUG DECRIMINALIZATION IN PORTUGAL: SETTING THE RECORD STRAIGHT 1 (UNODC, 2014), <https://www.unodc.org/documents/ungass2016/Contributions/Civil/Transform-Drug-Policy-Foundation/Drug-decriminalisation-in-Portugal.pdf>.

²⁸⁶ *Id.* at 2.

²⁸⁷ *Id.* at 3.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 4.

²⁹¹ Caitlin Elizabeth Hughes & Alex Stevens, *A Resounding Success or a Disastrous Failure: Re-Examining the Interpretation of Evidence on the Portuguese*

as an administrative rather than criminal offense, decriminalization produced a reduction in the number of people arrested, and reduced the number of cases sent to criminal court for drug offenses from over 14,000 in the year 2000, to around 5,500-6,000 per year once the policy came into effect.²⁹²

Portugal's decriminalization policy has improved significantly in several key areas; most notably a decrease in HIV infections and drug-related deaths.²⁹³ Portugal's shift towards a more health-centered approach to drugs, as well as expanded health and social policy changes, are equally, if not more, responsible for the positive changes.²⁹⁴ Portuguese policy makers contend that such reform, while not a swift or total solution, holds numerous benefits, principally of increased opportunity to integrate drug users and to address the causes and damages of drug use.²⁹⁵ The Portuguese system suggests that combining the removal of criminal penalties with the use of alternative therapeutic responses to dependent drug users offers several advantages.²⁹⁶ Decriminalization of drugs also offers the ability to reduce the burden of drug law enforcement on the criminal justice system, while reducing problematic drug use.²⁹⁷

C. Analysis of Netherlands Drug Laws

In 1972, the Dutch government changed the drug policies so that the penalties for possession for personal use of marijuana products be reduced from a felony to a misdemeanor and the penalties for trafficking be differentiated according to the risk inherent in the use of these drugs.²⁹⁸ Since 1976, authorities across the Netherlands have chosen to openly ignore marijuana use, and have not prosecuted anyone in possession of personal use marijuana (less than five

Decriminalization of Illicit Drugs, 31 DRUG AND ALCOHOL REV. 101-13 (2012), <https://kar.kent.ac.uk/29901/1/Hughes%20%20Stevens%202012.pdf>.

²⁹² Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn From the Portuguese Decriminalization of Illicit Drugs?*, 50 BRIT. J. CRIMINOL. 999 (2010), <https://dpmp.unsw.edu.au/sites/default/files/dpmp/resources/HUGHES.pdf>.

²⁹³ MURKIN, *supra* note 288.

²⁹⁴ *Id.*

²⁹⁵ Hughes & Stevens, *supra* note 295, at 1018.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ See Richard J. Bonnie, *The Virtues of Pragmatism in Drug Policy*, 13 J. HEALTH CARE L. & POL'Y 7, 13 (2010), <http://digitalcommons.law.umaryland.edu/jhclp/vol13/iss1/3>.

grams).²⁹⁹ With over 10,000 marijuana users integrated throughout Dutch society, there was a strong need to revise the current drug policy measures.³⁰⁰ The amended Opium Act of 1976 was a compromise between the international standards of prosecution and punishment of drug traffickers especially by raising penalties, and an affirmation of the domestic consensus with respect to the use, possession and retail trade of marijuana.³⁰¹ A distinction was made between “hard” drugs, such as cocaine, heroin, and amphetamine, which involved an unacceptable degree of risk and marijuana products marijuana and hashish known as “soft” drugs.³⁰² The penalties for possession of these substances or for importing, exporting, or trafficking differ according to whether the substance in question is a hard drug or a marijuana product.³⁰³ “Possession of less than 30 grams of marijuana . . . is a summary offense liable to a custodial sentence not exceeding one month, whereas possession of any hard drug is indictable.”³⁰⁴

The guidelines issued by the Public Prosecutions Department gave highest priority to combating trafficking and lowest to cases of possession.³⁰⁵ In practice this means that, although the police confiscate any drugs found in someone's possession, the Public Prosecutions Department would refrain from prosecuting on the grounds of public interest in cases that involve 0.5 grams of hard drugs or 30 grams of soft drugs, unless the offender is also suspected of dealing or another drug-related crime.³⁰⁶ The Netherlands, allowed open marijuana consumption and sales at its famous “coffee shops” for decades, until the marijuana restrictions took place in 2008.³⁰⁷

In the Netherlands, persons under the age of 18 are prohibited from buying drugs and are barred access to coffee shops.³⁰⁸ Using the discretion

²⁹⁹ Ross, *supra* note 245.

³⁰⁰ Christopher Gatto, *European Drug Policy: Analysis and Case Studies*, NORML (1999), <http://norml.org/component/zoo/category/european-drug-policy-analysis-and-case-studies> (last visited July 30, 2015).

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ Frida Ghitis, *Amsterdam for Tourists: What's Legal?*, CNN (Jul.17, 2013, 8:21 AM), <http://www.cnn.com/2013/07/17/travel/amsterdam-travel-legal-parameters>.

³⁰⁸ Ross, *supra* note 245, at 3.

provided under the new restrictive laws most local county governments have banned foreigners from coffee shops and closed any shops that were close to schools.³⁰⁹ Although most localities have chosen to enforce the new marijuana laws, Amsterdam, however has continued to allow foreigners to visit coffee shops, but have closed those shops close to schools.³¹⁰ Government officials in Amsterdam have fought to keep the coffee shops from going out of business because “drug tourism” in Amsterdam represents such a major element of the city’s economy.³¹¹ Coffee shops are governed by strict laws that control the amount of permitted soft drugs, allowing only the sale soft drugs and not more than five grams of marijuana per person per day. Additionally, coffee shops are not allowed to advertise drugs factors influencing the Dutch government’s crackdown of marijuana is pressure from outside nations, especially France, which has pushed the International Narcotics Control board to sanction Holland for violating international treaties on drug laws, due in part to the Dutch government’s pragmatic drug policies.³¹² Following the new restrictions, Holland’s failure to allow for a system of legal supply for the coffee shops left shop owners to deal with illegal marijuana suppliers thus opening them up to criminal charges of facilitating criminality by buying product from criminal syndicates.³¹³ The failure in the supply system provides some lessons: decriminalization is a useful concept for a transition period, but real progress can only be obtained and assured with legal regulation of the entire chain from producer to consumer.³¹⁴

VI. IMPLICATIONS OF LEGALIZING MARIJUANA

As governments around the world try to manage high budget deficits and public debt, some liberal politicians have looked to the idea of legalizing and regulating marijuana.³¹⁵ Both the proponents and opposition debate over the economic benefits and costs of legalization, and seem to agree that it depends on

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *See id.*

³¹⁵ *See* David G. Evans, *The Economic Impacts of Marijuana Legalization*, 7 J. GLOBAL DRUG POL’Y AND PRAC. 2 (2013), <http://www.globaldrugpolicy.org/Issues/Vol%207%20Issue%204/The%20Economic%20Impacts%20of%20Marijuana%20Legalization%20final%20for%20journal.pdf>.

the following concerns: (a) estimated savings from reduced spending on the criminal justice costs of marijuana law enforcement and revenue losses from shifts in law enforcement policies; (b) projected revenues from additional taxes and streams of income; (c) immediate and projected expenditures to address the known harms of marijuana use and to implement and enforce policy reforms.³¹⁶ However, there is also a public health concern in which both sides urge that regulation of legalized marijuana be viewed as a public health priority.

There are dozens of factors to consider, in terms of the economic impact of widespread legalization. In determining the potential revenues from taxes on pot, it is valuable to know that approximately 7.6 million frequent marijuana smokers in America consume roughly twenty-four million pounds of marijuana each year.³¹⁷ This translates to about \$10.5 billion in consumer spending.³¹⁸ Assuming that demand for the drug remains relatively stable, states such as Colorado and Washington are hoping that a legal marketplace for marijuana will likely replicate the current distribution system for alcohol and be sold in stores with special permits.³¹⁹ Washington placed a 25% excise tax on marijuana with its new law, and Colorado voters approved a 15% excise tax and a 10% sales tax on recreational marijuana.³²⁰ These measures are expected to raise hundreds of millions of dollars in revenue for each state, including a projected \$500 million for Washington alone by 2015.³²¹ Although one year has passed since Colorado and Washington have legalized marijuana, policymakers are finding that it is still too soon to draw reliable conclusions on the costs versus benefits of legalization.³²² Tax revenues within the one year from legal marijuana sales were \$86 million less than projected.³²³ However, policymakers must remember

³¹⁶ *Id.*

³¹⁷ Dash Thomas, *Legalizing Marijuana: The Grass is Greener on the Other Side*, U. MIAMI BUS. L. REV. (2015).

³¹⁸ *Id.*

³¹⁹ Dan Schneider, Pot Economics, *What's the Future of the American Marijuana Market?*, DOLLARS & SENSE (Apr. 2014), <http://dollarsandsense.org/archives/2014/0314schneider.html>.

³²⁰ *Id.*

³²¹ *Id.*

³²² Douglas A. Berman, *Why Marijuana Legalization is The Rare Issue That Divides the 2016 Republican Presidential Field*, LAW PROFESSORS BLOG NETWORKS (Jul. 30, 2015), http://lawprofessors.typepad.com/marijuana_law/2015/07/why-marijuana-legalization-is-the-rare-issue-that-divides-the-2016-republican-presidential-field.html.

³²³ Deborah Sutton, *Unknowns and Uncertainties After One year of Marijuana Legalization in Colorado*, DESERET NEWS NATIONAL (Mar. 6, 2015),

that the illegal market could resurface if government taxes are set too high.³²⁴ Assuming state-by-state commercial legalization continues, illicit marijuana markets will persist until legal and black market prices converge and interstate arbitrage opportunities disappear.³²⁵ While neither of these outcomes is likely in the near-term, states still face the very difficult task of managing consumption levels via unique regulatory regimes that promote scarcity, while simultaneously trying to price out illicit suppliers.³²⁶

Marijuana legalization has many economic impacts beyond tax revenue.³²⁷ Studies have proved that marijuana legalization correlates with decreased rates of violent crime, a result that should be included in the social calculus to determine the optimal tax rate.³²⁸ Recreational legalization has the ability to create a new industry of growers and dispensaries that can revitalize economically depressed areas.³²⁹ Spinoff industries, such as those that specialize in devising marijuana packaging, as well as labs to test the chemical properties of marijuana, ensuring consumers a pure and adequately potent product, can contribute to economic development.³³⁰ The legal marijuana industry could be the fastest growing sector of the U.S. economy.³³¹ It grew 74% to \$2.7 billion in 2014, which includes revenue from both recreational drug stores and from medical marijuana, which has been legalized in 23 states.³³² This means less cash for Mexican cartels to buy guns, bribe police, and pay assassins.³³³ Coinciding with legalization, violence has decreased in Mexico and U.S. Border Patrol has been seizing steadily smaller quantities of the drug, from 2.5 million

<http://national.deseretnews.com/article/3709/Unknowns-and-uncertainties-after-one-year-of-marijuana-legalization-in-Colorado.html>.

³²⁴ Melody Wang, *Recreational Marijuana Legalization Lights Up Economic Policy Considerations*, YALE ECON. REV. (Jul. 8, 2014), <http://www.yaleeconomicreview.org/archives/259>.

³²⁵ Jason Tama, *Despite Push to Legalize Pot, the War on Drugs Still Matters*, DENVER POST (Jan. 28, 2015, 2:18 PM), http://www.denverpost.com/guestcommentary/ci_27411945/despite-push-legalize-pot-war-drugs-still-matters.

³²⁶ *Id.*

³²⁷ Wang, *supra* note 327.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ Ioan Grillo, *U.S. Legalization of Marijuana Has Hit Mexican Cartels' Cross-Border Trade*, TIME (Apr. 8, 2015), <http://time.com/3801889/us-legalization-marijuana-trade>.

³³² *Id.*

³³³ *Id.*

pounds in 2011 to 1.9 million pounds in 2014.³³⁴ Mexico's army has noted an even steeper decline, confiscating 664 tons of marijuana in 2014, a drop of 32% compared to year before.³³⁵ Still, marijuana legalization has unforeseen consequences such as decreasing public budgets.³³⁶ Many studies cite decreased enforcement costs as a benefit to marijuana legalization, but this would entail layoffs in the law enforcement sector.³³⁷ However, streamlining law enforcement priorities would be societally beneficial, allowing officers to pursue higher-priority crimes.³³⁸

If marijuana is approved for importation, this could drive down its price in the United States, just as Mexican imports already do.³³⁹ Uruguay's bold announcement that it would begin to allow the use and sale of legal, regulated marijuana nationwide, at the price of \$1 per gram in comparison to \$15 or more per gram in the US. tariffs and added costs for packaging, shipping, and distribution could bring the costs up on its way to the United States.³⁴⁰ However, if other countries follow Uruguay's example, U.S. producers may have to lower prices to compete.³⁴¹ If marijuana legalization erodes market share for transnational criminal networks, they will migrate toward more profitable segments of the illicit market, and will continue to threaten stability in the Western Hemisphere. For example, cocaine, heroin, and methamphetamine continues to cross our borders via robust networks, and in most cases, cocaine being the exception, consumption in the United States is on the rise. As more states legalize marijuana, the federal government's continued prohibition posture will become increasingly problematic in the foreign policy arena, especially in Western Hemisphere nations with a history of supporting the fight against drugs. Further, with no regulatory harmonization among states and no credible movement to legalize federally, illicit economies and criminal networks will persist, and so must the international effort to combat them. The impacts of

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Wang, *supra* note 327.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Schneider, *supra* note 322.

³⁴⁰ *Id.*

³⁴¹ *Id.*

state-by-state marijuana legalization on numbers of users, incidence of addiction, and consumption of stronger illicit drugs remain an open question.

The public health implications that come with widespread decriminalization or legalization are beginning to surface as state health departments and scientific research attempt to stay in step with the trend.³⁴² The frequent use of Tetrahydrocannabinol (THC) containing marijuana products has doubled since recreational marijuana was legalized in Colorado.³⁴³ THC is associated with psychosis, anxiety, and depression symptoms.³⁴⁴ Subsequently there has been an increase in hospital visits for pure marijuana intoxication.³⁴⁵ Increased availability has also led to increased health care utilization related to marijuana exposure.³⁴⁶ The University of Colorado Medical Center Emergency Department saw an uptick in patients presenting with marijuana intoxication or marijuana associated illnesses.³⁴⁷ Denver-area hospitals and the state poison control service have seen 14 cases of marijuana intoxication in children over the last two years, half of which required admission to intensive care units.³⁴⁸ However, the statistics have not indicated as to whether these effects occurred in inexperienced marijuana users who may not be familiar with high-dose effects and dangers of extracting THC.³⁴⁹ To date, a small number of medical conditions have been found to respond to treatment with marijuana or marijuana-like drugs; with further research, it is likely that more disorders will be shown to benefit from careful use of marijuana-like drugs.³⁵⁰ As states garner tax revenue from the sale of legal marijuana, the hope is that some of these

³⁴² Natalie McGill, *As Marijuana Decriminalization Spreads, Public Health Prepares: Health Effects, Regulations Examined*, THE NATIONS HEALTH, (Sept.2014), <http://thenationshealth.aphapublications.org/content/44/7/1.3.full>.

³⁴³ Sabrina Eaton, *Smoking Marijuana is so Old-Fashioned: Colorado Pot Products Range from Tasty to Pasty*, CLEVELAND.COM (June 24, 2015), http://www.cleveland.com/open/index.ssf/2015/06/smoking_marijuana_is_so_old-fa.html.

³⁴⁴ Dr. Andrew Monte, Dr. Richard Zane & Dr. Kennon J. Heard, *The Implications of Marijuana Legalization in Colorado*, 313 J. AM. MED. ASS'N, 241 (2015).

³⁴⁵ *See id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ Eugene Rubin M.D., Ph.D., *Medical Information to Consider as the Use of Marijuana Increases*, PSYCHOL. TODAY (Aug. 01, 2014), <https://www.psychologytoday.com/blog/demystifying-psychiatry/201408/new-england-journal-medicine-article-about-marijuana>.

funds will be set aside to cover the increased medical costs and social consequences of legalization.³⁵¹

V. PATHWAY TO MARIJUANA LAW REFORM

The U.S has always been a staunch supporter of the international drug treaties, but publicly the U.S has described the drug treaties as living documents that can be updated through interpretation.³⁵² This begs the question, are the international drug treaties truly binding? With respect to the role that treaties play in a nations' national law, the answer is complicated by the variety of ways that treaties are made, as well as the possibility of constitutional provisions addressing the role of treaties. For example, in the United Kingdom, an act of parliament is required before a treaty can be active as law.³⁵³ In the U.S., the President's power to make treaties falls under executive privilege, however in order for a treaty to be ratified, two-thirds of the Senate must concur.³⁵⁴ Under this view a conclusion could be drawn that nations with a similar government to the U.S., the UN treaties would apply only to federal policy.³⁵⁵ Following that logic, the U.S. federal government would be then bound by the UN drug control treaties it signed but individual states would not.³⁵⁶

In August 2013, following the legalization of marijuana by Colorado and Washington, the Department of Justice (DOJ) issued a memo in which it set forth a hands-off approach to states that reformed their marijuana laws.³⁵⁷ This move by DOJ in addition to Colorado and Washington's legalization put the State Department and U.S. foreign policy in a bind.³⁵⁸ William Brownfield, Assistant Secretary of State for the Bureau of International Narcotics and Law

³⁵¹ *Id.*

³⁵² Jonathan Rauch, *Marijuana Legalization Poses a Dilemma for International Drug Treaties*, BROOKINGS INST. (Oct. 16, 2014), <http://www.brookings.edu/blogs/fixgov/posts/2014/10/16-marijuana-enforcement-modernize-international-drug-treaties-rauch>.

³⁵³ VALERIE EPPS, *INTERNATIONAL LAW* 11 (Carolina Academic Press, 4th ed. 2009).

³⁵⁴ U.S. CONST., art. II, § 2, cl. 2.

³⁵⁵ Keith Humphreys, *Understanding the U.N. Treaties, Federalism and Marijuana Legalization*, THE REALITY-BASED CMTY. (Oct. 1, 2013), <http://www.samefacts.com/2013/10/drug-policy/understanding-the-u-n-treaties-federalism-and-marijuana-legalization>.

³⁵⁶ *Id.*

³⁵⁷ Michael Collins, *U.S. State Dept. Calls for Reforming International Treaties That Support the Global Drug War*, DRUG POL'Y ALL. (Oct. 16, 2014), <http://www.drugpolicy.org/blog/us-state-dept-calls-reforming-international-treaties-support-global-drug-war>.

³⁵⁸ *Id.*

Enforcement Affairs (INL) has long been a champion of the drug war, cracking down on any country that dared to engage in drug policy reform.³⁵⁹ However recently, while addressing the United Nations, Assistant Secretary Brownfield, in noting the change in shift of marijuana policy both in the U.S. and abroad said, “How could I, a representative of the . . . [U.S.], be intolerant of a government that permits any experimentation with legalization of marijuana if . . . states in the [U.S.] have chosen to walk down that road?”³⁶⁰ Brownfield emphasized that things have changed, and flexibility is needed to allow for incorporation of those changes into our policies. He called for all nations, including the U.S., to tolerate different national drug policies, to accept the fact that some countries will have very strict drug approaches; other countries will legalize entire categories of drugs.³⁶¹ Such a phrase would have been unthinkable two years ago, and represents a shift by the U.S. in the direction of ending the international drug war and reforming outdated international drug laws.³⁶² This brings about important questions: has the time come for the whole drug framework to unravel?,³⁶³ if marijuana legalization is successful, could it become a precedent for moving away from criminalization of all recreational drugs, with the flexibility to craft a regulatory regime that could vary from one drug to another?,³⁶⁴ and, how can we approach the discussion for reform?

Today, most European countries accept the operation of customary international law within their national law, provided that it does not conflict with existing internal laws.³⁶⁵ Even though different nations have opted to incorporate international law into their respective national laws, while also preserving the right to pass contrary legislation, it should be remembered that under international law, a state may not rely on its domestic law to excuse the

³⁵⁹ *Id.*

³⁶⁰ Christopher Ingraham, *How Marijuana Legalization in Colorado and Washington is Making the World a Better Place*, WASH. POST (Oct. 17, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/17/how-marijuana-legalization-in-colorado-and-washington-is-making-the-world-a-better-place>.

³⁶¹ *See* Collins, *supra* note 342.

³⁶² *See id.*

³⁶³ *See* Rauch, *supra* note 355.

³⁶⁴ *Id.*

³⁶⁵ *See generally* MALCOLM N. SHAW, INTERNATIONAL LAW 138-79 (Cambridge Univ. Press, 6th ed. 2008) (discussing approaches adopted by other countries' municipal courts).

non-performance of an international obligation.³⁶⁶ When the three UN Drug Conventions were originally drafted they imposed a one-size-fits-all prohibitionist approach to drug policy throughout the world. The original intention and design of the UN drug treaties was to essentially eliminate controlled substances and in the process usher in a drug-free world. Since the treaties have been put in place, the global “War on Drugs” seemingly has no end in sight and could be argued that it has been a pointless, fruitless war. Today, criminal cartels are gaining increased power, millions of low-level drug offenders world-wide now have arrest records, civil liberties have been impinged upon on and millions continue to die in the drug war each year.

As nations begin make changes to their national drug laws, can these new legislations override the existing UN Drug Conventions? The argument can be made that nations are generally free to disregard customary law by passing contrary legislation, except where the customary rule of “jus cogens” exists.³⁶⁷ The Vienna Convention on the Law of Treaties defines “jus cogens” as “norms accepted and recognized by the international community of States as a whole and as a norm from which no detraction is permitted. . . .”³⁶⁸ Although the eradication of drug use worldwide via the “War on Drugs” has been the accepted norm, the United Nations also recognizes international human rights law as jus cogens. Human rights has been and continues to be one of the most important pillars of the UN Charter.³⁶⁹ Central to the arguments to promote drug right reform is a human rights argument, the premise on which many UN standards and norms have been developed. However, this argument is often insufficient to encourage reform programs in countries with scarce human and financial resources.³⁷⁰ Today, UN states have agreed in substance that human

³⁶⁶ See Vienna Convention on the Law of Treaties art. 27, 1155 U.N.T.S 331 (May 23, 1969).

³⁶⁷ See EPPS, *supra* note 338, at 21.

³⁶⁸ Vienna Convention on the Law of Treaties, *supra* note 369, at art. 53.

³⁶⁹ See generally BEATRIZ CAIUBY LABATE & CLANCY CAVNAR, PROHIBITION, RELIGIOUS FREEDOM, AND HUMAN RIGHTS: REGULATING TRADITIONAL DRUG USE (2014) (ebook) (providing overview of the creation of the United Nations Declaration of Human Rights and the Drug Conventions), http://neip.info/novo/wp-content/uploads/2015/04/foreword_introduction_contents_contributors_regulating_traditional_drug_use_2014-1.pdf.

³⁷⁰ *Prison Reform and Alternatives to Imprisonment*, UNDOC, <https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html>. (last visited July 30, 2015).

rights reform must take precedence while instituting drug reform.³⁷¹ However, only through consistent collaborative efforts of UN agencies and other international and national organizations can human rights reform achieve sustainable impact.

A. Proposed Marijuana Reform

At the 2012 session of the CND in Vienna, Argentina's Minister of Health Juan Manzur asked: "[Hasn't] the time [come] to start an open debate on the consistency and effectiveness of some of the provisions . . . in th[e]se treaties[?]"³⁷² In 2013 Diego Cánepa, head of the Uruguayan delegation, declared: "Today more than ever we need the leadership and courage to discuss if a revision and modernization is required of the international instruments adopted over the last fifty years."³⁷³ Former UN Secretary General, Kofi Annan said it best, "[T]he time to change course [has come. The world] need[s] drug policies informed by evidence of what actually works, rather than policies that criminalize drug use while failing to provide access to effective prevention or treatment. This has led not only to overcrowded jails but also to severe health and social problems."³⁷⁴

At a time when the global economy is weak and each nation's budgets are limited, funding for programs need to be narrowed to go to programs that would be effective methods of controlling drugs and reducing drug-related harm. Recently, Senators Cory Booker (D-NJ), Rand Paul (R-KY) and Kirsten Gillibrand (D-NY) announced new bipartisan legislation that will allow the use

³⁷¹ See DAMON BARRETT, INT'L HARM REDUCTION ASS'N, UNIQUE IN INTERNATIONAL RELATIONS? A COMPARISON OF THE INTERNATIONAL NARCOTICS CONTROL BOARD AND THE UN HUMAN RIGHTS TREATY BODIES 25 (2008), <http://www.undrugcontrol.info/images/stories/Barrett-UniqueinInternationalRelations.pdf>.

³⁷² Dr. Juan Mansur, *Important Intervention of the Argentine Health Minister at the UN-CND*, INTERCAMBIOS (Mar. 16, 2012), <http://www.intercambios.org.ar/en/15-ideas-en/news/important-intervention-of-the-argentine-health-minister-at-the-un-cnd>.

³⁷³ MARTIN JELSMAN, TRANSNAT'L INST., UNGASS 2016: PROSPECTS FOR TREATY REFORM AND UN SYSTEM-WIDE COHERENCE ON DRUG POLICY 17 (May 1, 2015), <http://www.brookings.edu/~media/Research/Files/Papers/2015/04/global-drug-policy/Jelsma--United-Nations-final.pdf>.

³⁷⁴ Tony Newman, *World Leaders Call For Ending Criminalization of Drug Use and Possession and Responsible Legal Regulation of Psychoactive Substances*, GLOB. COMM'N ON DRUG POL'Y (Sept. 8, 2014), <http://www.globalcommissiondrugs.org/new-report-world-leaders-call-for-ending-criminalization-of-drug-use-and-possession-and-responsible-legal-regulation-of-psychoactive-substances-2>.

of medical marijuana in states where it is legal without fear of federal prosecution.³⁷⁵ The Compassionate Access, Research Expansion and Respect States Act (CARERS) would reschedule marijuana from a Schedule I to a Schedule II drug to recognize it has accepted medical use, and would amend federal law to allow states to set their own medical marijuana policies.³⁷⁶ The acknowledgment that marijuana has “accepted medical use” in this bill may set the stage for the WHO and the CND to conduct a substance evaluation of marijuana and make a recommendation to remove marijuana from Schedule IV, which is reserved for substances that have “particularly dangerous properties and lack therapeutic value.

The Supreme Court recently noted that marijuana was placed as a Schedule I drug until further studies were completed.³⁷⁷ Today, it is known that marijuana satisfies none of the Schedule I requirements: (1) marijuana has low harmful effects and low likelihood of abuse; (2) marijuana has shown to have medicinal purpose; and (3) under proper doctors care, it can be used safely for therapeutic purposes. The evolution of national systems to account for changing circumstances and the inevitability of further marijuana reform is fundamental to creating an alternative regulatory drug reform in order to move toward drying up the black market and finally put an end to the flow of funds to organized crime syndicates.

Developing economic strategies to create public health policies and procedures would make treatment services available to addicts and abusers and mental health services to help addicts resolve the underlying issues of their addiction. These services should be user friendly and designed to provide assistance to all persons, i.e. minorities, women, etc. The creation of a mobile medical team consisting of a physician assistant, nurse practitioner, and a mental health counselor could provide pre-hospital treatment and mental health assistance to bring the hospital to the doorsteps of users at a much lower cost than going to a hospital. The Obama administration’s new drug policy reflects

³⁷⁵ David Kroll, *Senators Introduce Bill to End Federal Curbs on Medical Marijuana*, FORBES (Mar. 11, 2015, 4:31 PM), <http://www.forbes.com/sites/davidkroll/2015/03/11/is-congress-planning-to-legalize-marijuana>.

³⁷⁶ *Id.*

³⁷⁷ Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL.'Y & L. 26 (2009).

this understanding, calling for prevention and access to treatment over incarceration; pursuing “smart on crime” rather than “tough on crime” approaches to drug-related offenses; and supporting early health interventions designed to break the cycle of drug use, crime, incarceration, and re-arrest.³⁷⁸ During the “War on Drugs” many offenders are arrested and incarcerated for the mere possession of personal use marijuana. In states such as Arizona, marijuana possession without a written certificate from a physician is a felony. The arrest of low-level personal use offenders has not only inundated the U.S. court systems and jails, but globally where marijuana possession is still a crime. In turn, when offenders return to society they have no way of finding jobs with a felony conviction on their record. Forming a treatment system would allow low-level offenders to be given the choice of treatment instead of prison. Removing international and domestic obstacles to essential medications such as methadone would help offenders begin the treatment process.

The Obama Administration’s “smart crime approach” calls for the expansion of specialized courts that divert non-violent drug offenders into treatment instead of prison.³⁷⁹ Additionally, the smart diversion programs would help identify first time offenders who have a substance use disorder and provide community health services instead of a jail cell and having an arrest record.³⁸⁰ Screening, brief intervention, and referral to treatment can begin the process of promoting healthy lifestyles and preventing addictive disorders from taking hold; in turn reducing the number of people entering the criminal justice system.³⁸¹ The inundation of the court systems and the jails comes at a cost to American taxpayers, and globally the jails are packed with offenders who see no light at the end of the tunnel. In order to help offenders returning to society, programs to help support them through their recovery from addiction and pro bono legal services could also assist in clearing any outstanding legal issues. Rather than focusing on low-level offenders, the U.S. and the rest of the world could create cost-efficiency by focusing resources and funds on large drug transactions that cross state and international lines. However, much like any other “product,” so

³⁷⁸ The White House, *A Drug Policy for the 21st Century*, OFF. OF NAT’L DRUG CONTROL POL’Y, <https://www.whitehouse.gov/ondcp/drugpolicyreform> (last visited July 30, 2015).

³⁷⁹ *See id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

long as there is a demand, supply will find a way to the consumer. In order to cut off the supply/demand chain, perhaps the movement to decriminalization might be the answer.

Creating a means by which legal marijuana businesses can put their money into bank accounts would solve a big problem for the industry. As of May 2015 many banks were still not allowing marijuana businesses to open bank accounts. Banks were originally prohibited from allowing marijuana dispensaries to open accounts, because marijuana is a Schedule 1 federally banned substance, even though dispensaries were being given licensure by their state, i.e. Colorado, etc.³⁸² Due to this restriction by the banking industry, marijuana businesses were running cash businesses which created safety issues for employees traveling with large amounts of cash or making their businesses a greater target for theft. In February 2014, the Obama administration gave the banking industry the green light to finance and do business with legal marijuana sellers.³⁸³ This would pave the way for, Rep. Ed Perlmutter (D-Colo.) who, in April 2015, introduced the Marijuana Businesses Access to Banking Act in the House of Representatives.³⁸⁴ This Act would provide banks with “safe harbor,” to offer accounts to marijuana businesses without the threat of criminal penalties and asset forfeiture proceedings that they currently risk under federal law when doing business with marijuana dispensaries.³⁸⁵

The Treasury Department followed suit and issued new rules for banks to do business with marijuana dispensers.³⁸⁶ The guidelines include that banks must file a “marijuana limited” report stating that the marijuana business is following the government’s guidelines, ensuring that sales revenue will not end up in the hands of criminal enterprises.³⁸⁷ However, if the bank believes the businesses’ revenue are not legal sales, then the bank must file a “marijuana priority” report

³⁸² Tim Devaney, *Bill to Legitimize Marijuana Money Introduced in House*, THE HILL (Apr. 29, 2015, 4:21 PM), <http://thehill.com/regulation/legislation/240534-marijuana-banking-legislation-introduced>.

³⁸³ Danielle Douglas, *Obama Administration Clears Banks to Accept Funds from Legal Marijuana Dealers*, WASH. POST (Feb. 14, 2014), http://www.washingtonpost.com/business/economy/obama-administration-clears-banks-to-accept-funds-from-legal-marijuana-dealers/2014/02/14/55127b04-9599-11e3-9616-d367fa6ea99b_story.html.

³⁸⁴ Devaney, *supra* note 385.

³⁸⁵ *Id.*

³⁸⁶ Douglas, *supra* note 386.

³⁸⁷ *Id.*

to alert regulators.³⁸⁸ At the end of 2014, 185 banks and credit unions notified the Treasury that they were working with marijuana-related businesses.³⁸⁹ Since marijuana is still illegal and out of fear of opposition, the names of those banks are kept confidential. Allowing marijuana businesses to open bank accounts opens the door toward legalizing marijuana while creating a functioning national regulatory structure to hopefully end the negative concerns of society, i.e. violence, corruption and mass incarceration of many low-level offenders.

In the U.S. and around the world the regulation of marijuana and in some countries the decriminalization of other drugs has already begun. States and nations are each developing different models of legal marijuana regulation. Different populations will necessitate flexible regulatory policies. Regulation does not mean that there will not be risk involved. However, creating a regulatory market with a sound legal framework can set the state for a successful long term reform process. Successful regulatory models will need to adapt as new information, both positive and negative, from consistent monitoring and evaluation comes available.³⁹⁰

CONCLUSION

The international drug control regime was created with two goals in mind: to reduce drug use and provide access to treatment. Neither goal has been reached. Today, countries around the world are taking an unprecedented stand for reform and have begun to implement new approaches to drugs and the problems that they can generate, many of which have been great successes. The U.S. and the UN must now look to the future of eradicating or reducing global drug trafficking through the creation of new public health policies and controlled substances regulatory procedures. The change must begin by seeking alternatives to criminal adjudication, by treating drug addicts for their addiction and providing resources for prevention. Marijuana legalization is only a temporary solution for a much larger illicit drug problem. New ideas are greatly needed, and for now one such novel idea being experimented by

³⁸⁸ *Id.*

³⁸⁹ Katie Lobosco, *Pot Problem: Banks Still Don't Want This Cash*, CNN MONEY (Apr. 14, 2015, 1:13 PM), <http://money.cnn.com/2015/04/14/news/economy/pot-marijuana-banking>.

³⁹⁰ GLOBAL COMM'N ON DRUG POLICY, TAKING CONTROL: PATHWAYS TO DRUG POLICIES THAT WORK 30 (Sept. 2014), <http://www.globalcommissiondrugs.org/reports>.

Uruguay and states such as Colorado is legalizing and regulating marijuana. As states and nations test different models of regulation, in turn this will create a new and less expensive alternative to incarceration while weakening the power of illicit economies. The U.S and their global partners must work together to create innovative regulatory drug policies with stringent treatment guidelines in order to truly begin to disconnect the pipeline of profits going to drug trafficking. The upcoming United Nations General Assembly Special Session on Drugs (UNGASS) in 2016 is an opportunity to begin reviewing international drug control policies and the future of the global drug control regime.³⁹¹ It can be argued that the UN Drug Conventions are outdated and much like the laws of any nation, they can be amended or changed through a democratic process. As future amendments are made, perhaps allowances will be made to the Conventions making them adaptable as time and society continue to evolve.

³⁹¹ *Id.* at 6.