

High Crimes

Strategies to Further Marijuana Legalization Initiatives



A National Lawyers Guild Report
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About the Author

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About the National Lawyers Guild

The National Lawyers Guild (NLG) is a bar association composed of lawyers, legal workers, law students, and jailhouse lawyers. NLG's work is based on the founding principle that human rights are more sacred than property interests.

About the NLG Drug Policy Committee

The NLG Drug Policy Committee (DPC) educates the public about drug policy issues and alternatives and advocates for policies that reduce the harm caused by the War on Drugs. Members of the DPC work with organizations such as the ACLU, Americans for Safe Access, the Criminal Justice Policy Foundation, Law Enforcement against Prohibition, NORML, Sensible Colorado, Students for Sensible Drug Policy, and the Rhode Island Patient Advocacy Coalition. They have written extensively on drug crimes, drug laws, medical marijuana, police accountability, international drug conventions, and mass incarceration. NLG members have been at the forefront of efforts to legalize medical and recreational marijuana and to mitigate the worst effects of the War on Drugs.

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Executive Summary

In November 2012, Colorado and Washington made history by becoming the first states to legalize production and distribution of recreational marijuana for adult use. Successful ballot measures in both states led to the removal of criminal and civil penalties, marking the first time voters have elected to abolish cannabis prohibition. Made possible by decades of advocacy for marijuana legalization, this historic moment has created an opportunity to radically shift the legal and social landscape of drug policy and criminal justice reform in the United States.

As many scholars, activists, and legal practitioners have made clear, the US government's 40-year War on Drugs has been an abject failure. Polls show that public opinion increasingly favors the legalization of medical and recreational marijuana for adult use. Even the Obama administration admits that it is time for a serious conversation about marijuana policies. Thus far, however, drug policy pronouncements coming from the White House have not addressed some of the most critical issues around marijuana prohibition. These include:

- the need to revisit international drug conventions in light of the global shift toward decriminalization,
- the War on Drugs' disproportionate effect on the poor and people of color,
- the scientific and anecdotal evidence pointing to marijuana's therapeutic value,
- the disconnect between the federal government's rhetoric and its practice in states where medical marijuana is legal,
- the ongoing financial dependence of law enforcement on funds seized during drug arrests,
- and the growing influence of the private prison industry and their lobbyists on federal drug policy.

This paper explores ongoing discussions about the War on Drugs and cannabis legalization. After reviewing the legal history and consequences of marijuana prohibition in the United States and internationally, we highlight the economic incentives motivating law enforcement agencies and private prison industry interventions in the field of US drug policy. We demonstrate that the War on Drugs is driven by the increasing militarization of police forces, who fund their operations using revenues obtained through property and financial seizures, and by private corrections corporations, whose profitability is contingent upon ever-increasing rates of incarceration. These interest groups are clearly implicated in the federal government's ongoing support for marijuana prohibition. They are direct opponents to the new wave of legalization and will play an important role in exacerbating tensions between state and federal laws. In response to their initiatives, we outline legal strategies aimed at mitigating the worst excesses of the War on Drugs and furthering state, national, and international legalization initiatives.

Drawing on the knowledge and expertise of NLG members working in the area of drug policy—as well as the work of academics, journalists, and legal commentators addressing the War on Drugs, mass incarceration, the role of police and prisons, and the history of cannabis prohibition—we advance a series of recommendations for legal practitioners, politicians, and legalization advocates working to end marijuana prohibition.

Summary of Recommendations

- 1. Reframe drug use as a social and public health issue and not a criminal justice problem.** Research shows that punitive criminal justice drug policies do not decrease drug use. Legalization advocates should therefore push for harm-reduction strategies to address health-related drug problems and work to increase government funding for treatment and education.
- 2. Revisit drug treaties to challenge the punitive international drug policy framework.** The US government has cited international drug treaties to justify its challenges to state-level marijuana legalization. These conventions should instead be amended to reflect the current shift toward decriminalization in the United States, Europe, Australia, and Latin America.
- 3. Reclassify marijuana from its current status as a Schedule I substance.** Mounting scientific and anecdotal evidence supports the therapeutic benefits of marijuana, yet the US government continues to insist that cannabis is a dangerous drug with no proven medical applications. Rescheduling cannabis would allow for expanded medical research and use under international law.
- 4. Support the right of states to legalize medical and/or recreational marijuana for adult use without federal interference or sanctions.** Advocates of medical and recreational adult use cannabis should continue to work on state legalization initiatives through referenda where possible and legislation where necessary. These efforts should be accompanied by support for federal marijuana bills currently under consideration.
- 5. End the practice of civil asset forfeiture by law enforcement agencies.** Seizures made during drug arrests lead to skewed police priorities, unjust treatment of drug offenders, the militarization of US police departments, and increased police corruption. Interim solutions include reassigning seizure money to a general fund and making forfeiture laws require criminal convictions before enabling the government seizure of any property.
- 6. Connect legalization efforts to the abolishment of the for-profit prison industry, which benefits from growing levels of incarceration.** These measures include repealing harsh mandatory minimum sentences, challenging exploitative prisoner work programs, and releasing nonviolent drug offenders into community alternatives to incarceration or on the basis of time served.

Ending cannabis prohibition offers multiple benefits. Legalization would transform the marijuana industry from a violent illicit market into a stable regulated one. It would significantly reduce infringements on civil liberties and lower arrest and incarceration rates. Changing marijuana's criminal status would reduce current law enforcement costs and protect people from entering the criminal justice system. Finally, legalization would remove restrictions currently impeding the study of medical marijuana and allow more users to acquire treatment if necessary.

The time has come to replace the drug war rhetoric with sound economic, criminal justice, and public health policies. Studies show that higher drug use is strongly correlated to income inequality, and that socioeconomic disparities and differential access to social support networks tend to be better indicators of drug use than existing drug laws and policies. Consequently, the NLG encourages policy makers and advocates to recognize that harmful drug use must be understood within the context of broader social and economic factors.

I. Introduction

In November 2012, Colorado and Washington made history by becoming the first states to legalize production and distribution of recreational marijuana for adult use.¹ Successful ballot measures in both states led to the removal of criminal and civil penalties, marking the first time voters have elected to abolish cannabis prohibition.² Made possible by decades of advocacy for marijuana legalization, this historic moment has created an opportunity to radically shift the legal and social landscape of drug policy and criminal justice reform in the United States.

The landmark developments in Colorado and Washington reflect broader changes in perceptions of marijuana. Over the past ten years, support for medical marijuana has consistently polled at 70-80% in the United States,³ and recent polls show that more Americans are willing to legalize cannabis for recreational adult use than ever before. According to one national poll, 58% of Americans said they think marijuana should be legal; and 50% said they think marijuana will become legal under federal law within ten years.⁴ Additionally, a December 2012 Gallup poll indicated that 64% of Americans are against the government enforcing federal anti-marijuana laws in states where marijuana is legal.⁵ Over 106 million people currently live in jurisdictions that have approved the use of cannabis in some form,⁶ and more than 100 million Americans report having used the herb despite its prohibition.⁷ More states are expected to legalize medical and recreational marijuana in the coming years, and several legislative attempts to relax prohibition are currently under consideration at the federal level.⁸ Yet President Obama and US Attorney General Eric Holder have both indicated that they are against ending marijuana prohibition and delayed making any pronouncements on how they would respond to the legalization process under way in the states.⁹

Many scholars, activists, and legal practitioners now agree that the decades-long global War on Drugs has failed, producing serious negative repercussions for individuals and societies. In the United States, the harsh legal penalties, the explosion of mass incarceration, the militarization of policing, and the consistent violations of constitutional rights carried out as part of the drug war have damaged the lives of millions of people. With public opinion increasingly in favor of relaxing restrictions on cannabis and in light of the devastating outcomes of the War on Drugs, it is imperative to ask: Why, despite the growing trend of states changing their drug laws to end prohibition, has the federal government refused to consider legalizing marijuana? Who benefits from the continued criminalization of an herb with medicinal properties that is already being used by millions of people?

There is no lack of alternatives to prohibition. Many countries have decriminalized cannabis or legalized personal possession and adult use without a significant increase in drug usage. Economists and marijuana advocates have pointed to the potential savings in law enforcement costs and increases in tax revenue created by legalization. Nevertheless, the federal government has so far rebuffed calls for reform even as funding is cut for basic social services. Hundreds of peer-reviewed studies have reported the therapeutic qualities of cannabis, yet the Drug Enforcement Administration (DEA) continues to aggressively arrest and prosecute growers and sellers in states where medical marijuana has been legalized.

In order to understand these contradictions, it is necessary to examine the ongoing War on Drugs and consider critical aspects of the conversations currently taking place around cannabis

legalization. After reviewing the legal history and consequences of marijuana prohibition in the United States and internationally, we highlight the economic incentives motivating two groups that have an enormous influence on US drug policy—law enforcement agencies, which supplement their budgets through seizures of property and financial assets made during drug trafficking cases, and the growing private prison industry. We argue that the US government’s drug policies are currently being driven by the militarization of American police forces and by the interests of private corrections corporations. The role of these interest groups is central to continued federal support for marijuana prohibition. Furthermore, they will pose a serious obstacle in the coming wave of legalization and will exacerbate tensions between state and federal laws. We conclude by outlining legal strategies to mitigate the worst excesses of the drug war and to move forward legalization and decriminalization initiatives at the state, national, and international level.

As a progressive legal organization with experience in criminal defense, drug policy reform, and marijuana litigation and activism, the National Lawyers Guild is uniquely positioned to comment on the current legalization process. The following analysis draws on the knowledge and expertise of NLG members in order to advance recommendations for legal practitioners and activists working to end marijuana prohibition. It also builds on the work of academics, journalists, and legal commentators who have written about the War on Drugs, mass incarceration, the role of police and prisons, and the history of cannabis prohibition in America and abroad.¹⁰

In order to challenge the current drug policy regime, the NLG calls for drug use to be reframed as a social and public health issue rather than as a criminal problem. We recommend revisiting the international drug conventions that the federal government has used as justification to challenge the legalization of marijuana at the state level, and instead argue that these conventions should be amended to reflect the current shift toward decriminalization in the United States, Europe, Australia, and Latin America. We call for the reclassification of cannabis from its current Schedule I status to allow for expanded medical research and use under current international laws. Additionally, we recommend allowing states the option to legalize or decriminalize recreational and medicinal marijuana without federal government interference. We argue that such legalization efforts must coincide with efforts to end the practice of seizing assets during drug-related arrests and to curtail the for-profit prison industry, which benefits from growing levels of incarceration and lobbies for harsh drug laws. Finally, the NLG calls for the release of all nonviolent drug offenders—either on the basis of time served, or into community programs that provide an alternative to incarceration.

A Note on Definitions

Several terms are often used inaccurately and interchangeably in discussions of marijuana policy reform. This section briefly outlines differences between depenalization, decriminalization, and legalization before turning to an examination of how these models are applied in other countries and the United States.

Depenalization refers to reductions in the criminal status of marijuana possession. This does not imply complete decriminalization, but rather the removal of certain penalties associated with marijuana (i.e. jail time). Under depenalization, marijuana possession and sale generally remain a criminal offense. Popularized by Robert MacCoun and Peter Reuter in their landmark study *Drug War Heresies*, the term is thought to more accurately reflect the diversity of anti-

prohibition models applied internationally.¹¹ However, the term **decriminalization** is commonly used in policy debates even in cases where marijuana possession has not formally shed its criminal status.¹² Decriminalization literally means that marijuana offenses are addressed as a civil matter rather than as a criminal issue. However, decriminalization is not the same as legalization and certain aspects of marijuana use often remain criminal offenses.¹³ For example, in New York City, cannabis possession is not a criminal offense, but charges of holding marijuana in public view lead to more than 35,000 arrests per year.¹⁴ Sale of marijuana also typically remains criminalized under marijuana decriminalization schemes in which possession is allowed, thereby complicating enforcement efforts.

During the 1970s, eleven states lowered their penalties for marijuana possession and casual use, starting with Oregon in 1973 and followed by Colorado, Alaska and Ohio in 1975, California, Maine and Minnesota in 1976, Mississippi, New York and North Carolina in 1977, and finally Nebraska in 1978. These states have been referred to as “decriminalized” states in drug policy literature and are often examined together as a category.¹⁵ However, this label can be misleading because some states that are called decriminalized have not actually rescinded the criminal status of marijuana offenses, making depenalization a more accurate description of their policies. Meanwhile, other states that are not on the “decriminalized” list have reduced the impact of criminal status substantially or offered expungement provisions that remove marijuana offenses from a criminal record.¹⁶ As a result, the label “decriminalization” may be less adequate now than it was when these policies were adopted in the 1970s.¹⁷ The confusion around decriminalization has produced ambiguity in people’s understanding of drug laws; one-third of Americans do not know the penalties for marijuana possession in their state and consistently assume the maximum penalties are higher than they are.¹⁸

Legalization is the third term that is used in public and policy debates on marijuana, and yet its meaning is not as obvious as the term would immediately suggest. Legalization requires that a state or country remove all criminal and civil sanctions for marijuana. However, it is possible to *partially* legalize—for example, by allowing possession but not production or distribution.¹⁹ This model actually comes closer to decriminalization. Full legalization of marijuana would allow people to use, hold, grow, transport, process, and sell the plant without legal repercussions. However, legalization could also be accompanied by restrictions on marijuana’s sale or use, which would determine its everyday application.²⁰ Furthermore, there would still be marijuana-related arrests even if the product became legal; underage possession, driving while impaired, and selling to minors would all likely be against the law even if marijuana were legalized. Using these terms without carefully describing the exact specifications of any particular policy leads to more confusion than clarity when it comes to drug policy reform discussions.²¹

Perhaps the most important insight to take away from this delineation of terminology is that, despite the existence of various models for the depenalization, decriminalization, and legalization of some aspects of marijuana use, *no country has fully legalized recreational marijuana possession, production, and distribution*. In many cases, countries or jurisdictions that legalized the possession of small amounts of cannabis for personal use have simultaneously increased efforts to prosecute those who grow and sell.²² The following section addresses the restrictions arising from international drug conventions that prevent full legalization of cannabis as well as various models of drug policy reform under way in Europe, Australia, and Latin America before turning to the legal status of marijuana in the United States.

II. International Drug Conventions

Understanding drug policy reform requires that we first examine the international drug conventions to which the United States is a signatory. The three international drug treaties that currently mandate the control of drug use and trafficking are: 1) the 1961 Single Convention on Narcotic Drugs, which banned the use, possession, and manufacturing of ten scheduled drugs,²³ 2) the 1971 Convention on Psychotropic Substances, which added hallucinogens such as LSD to the list of prohibited substances, and 3) the 1988 Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was aimed at drug traffickers and included provisions on asset forfeiture, money laundering, and dealing in precursor chemicals. There have been no new international conventions related to drug policy in twenty-five years.

The implementation of these conventions falls under the authority of three bodies that oversee the global drug regime: 1) the United Nations Office on Drugs and Crime (UNODC), 2) the International Narcotics Control Board (INCB), and 3) the Commission on Narcotic Drugs (CND). All three agencies advocate a primarily criminal justice approach to drug control.²⁴ As a result, the UN (and the United States in particular) has insisted for over fifty years that all countries employ a punitive drug policy framework. Despite restrictions of international drug conventions, individual countries have experimented with new strategies such as harm reduction approaches and decriminalization measures, including the limited legalization of marijuana for medical use in countries such as Canada and Israel.

Over the past several decades, more countries have been moving toward models of depenalizing and decriminalizing cannabis (See Figure 1). To get around the limitations of international treaties, countries have adopted various strategies of both *de jure* and *de facto*²⁵ depenalization for marijuana, ranging from complete decriminalization of personal use (Portugal, Italy, and Spain)²⁶ to non-prosecution policies for possession and small sales that approach *de facto* legalization (the Netherlands).²⁷ Other countries such as Germany and Belgium allow cannabis “social clubs”—cooperative arrangements in which members share resources to grow marijuana for personal use.²⁸ In Australia, personal use and growing of marijuana are decriminalized, but selling remains subject to criminal penalties.²⁹ Canada, the United Kingdom, Denmark, France, and Switzerland have also moved toward a decriminalization approach.³⁰ Over the past year, Latin American leaders initiated a series of summits to discuss drug policy reform with a focus on decriminalization and regulation: Argentina, Mexico, Brazil, Bolivia, and Ecuador have all shifted away from a punitive framework.³¹ Many countries also advocate harm reduction approaches to drug policy, viewing drug use as a social and public health problem rather than as a criminal justice issue.³²

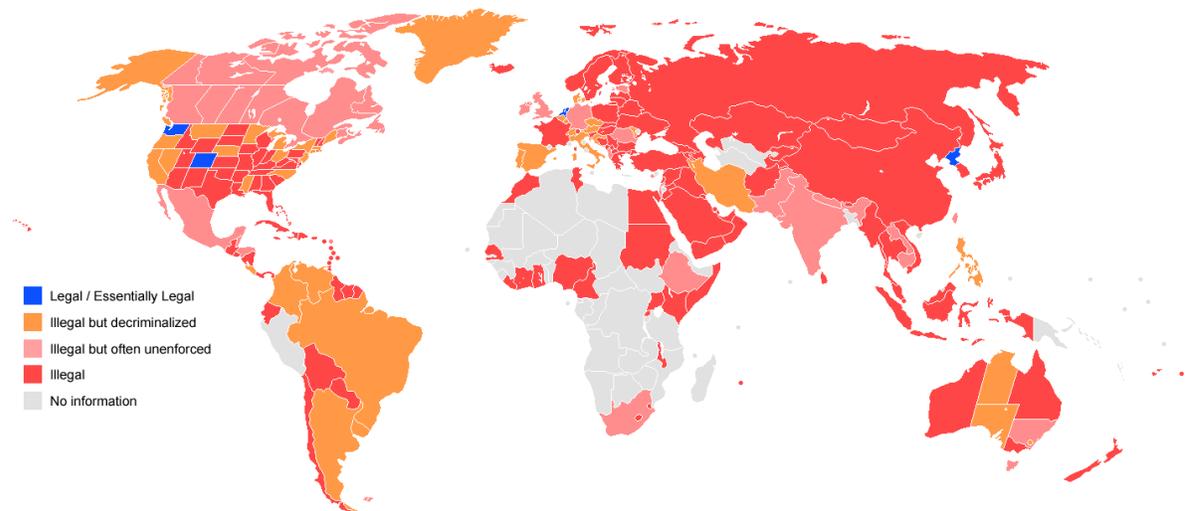


Figure 1: Comparative chart of marijuana legal status by country.³³

These depenalization initiatives are useful for assessing implications of US drug policy reform, and especially in addressing the oft-cited concerns that lessening criminal penalties on marijuana will lead to significant increases in usage and turn decriminalized regions into drug tourism zones.³⁴ Overall, studies of countries that have experimented with decriminalization and *de facto* legalization have not seen large expansions in drug use. A recent study of Portugal found that, despite having decriminalized all drugs in 2001, usage rates remained quite similar to (and sometimes lower than) other European countries. The same study showed that drug-related health problems and fatalities decreased dramatically after the removal of criminal penalties.³⁵ In another comparative study, MacCoun and Reuter examine the Netherlands cannabis policy and conclude that changes in drug policy alone did not lead to usage increases. While they acknowledge that drug use rose in the Netherlands in the decades after decriminalization, they point out that Dutch use levels consistently remained lower than those in the United States.³⁶

No country has yet violated the terms of international conventions by legalizing recreational marijuana.³⁷ However, strategies exist for countries to challenge or change the 1961 Single Convention, including calling for an amendment to remove marijuana from the list of prohibited substances, withdrawing from the convention altogether, or withdrawing and then re-ratifying with a reservation concerning marijuana.³⁸ In fact, according to Article 46 of the Single Convention, signatory countries can withdraw from the treaty—and if enough choose to withdraw the treaty will cease to exist. Although such measures have thus far been rare, Bolivia announced in 2011 that it would be withdrawing and then rejoining the convention with a formal reservation regarding the chewing of coca leaves.³⁹ The outcome of this attempt will be instructive for marijuana reform advocates. Furthermore, because the Single Convention allows leeway for the medicinal use of drugs, the rescheduling of marijuana to permit medical use and research would not violate the treaty.⁴⁰ Many countries, as well as US states, have already legalized the use of medical marijuana (See Figure 2).

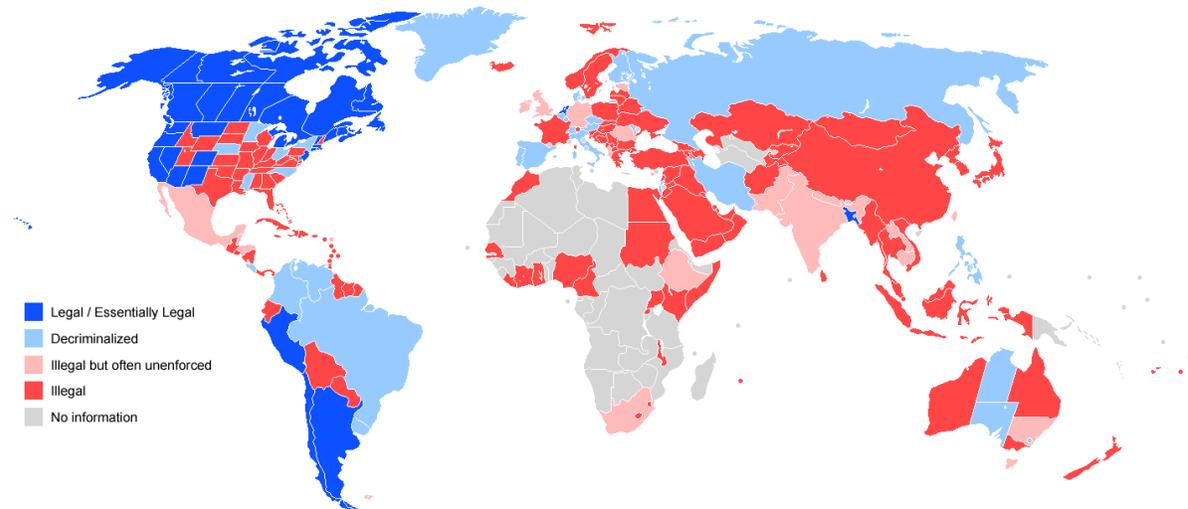


Figure 2: Comparative chart of medical marijuana legal status by country.⁴¹

Changes to marijuana policy currently under way in numerous countries indicate that the time has come to challenge international drug conventions and the UN institutions that enforce them. As the NLG has argued in other cases, a human rights framework must be applied to global drug policy.⁴² The 2011 report of the Global Commission on Drug Policy concurs that the rights enshrined in the Declaration of Human Rights—including the right to health, to due process and a fair trial, and to be free from cruel, inhumane, or degrading treatment—supersede the international drug control conventions. These conventions need to be revisited and adjusted to reflect current trends in marijuana policy. Allowing individual nations to experiment with different models of depenalization, decriminalization, and legalization will allow people to decide for themselves if marijuana should be legal in their region and/or country.

The United States plays a crucial role in global drug policy reform. Current drug conventions are strongly supported by the US government, which threatens countries that depend on it for monetary aid with decertification if they do not abide by convention rules.⁴³ While the United States has been more than willing to violate international conventions in other circumstances—such as the Geneva Convention, the Convention Against Torture, and the Comprehensive Nuclear Test Ban Treaty—every administration has upheld the rigid framework of the drug conventions. The Obama administration has pointed to international drug treaties as a reason to severely restrict medical marijuana research, to question the legalization of recreational marijuana in Washington and Colorado, and to avoid ending prohibition at the federal level.⁴⁴ Furthermore, in March 2013, the UN International Narcotics Control Board called on US federal officials to fully comply with the international drug control treaties by challenging the legalization process currently taking place at the state level.⁴⁵

The next few years are pivotal in challenging these international institutions and treaties. While international drug control agencies are calling for continued prohibition, Americans are moving in the opposite direction by using state referenda to legalize medical and recreational marijuana for adult use. International drug treaties are not a reason to invalidate the recent changes in state laws. Rather, the shift toward decriminalization in many nations demands that we begin changing these conventions to relax or eliminate penalties for marijuana and other drugs.

III. Marijuana Prohibition in the United States

Legal History

Marijuana has not always been illegal in the United States. Originally, the herb was commonly used in a medicinal capacity and hemp was a government-sanctioned crop widely used in textiles.⁴⁶ The first attempts to regulate marijuana came in 1906 with the Pure Food and Drug Act, which required labeling of cannabis products. Throughout the early twentieth century, more national and international legislation was passed to regulate the use and sale of marijuana, including the Harrison Act of 1914, the Uniform State Narcotic Act of 1925, the Federal Import and Export Act of 1922, the International Opium Convention of 1925, the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs of 1936, and the Marijuana Tax Act of 1937.⁴⁷ By the mid-1930s, each US state had some form of cannabis regulation on the books.

The racial aspect of these early drug laws cannot be overlooked; in many cases, restrictions on specific drugs were overtly linked to efforts to police immigrants whose presence was thought to disrupt the social order. As Martin Lee writes in his social history of cannabis, marijuana has long been “a convenient scapegoat for deep-rooted social inequities.”⁴⁸ Narratives about drugs, he argues, have consistently been used to incite fear and disparage specific social groups, including laws passed against opium targeting Chinese-Americans, the prohibition of cannabis in the United States partly arising from the demonization of Mexicans, and claims in the 1930s that marijuana use led to inter-racial sexual contacts.⁴⁹

During the 1930s, the US government created the Federal Bureau of Narcotics, headed by anti-drug zealot Harry Anslinger. Referred to as the “archnemesis of marijuana smokers,” Anslinger was responsible for lurid anti-cannabis propaganda such as the well-known 1936 film *Reefer Madness*.⁵⁰ Although many of Anslinger’s claims about the dangers of marijuana use were debunked in the 1944 LaGuardia Report,⁵¹ he continued to crusade against marijuana.⁵² Anslinger’s frequently racist assertions about the negative consequences of cannabis use influenced public perception and government policies for decades, and are still echoed today in the government’s position on marijuana.⁵³

As a result of Anslinger’s anti-marijuana propaganda, penalties for possession and sale of the herb intensified. In the 1950s, extended mandatory sentences and increasingly harsh punishments were enacted through the Boggs Act of 1952 and the Narcotics Control Act of 1956, which made first-time marijuana possession an offense punishable by 2-10 years and a fine of up to \$20,000. The Marijuana Tax Act was deemed unconstitutional by the Supreme Court in 1969 and replaced by the Controlled Substances Act, which continues to dictate drug policy today.⁵⁴ In 1970, marijuana was classified as a restricted Schedule I substance under federal law and growing the plant became a felony offense. President Richard Nixon combined the two federal agencies responsible for drug policy—the Bureau of Narcotics and Dangerous Drugs (BNDD) and the Office of Drug Abuse Law Enforcement (ODALE)—to create the Drug Enforcement Administration (DEA) in 1973. By the mid-1970s, more than 10,000 DEA agents were stationed throughout the world and efforts at interdiction of drug trafficking were under way.⁵⁵

Changing attitudes toward marijuana use during the 1960s and ‘70s led to a comprehensive study from the National Commission on Marijuana and Drug Abuse in 1972. The results of this study, known as the Shafer Commission, were published in a bipartisan report, titled *Marihuana: A*

*Signal of Misunderstanding.*⁵⁶ The report stated that marijuana was not a threat to public safety and called for decriminalization of small amounts for personal use. As a result, local and state governments started relaxing penalties for possession and sale of marijuana and Congress repealed the mandatory sentences for marijuana offenses. Between 1973 and 1978, eleven states decriminalized marijuana to varying degrees.⁵⁷ Despite increasingly permissive public perceptions of cannabis and the recommendations of the Shafer Commission, Nixon launched the “War on Drugs” in 1971—calling drugs “public enemy number one.”⁵⁸ Shortly after this pronouncement, New York Governor Nelson Rockefeller created strict sentencing guidelines known as the “Rockefeller Drug Laws.” These policies put even low-level drug offenders in prison for decades, and soon became the norm across the country despite criticism from drug treatment experts and politicians.⁵⁹

The penalties for marijuana were further expanded under President Ronald Reagan during the 1980s, as the Republican War on Drugs led to a renewed emphasis on arrest and incarceration. The Comprehensive Criminal Control Act of 1984 and the Anti-Drug Abuse Act of 1986 reinstated mandatory sentences for cannabis and other drugs and allowed law enforcement to seize the assets of those convicted of drug-related offenses. A later amendment created a three-strikes law, which mandated a 25-year term for repeated felonies and allowed the death penalty for supposed “drug kingpins.” The 1980s also witnessed the effects of racially disparate drug arrests and sentencing practices—most notably in the vast difference in punishment for crack and powder cocaine⁶⁰—which led some commentators to suggest that the War on Drugs was convenient cover for politicians trying to appeal to white working class voters through racially coded policies.⁶¹ On the international level, Reagan tripled the interdiction budget and assigned Vice President George H.W. Bush to control drugs coming through the borders.⁶²

The drug war’s high rates of arrest and incarceration quickly overwhelmed the courts and prisons. As a result, drug courts were created in the late 1980s as a means of dealing with the high number of people processed on minor drug charges. The first drug court, initiated in Miami-Dade County, Florida in 1989, substituted community service and drug treatment for prison sentences. The trend quickly spread, and by 2012, there were over 2,700 drug courts in the United States.⁶³ However, the National Association of Criminal Defense Lawyers (NACDL) released a report questioning their efficacy.⁶⁴ Drug courts, the report claims, are “an obstacle to making cost-efficient drug abuse therapy available to addicts and reducing criminal case loads.”⁶⁵ According to the NACDL, access to treatment is dependent on a guilty plea for low-level drug offenses while people facing more serious drug charges end up going to prison. Furthermore, people of color, immigrants, and poor people tend to be under-represented in these courts. Studies also show that drug courts, while touted as a cost saving measure, actually fall short of stated goals in a cost-benefit analysis,⁶⁶ since drug courts tend to be over-inclusive of individuals who do not actually need treatment for drug addiction.⁶⁷

By the 1990s, another shift in public perception of cannabis resulted in the growth of the medical marijuana movement. Voters in California passed Proposition 215 in 1996, allowing for the medicinal use of cannabis with a doctor’s recommendation. However, despite the ballot measure at the state level, the federal government continued to aggressively prosecute medical marijuana patients and distributors under the Controlled Substances Act. Several important cases tried during this period set the framework for the relationship between state and federal laws that continue to shape drug policy efforts today. In *United States v. Oakland Cannabis Buyers Coop*

(2001), the Supreme Court rejected the medical necessity defense and ruled that federal drug laws do not allow an exception for medical marijuana.⁶⁸ In *Gonzales v. Raich* (2005), the Supreme Court ruled that even when people are acting in accordance with state-approved marijuana programs, they may still be prosecuted by federal authorities under the Commerce Clause of the Constitution.⁶⁹ These cases have allowed the federal government to prosecute medical marijuana patients and distributors in California and several other states.

Courts have also imposed some limitations on federal drug prosecutions. In a lawsuit brought by California doctors and patients, *Conant v. Walters* (2002), the Ninth Circuit ruled that it is within the First Amendment rights of doctors to recommend medical marijuana.⁷⁰ Other important Court of Appeals cases, such as *Raich v. Ashcroft* (2005) and *Santa Cruz v. Ashcroft* (2003), determined that the Commerce Clause does not apply to medical marijuana operations that are local and noncommercial.⁷¹ Currently, NLG attorney Matt Kumin is co-counsel against the federal government in a Ninth Circuit case challenging the constitutionality of the federal government's raids and criminalization of California patients in light of state law protections.⁷²

The current position of the US government and the DEA remains that marijuana has no proven medical value, even though close to twenty states have enacted medical marijuana laws.⁷³ With the DEA and the National Institute on Drug Abuse (NIDA) refusing to recognize any therapeutic benefits from marijuana use and obstructing meaningful research, cannabis remains classified as a Schedule I drug.⁷⁴ Such a classification implies that it has a high potential for abuse, no currently accepted medical use, and a lack of accepted safety for use under medical supervision.⁷⁵ In opposition to these claims, medical marijuana advocates have pointed to more than 200 peer-reviewed studies that demonstrate various medical applications of cannabis, including a 1999 study by the Institute of Medicine.⁷⁶

“To say that sufficient evidence is lacking on the medical efficacy of marijuana is to ignore a mountain of well-documented studies that conclude otherwise,” said Kris Hermes of the NLG Drug Policy Committee and Americans for Safe Access, the group challenging the federal classification of marijuana.⁷⁷ “The Obama Administration has so far succeeded in keeping medical marijuana out of reach for millions of sick Americans by setting unnecessarily prohibitive standards.” Despite the growing scientific and anecdotal evidence that marijuana has medicinal value—not to mention that no fatalities have ever been directly associated with cannabis use—the US government continues to challenge the legalization of medical marijuana and expend significant resources in order to undermine its implementation at the state level.

Many believed that the election of President Obama—who has admitted to using marijuana himself⁷⁸— signaled a change in federal enforcement policies, but in fact DEA raids on the medical marijuana industry under his administration have far exceeded the number carried out under George W. Bush.⁷⁹ Even after the November ballot initiatives to legalize and regulate recreational marijuana in Colorado and Washington, the federal government has threatened medical cannabis dispensary operators in West Coast cities with shutdown notices, civil forfeiture, and up to forty year prison terms.⁸⁰ Obama administration has continued to hold the same priorities as previous administrations: prosecution and incarceration rather than harm reduction and education. As a result, the government-proclaimed War on Drugs’ dire consequences for users, families, and communities continue unabated today.

Consequences of the War on Drugs

Over twenty million people have been incarcerated for marijuana-related offenses in the United States since 1965.⁸¹ Despite this harsh regime, marijuana use is more prevalent now than ever before. Globally, close to 200 million people use marijuana each year, making the herb the most popular and widely used illicit substance on the planet.⁸² Over 100 million Americans report having used marijuana despite its current prohibition, with 1 in 10 using it regularly.⁸³ In fact, between 1998 and 2008, the estimated use of marijuana in the United States rose 8.5%.⁸⁴ Prevalence of cannabis use in the United States is three times the global average,⁸⁵ and statistics show that older Americans are increasingly using marijuana in a recreational capacity.⁸⁶ Since many Americans regularly use or have experimented with cannabis, the criminalization of this drug has caused a great deal of harm.

Reliance on an aggressive law enforcement approach has exacerbated the risks associated with drug use, leading to millions of people entering the criminal justice system. Harsh penalties and drug war rhetoric, however, have not resulted in decreased rates of drug use. In fact, a recent World Health Organization report found that “countries with more stringent policies towards illegal drug use did not have lower levels of drug use than countries with more liberal policies.”⁸⁷ Correspondingly, studies show that countries experimenting with loosening drug laws have not seen the dramatic increases of drug usage often predicted by detractors of drug policy reform.⁸⁸

The global drug war has been an overall failure resulting in devastating consequences for individuals and societies.⁸⁹ Law professors Eric Blumenson and Eva Nilsen outline the adverse effects of marijuana prohibition,⁹⁰ including the creation of an extensive and often violent illicit market controlled by organized crime. Under these conditions, there is an increased likelihood that youth will attain marijuana from dealers who have access to potentially more dangerous drugs like heroin and cocaine, thereby increasing the chance that cannabis will become a “gateway drug.” The approximately 750,000⁹¹ people arrested for marijuana-related crimes each year face the possibility of pretrial detention, court fees, and ineligibility for jobs, government grants and contracts, public housing, driver’s licenses, occupational licenses, and voting rights. College students can lose their federal loans⁹² and high school students risk expulsion for marijuana possession. Immigrants face the danger of deportation and parents risk losing custody of children. People caught in possession of marijuana while on parole or probation risk being sent back to prison. In addition to these legal consequences, those arrested for marijuana offenses must deal with the negative social and economic repercussions of having a criminal record.

More people are in jail today for drug crimes than were incarcerated for all reasons put together in 1980, a direct result of the War on Drugs. Because of strict mandatory minimum sentences, even non-violent drug offenders can end up serving long prison terms. Perhaps the most detailed and poignant description of the negative consequences of the drug war comes from law professor Michelle Alexander in her book, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness*.⁹³ Comparing the current regime of mass incarceration to slavery and segregation, Alexander argues that the government’s War on Drugs has created a new racial caste system in which arrests for drugs provide a pretext for the mass imprisonment of people of color, especially African-American men. The numbers she cites in support of this claim are alarming: In seven states, 80-90% of all drug offenders sent to prison were Black in 2000.⁹⁴ In 2006, 1 in every 14 African-American men was imprisoned, compared to 1 in 106 white men.⁹⁵

Almost 75% of all people in jail for drug offenses are Black and Latino men, even though drug use and sale rates are no higher among these populations than for whites.⁹⁶

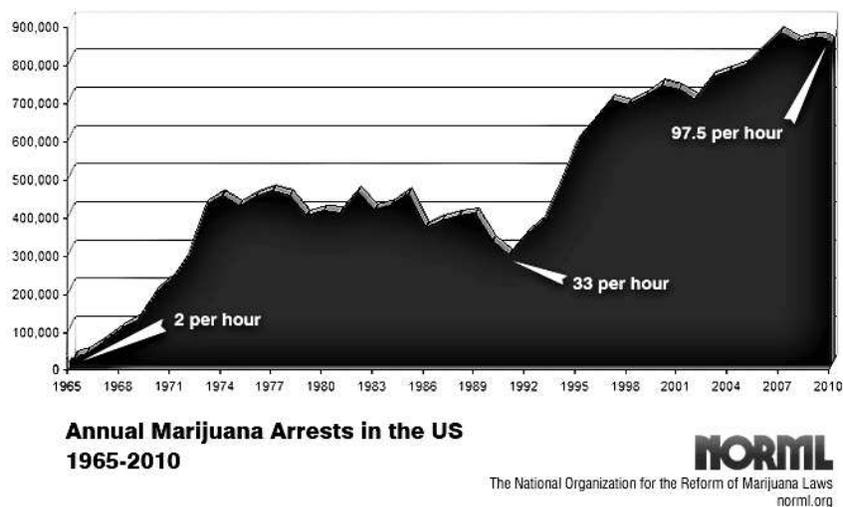


Figure 3: Annual Marijuana Arrests in the US 1965-2010.⁹⁷

To put prison sentences for marijuana sale and possession into context, it is useful to look at how these policies play out in people’s lives. Take the case of Weldon Angelos, who was sentenced to a mandatory minimum sentence of fifty-five years for selling \$350 worth of marijuana to undercover police officers in 2004. The US District Judge who sentenced him pointed out that Angelos’ prison time was more than he would have received if he had hijacked an airplane, killed someone in a fight, or raped a child. Angelos, a first-time offender and father of two, was 25-years old when he was sentenced.⁹⁸ In another case, 28-year old Robert Furlong was arrested for growing 725 marijuana plants and charged federally with conspiracy to manufacture and distribute marijuana and possession of a firearm in furtherance of a drug crime, even though all three of the guns that were found by police at his home had been legally purchased. Furlong received a mandatory minimum 15-year prison sentence for his offense—ten years for the marijuana and an additional five years for the guns. Federal prosecutions of medical marijuana patients and providers have been similarly prevalent. Within the last few years, numerous people have been convicted and sentenced to mandatory minimums of 5-20 years, despite the lack of any evidence that they violated state medical marijuana laws.⁹⁹

In addition to soaring incarceration rates and mandatory minimum sentences, the excesses of drug war policing have led critics to challenge these practices on the basis of First and Fourth Amendment-protected rights. The enforcement of drug laws has been called an “ugly process,” requiring intrusive tactics on the part of police such as undercover operations, the use of informants, paramilitary raids, wiretapping, and other surveillance methods.¹⁰⁰ Blumenson and Nilsen argue that “marijuana offenses have been the catalyst for some of the most significant Supreme Court retrenchments on Fourth Amendment protections against unreasonable searches and First Amendment-protected free speech rights.”¹⁰¹ For example, the Supreme Court ruled in *Kentucky v. King* (2011) that police can enter a home and arrest those inside without a warrant or even probable cause if they smell marijuana.¹⁰²

The questionable constitutionality of marijuana-related arrests is vividly illustrated in the case of New York City. Known as the nation’s “pot arrest capital,” NYC saw an 882% increase in marijuana arrests between 1992 and 2002.¹⁰³ The explosion of drug-related arrests can be traced to the New York City Police Department’s (NYPD) expanded use of arrest and incarceration for minor offenses, especially the crime of smoking marijuana in public view (MPV).¹⁰⁴ The crackdown on MPV was part of the NYPD’s “Quality of Life” or “Order Maintenance Policing” strategy, which relies heavily on the controversial tactic of “stop and frisk,” and disproportionately targets African-American and Latino neighborhoods¹⁰⁵ (See Figure 4). Civil rights organizations have condemned the unconstitutional practice of stop and frisk,¹⁰⁶ yet the NYPD continues to conduct over 700,000 stops per year.¹⁰⁷ These practices and policies for enforcing marijuana prohibition come at the expense of constitutionally-protected rights, which are being eviscerated in the name of the War on Drugs.

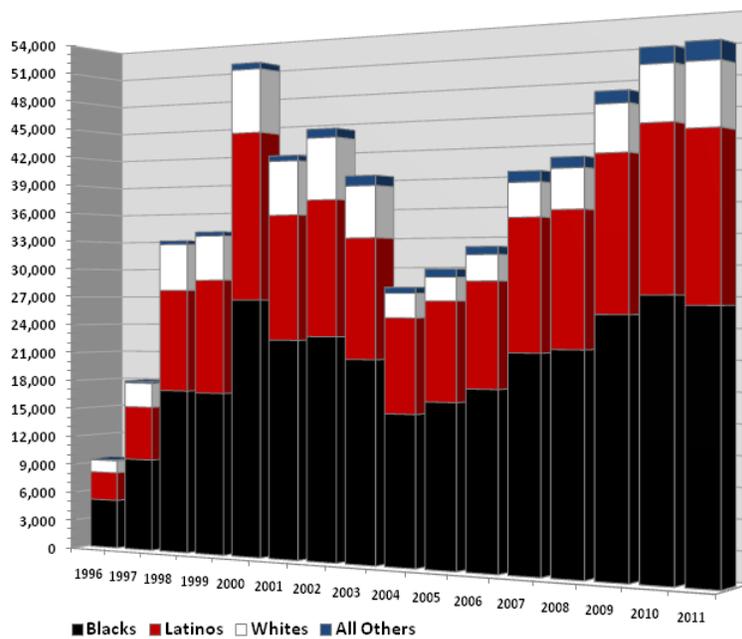


Figure 4: Marijuana Possession Arrests of Blacks, Latinos, Whites and Others in New York City, 1996-2011.¹⁰⁸

The War on Drugs’ devastating legal penalties, increasing rates of arrest and incarceration for people of color, and consistent violations of constitutional rights are all critical aspects of what constitutional law expert Glenn Greenwald calls the “two-tiered system of justice.” In this system, low-level offenders such as drug users and sellers face the constant risk of arrest, prosecution, and incarceration. Meanwhile, criminal acts carried out by the elite rarely, if ever, lead to prison terms.¹⁰⁹ This imbalance was clearly in evidence during the recent case against the bank HSBC, which was convicted of laundering money for Mexican drug cartels and yet received only a fine. None of those found guilty were incarcerated, thus confirming that wealthy people can buy their way out of jail time while non-violent drug offenders are locked away for decades.

IV. Economic Analysis of Marijuana Prohibition

In addition to the personal and social costs of the drug war, the actual financial cost of drug prohibition is a compelling factor in the argument for marijuana legalization. An estimated \$545 billion in taxpayer dollars has been spent by the US government since the beginning of the War on Drugs, even though drug usage rates have remained relatively stable.¹¹⁰ On a global scale, enforcement of the current drug control system costs at least \$100 billion per year.¹¹¹ According to legalization advocate Ethan Nadelmann, enforcement of marijuana laws entails an estimated \$10-15 billion in direct costs alone.¹¹² At the current rate, states will spend over \$20 billion enforcing marijuana laws over the next six years.¹¹³ However, while a vast amount of money is spent on enforcement of drug laws, far less is assigned to harm reduction or educational approaches. The drug control spending ratio in the 2013 White House budget allotted 62% to punishment and interdiction, with only 38% going toward treatment or prevention.¹¹⁴

Savings in law enforcement efforts and potential tax revenue could be gained from regulating marijuana, according to legalization proponents. In a recent white paper, representatives Earl Blumenauer (D-OR) and Jared Polis (D-CO) suggest that revenue from marijuana taxation could raise an estimated \$20 billion annually.¹¹⁵ Similarly, a frequently-cited article by Harvard economist Jeffrey Miron indicates that ending marijuana prohibition would save \$7.7 billion per year in government spending on law enforcement, with \$5.5 billion accruing to state and local governments and \$2.4 billion to the federal government.¹¹⁶ In his assessment, Miron asserts that savings in enforcement expenditures would result from reductions in police, prosecutorial, and correctional resources. He calculates that marijuana legalization could also produce revenue of \$6.2 billion annually if marijuana were taxed like alcohol and tobacco products.¹¹⁷ Miron does acknowledge that certain factors would offset these savings, such as a decline in fine payments and seized property.

Economic arguments for the legalization and regulation of marijuana such as these are based on the assumption that disentangling marijuana use and sale from the criminal justice system would be a self-evident good. However, the determination of the federal government to maintain the prohibition on cannabis—despite savings in law enforcement and the extra tax revenue legalization would generate—suggests that other issues must be considered. The following sections discuss two driving factors of marijuana’s continued prohibition: 1) the seizure of assets by police departments in drug-related cases and 2) the profits of the growing private prison industry. The economic surplus created by police seizures and private prisons does not benefit most Americans, but rather increasingly militarized police departments and the bottom lines of private corporations that depend on growing prison populations.

Civil Asset Forfeiture

After the passage of the Comprehensive Criminal Control Act of 1984, US police departments began receiving funding and training from federal authorities. In addition to emphasizing drug arrests, these authorities gave departments wide latitude to seize assets of suspected marijuana dealers and retain a portion for their own operations.¹¹⁸ The new laws allowed police to keep up to 90% of the money seized through drug cases tried in federal court, and gave the option of holding forfeiture proceedings in civil rather than criminal court, where the burden of proof is much lower. According to journalist and author Christian Parenti, the CCCA “revolutionized law enforcement’s use of forfeitures and sanctioned an insidious police dependency on drug

money.”¹¹⁹ Soon after the CCCA went into effect, almost every state had new civil forfeiture laws, and police departments across the country were collecting billions of dollars worth of money and property including houses, bank accounts, cars, and more.¹²⁰

The numbers are staggering. During the 1980s, the War on Drugs propelled the criminal justice system into one of the top growth industries in the United States.¹²¹ The amount seized from drug arrests rose from \$100 million in 1981 to over \$1 billion in 1987, with 80% of the forfeited property belonging to people who were never formally charged with a crime.¹²² By the early 1990s, the Justice Department had collected over \$1.5 billion in drug-related assets, and that number has only increased. Between 2004 and 2008, assets seized by local law enforcement agencies grew from \$567 million to \$1.6 billion—and this figure does not take into account the millions seized through state-level forfeiture programs.¹²³ Most of this money goes directly to police department budgets (See Figure 5), providing a strong incentive for law enforcement agencies to push for the continuation of marijuana prohibition and leading to what has been called an “addiction” to drug money.”¹²⁴ According to *Business Insider*, an end to the War on Drugs would be “a financial disaster for law enforcement.”¹²⁵

Civil Forfeiture Proceeds Distributed to Law Enforcement

0%	Indiana, Maine, Maryland, Missouri, North Carolina, North Dakota, Ohio, Vermont
50%	Colorado, Wisconsin
60%	Connecticut, New York
63%	Oregon
65%	California
75%	Nebraska
80%	Louisiana, Mississippi
85%	Florida
90%	Illinois, Minnesota, New Hampshire, Rhode Island, Texas
95%	South Carolina
100%	Alaska, Alabama, Arkansas, Arizona, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming

Figure 5: Civil Forfeiture Proceeds Distributed to Law Enforcement by State.¹²⁶

The incentive to prioritize cases that pad police budgets results in law enforcement agendas focused on gaining assets as opposed to increasing public safety, leading to distorted law enforcement policies, unjust treatment of drug offenders, and the increased possibility of police corruption.¹²⁷ According to National Police Accountability Project (NPAP) Director Britt Keller,¹²⁸ the money flowing into local police departments through drug-related seizures severely undermines police accountability:

Drug money affords departments considerable resources without the important constraints of a budgetary process which normally provides for some degree of public

scrutiny of policing priorities. The lack of oversight on how departments spend ‘their’ drug money increases the potential for corruption and encourages decisions that are no longer informed by best practices and public safety considerations, but by the unchecked availability of funds.¹²⁹

Due to the large sums of money and the limited oversight involved in allocating drug forfeiture funds in some regions, there have been numerous reports of questionable expenditures, including running gear, football tickets, training seminars in Hawaii, and food and entertainment for police departments.¹³⁰

Even more disturbingly, the huge influx of money from drug-related seizures has contributed to the militarization of American police.¹³¹ Departments have used the extra funds gained through seizures to purchase paramilitary equipment such as semi-automatic weapons, helicopters, body armor, infrared night-vision goggles, and armored vehicles as well as surveillance equipment and advanced computer systems. However, the increase in weaponry and surveillance equipment does little to reduce the influence of the illicit drug market; most arrested leaders in the drug trafficking industry have the option of reducing their sentences by agreeing to plead guilty and pay enormous fines or inform on others. Low-level drug offenders with few assets and connections receive no such lenience.¹³²

NPAP has also highlighted similar problems with waiver programs, which raise serious constitutional questions. In these programs, people sign over their money, often during traffic stops, waiving their right to forfeiture proceedings in exchange for the officer’s promise not to file criminal charges. In many cases, however, no crime has been committed. Parenti points to the racist consequences of forfeiture laws and waiver programs. In many areas, African-Americans and Latinos have been disproportionately targeted by police; for example, a four-year study of traffic stops in Volusia County, Florida showed that a total of \$8 million was confiscated from motorists during traffic stops—85% were African-American and 75% were never charged with a crime.¹³³

While Miron’s economic analysis acknowledges that police seizures of drug assets are a counterpoint to the profit that could be made from marijuana legalization, his study does not take into account who profits from these practices. While the huge influx of money into police departments does little to actually benefit most Americans, law enforcement agencies at every level have profited handsomely. As a result, they will continue to fight for access to funds seized during drug arrests and to oppose the end of the War on Drugs.¹³⁴ Another group that profits from the ongoing prohibition of marijuana is the growing private prison industry, where profit margins depend on the steady growth of incarcerated people.

Private Prison Industry

Private sector involvement in incarceration is not a new phenomenon; for-profit companies have been contracting prison services for decades. However, since incarceration rates exploded in the 1980s as a result of the War on Drugs, private companies have expanded their roles and now partake in the complete management and operation of prison facilities¹³⁵ (See Figure 6). In a 2011 report titled *Banking on Bondage*, the ACLU documents the exponential growth of private prisons and the enormous profits of mass incarceration for private prison executives.¹³⁶ Two companies dominate the American prison privatization industry: the Corrections Corporation of

America (CCA)¹³⁷ and the GEO Group.¹³⁸ Currently, these two corporations run a combined total of 126 prisons in the United States (about 8% of the total prison system) and house nearly half of all immigrants detained by the federal government.¹³⁹ In 2010, CCA and GEO Group grossed almost \$3 billion in combined revenue.¹⁴⁰

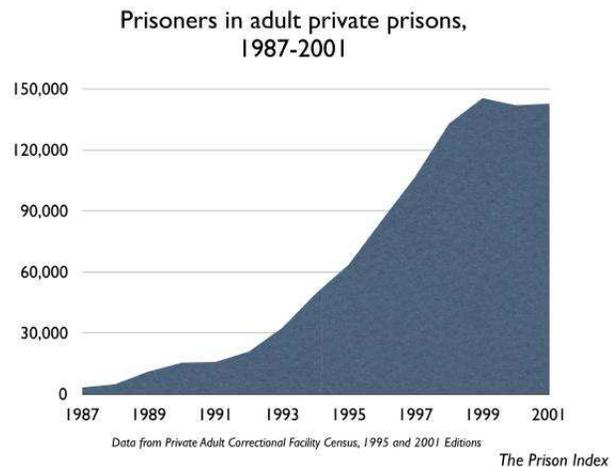


Figure 6: Prisoners in Adult Private Prisons, 1987-2001.¹⁴¹

The promise of lowered costs offered by private prison companies resulted in local, state, and federal agencies contracting private companies to build, manage, and staff correctional facilities.¹⁴² Under the private prison model, counties and states pay per-day rates for prisoners. While the cost-saving potential of private prisons has not been proven, the for-profit prison industry is growing.¹⁴³ Financially-struggling state governments lease prisons to corporations to save money; however, prison corporations like CCA have demanded 20-year contracts and assurances that states will maintain at least a 90% prison occupancy at all times.¹⁴⁴ These contracts guarantee that mass incarceration will continue regardless of the fact that the national crime rate has been decreasing for years.¹⁴⁵ In many rural regions, the prison industry is one of the largest employers and many congressional districts count prisoners in their census to increase their population despite the fact that they have been disenfranchised.

The private prison industry has not merely responded to a need for housing greater numbers of incarcerated people, but actually sought to deliberately increase the number of prisoners to expand profits, according to the Justice Policy Institute. Relying on strategies of lobbying, direct campaign contributions, and networking, the private prison industry has exerted tremendous pressure on lawmakers to maintain mandatory prison sentences and continue the War on Drugs, spending over \$2 million on lobbying efforts in the 2010 election cycle.¹⁴⁶ The loss of marijuana-related arrests and convictions would affect the profit line of private prison companies, which rely on these arrests to fill enough cells.¹⁴⁷ Private prison companies have fought for mandatory minimum sentences, fewer opportunities for parole, and an increase in the number of offenses deemed worthy of incarceration, leading Glenn Greenwald to comment that “the private prison industry profits from precisely the draconian approach to penal policies implemented over the past several decades.”¹⁴⁸ These corporations have also expended vast resources to specifically challenge drug policy reform and the legalization of marijuana, which they explicitly perceive to be an obstacle to profits.¹⁴⁹ In their 2010 annual report to the Securities and Exchange Commission, CCA wrote, “Any changes with respect to drugs and controlled substances or

illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby reducing demand for correctional facilities to house them.”¹⁵⁰

CCA and the GEO Group have both been members of the American Legislative Exchange Council (ALEC), a conservative organization that facilitates relationships between state legislators and the private sector by crafting and promoting model legislation. ALEC has played an instrumental role in the dramatic expansion of the US prison population by pushing for harsh sentencing laws, mandatory minimum sentences for non-violent offenders, and three-strikes and so-called truth in sentencing laws.¹⁵¹ Furthermore, ALEC was behind the revival of a little-known federal program called the Prison Industries Enhancement Certification Program, which expanded the ability of private prison corporations to exploit a captive labor force.¹⁵² At a time when unemployment is high and public sector employees are losing work, benefits, and the right to collective bargaining, private prisons are forcing inmates to work for 10-50 cents/hour.¹⁵³ Prison workers have no benefits, no option to unionize, and are forced to work for little to no wages for popular companies such as Starbucks, Microsoft, and Victoria’s Secret.¹⁵⁴ The profits of the private prison industry and the many corporations reliant on prison labor to conduct business depend on the continued incarceration of millions of people.

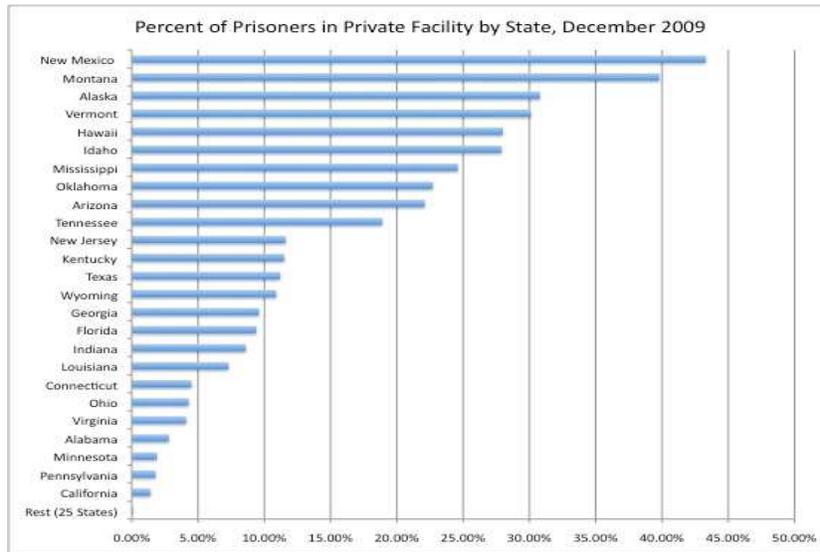


Figure 7: Percent of Prisoners in Private Prisons as of December 2009.¹⁵⁵

Despite the central importance of drug-related forfeitures and private prisons to the continued War on Drugs and the prohibition of marijuana, the US government has had little to say about either in drug policy discussions. As Ethan Nadelmann points out, “What’s telling is that Obama has yet to make one powerful comment about the high rate of incarceration in this country, or the fact that we have the highest rate in the world, or the incredible racial disproportion involved.”¹⁵⁶ The lack of acknowledgement of these aspects of the drug war skews current debates on marijuana legalization. Government officials refuse to consider ending prohibition despite rapidly changing state laws and growing public support for legalization. How much can this reluctance be attributed to the importance of drug assets to the ongoing process of police militarization and the lobbying efforts of the private prison industry? How far will the federal government go to continue marijuana prohibition despite the shift toward decriminalization and legalization?

V. Marijuana Legalization and Implications

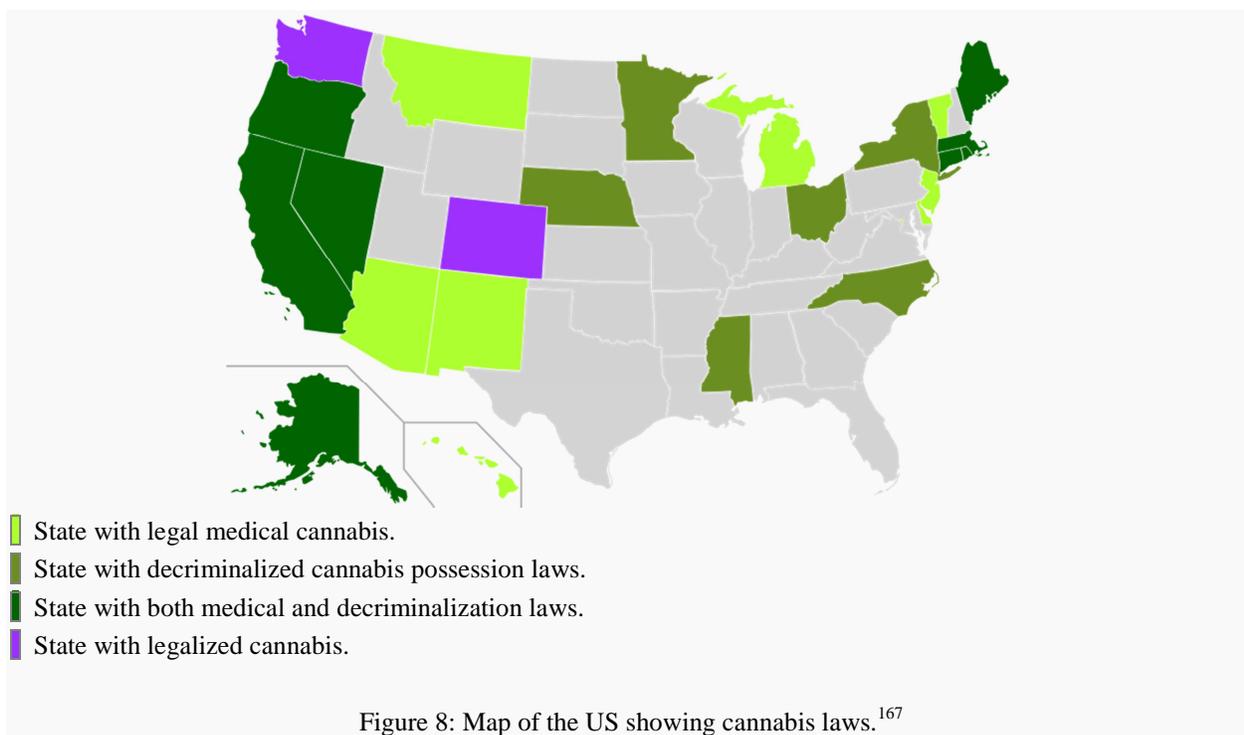
On November 6, 2012, Colorado and Washington became the first states—and the first geographic areas in the world—to legalize the sale and possession of cannabis for recreational adult use.¹⁵⁷ Colorado Amendment 64 (The Regulate Marijuana like Alcohol Act of 2012) amends the state constitution to legalize possession and personal cultivation of marijuana and provides a general framework for legalization, taxation, and regulation that leaves the implementation to the Colorado Department of Revenue. Washington Initiative 502 (Legalize Marijuana) legalizes marijuana by amending state law to allow for the possession of small amounts of marijuana in private, establishing a three-tiered production, processing, and licensing system, and imposing a 25% excise tax to be collected in a Dedicated Marijuana Fund and distributed to social and health services.

The passing of the Colorado Amendment and the Washington Initiative created an immediate tension between state and federal drug laws.¹⁵⁸ While President Obama has remarked that he has “bigger fish to fry” than to pursue marijuana users in states that have voted to legalize cannabis, his administration did not immediately make any official pronouncement detailing how the federal government will proceed.¹⁵⁹ However, statements from the White House indicated that while recreational users are unlikely to be prosecuted, the federal authorities will still go after those who attempt to grow and sell marijuana, even if they are acting in compliance with state laws.¹⁶⁰ US Attorney General Eric Holder delayed making a final decision on how the federal government would handle the new state initiatives, although he made clear that he was not in favor of legalization.¹⁶¹

The response of the White House to recent state legalization initiatives is difficult to assess. In President Obama’s first term, announcements from the federal government led drug policy reform advocates to believe that his administration would break from the 40-year War on Drugs paradigm. In 2009, both Holder and Deputy Attorney General David Ogden announced that they would relax federal enforcement policies on marijuana in states where it was legalized or decriminalized. Similarly, current Director of the Office of National Drug Control Policy Gil Kerlikowske said he thought it was time to retire the war rhetoric when addressing drug abuse. Despite these proclamations, federal authorities have continued to target the medical marijuana industry in several states.¹⁶² Kerlikowske has even gone on the record to acknowledge that the administration has done a poor job of clarifying their approach to drug policy.¹⁶³

In April 2013, the White House released a plan to reform drug policy. The report, titled “A Drug Policy for the 21st Century,” calls for more attention to prevention and treatment as well as measures to address high rates of arrest and incarceration.¹⁶⁴ However, the new drug policy continues to frame drug use as a criminal justice problem and President Obama has indicated that he does not support legalization of marijuana. “This is a tough problem, because Congress has not yet changed the law,” Obama said in an interview with Barbara Walters shortly after the Colorado and Washington initiatives were passed. “I head up the executive branch; we’re supposed to be carrying out laws. And so what we’re going to need to have is a conversation...How do you reconcile a federal law that still says marijuana is a federal offense and state laws that say that it’s legal?” he asked.

In legal terms, the actions of Colorado and Washington are subject to challenge under the constitutional doctrine of preemption under the Supremacy Clause, which prevents the states from enacting laws that contradict the federal law. However, the CSA was not meant to displace all state laws for controlled substances and states are allowed to pass laws related to marijuana if they do not create a conflict with federal laws.¹⁶⁵ NLG Drug Policy Committee member and law professor Alex Kreit addresses the tension between state and federal laws, arguing that “when it comes to federal drug law, traditional debates about prohibition, legalization, or decriminalization turn out to be surprisingly unimportant.”¹⁶⁶ Instead, he suggests, the most important issue facing lawmakers will be how to harmonize the new policies being passed by states with federal laws that prohibit marijuana. He points out that because states all have their own drug laws (and because most drug prosecutions take place at the state and local level), the federal government is actually quite limited in its ability to either override or amend state drug laws. He recommends enacting federal laws that respect states’ autonomy in the realm of drug laws—even in cases where state laws conflict with preferences of the federal authorities—and removing federal laws against possession of small quantities of marijuana.



Until recently, legalization advocates focused on the states rather than pushing for a federal end to prohibition (See Figure 8). Most states that have successfully passed medical marijuana laws have done so through referendum—an option not available in all states.¹⁶⁸ Successes in Washington and Colorado have already led to speculation about which states will be the next to legalize¹⁶⁹ or decriminalize.¹⁷⁰ Efforts are also emerging on the federal level to change drug policy laws, such as the Respect States’ and Citizens’ Rights Act of 2013, which would amend the CSA to exempt state marijuana laws from federal control plus recent legislation introduced by Rep. Jared Polis to regulate marijuana in a manner similar to alcohol.¹⁷¹ Senator Patrick Leahy also suggested amending the CSA to allow possession of up to one ounce of marijuana in

jurisdictions that have legalized cannabis.¹⁷² It is expected that 8-10 bills will be introduced by Congress in 2013,¹⁷³ including at least two medical marijuana bills.¹⁷⁴ At the grassroots level, over 45,000 people signed a petition asking the president to support the bipartisan congressional legislation to change federal law to allow states to legalize marijuana. Kerlikowske responded to the petition by simply saying that “America is in the midst of a serious national conversation about marijuana.”¹⁷⁵

Despite the Obama Administration’s silence on recent legal developments, the federal government laid out several possible strategies to challenge the ability of states to legalize marijuana soon after the victories in Washington and Colorado. The *New York Times* reported that a governmental inter-agency task force was considering several legal avenues, including suing the states on the grounds that any effort to regulate marijuana is pre-empted by federal law.¹⁷⁶ Another proposed strategy would be to punish state employees responsible for handling the regulation of marijuana.¹⁷⁷ As more states elect to legalize marijuana, they may face economic sanctions, such as reductions or loss of federal grants.¹⁷⁸ Federal authorities may also continue to arrest and prosecute growers, sellers, and users in legalized states under the provisions of federal anti-drug laws. In addition to these measures, the Department of Justice has the option of using civil asset forfeiture provisions of the CSA to impede the operation of marijuana growers and distributors.¹⁷⁹ In March 2013, eight former DEA chiefs released a statement urging the federal government to quickly nullify the new laws in Colorado and Washington.¹⁸⁰ These former DEA administrators cited the possibility of a “domino effect” if other states began legalizing marijuana.¹⁸¹

Today, legalization is already moving forward. As of June 2013, marijuana legalization bills had been introduced in eleven states and Puerto Rico; thirteen states introduced cannabis decriminalization bills.¹⁸² Washington and Colorado face the challenge of creating model policies that other lawmakers and voters will be likely to approve in the future in their own states. The response of the White House is crucial; if the federal government does not interfere, it is likely that other states will soon follow the examples of Colorado and Washington. On the other hand, if the current administration uses the same tactics it has employed against the medical marijuana industry, the fight for an end to cannabis prohibition will become much more difficult and protracted. NLG member Brian Vicente, who is co-director of the Amendment 64 campaign and one of the primary authors of this historic measure, calls on the federal government to respect the decision of states that voted for legalization:

In November 2012, the people of Colorado rejected the failed policy of marijuana prohibition. Thanks to their votes, we will now reap the benefits of regulation. We will create new jobs, generate millions of dollars in tax revenue, and allow law enforcement to focus on serious crimes. It would certainly be a travesty if the Obama administration used its power to impose marijuana prohibition upon a state whose people have declared, through the democratic process, that they want it to end.

However, given the pressures from international drug organizations, US law enforcement agencies, and the private prison industry, it may be optimistic to expect the federal government to facilitate the process of legalization.

VI. Conclusion

The 40-year War on Drugs has been an abject failure. Even the current administration admits that it is time for a “serious conversation” about marijuana policies. Thus far, however, drug policy pronouncements coming from the White House have not addressed some of the most critical issues around marijuana prohibition. These include:

- the need to revisit international drug conventions in light of the global shift toward decriminalization,
- the War on Drugs’ disproportionate effect on the poor and people of color,
- the scientific and anecdotal evidence pointing to marijuana’s therapeutic value,
- the disconnect between the federal government’s rhetoric and its practice in states where medical marijuana is legal,
- the ongoing financial dependence of law enforcement on funds seized during drug arrests,
- and the growing influence of the private prison industry and their lobbyists on federal drug policy.

The NLG believes that ending the prohibition of cannabis would offer multiple benefits. Legalization would help to transform the marijuana industry from a violent illicit market into a stable regulated one. It would significantly reduce infringements on civil liberties and lower the arrest and incarceration rates of people of color. Changing the criminal status of marijuana would lower the costs of law enforcement and protect people from entering the criminal justice system. Finally, legalization would remove restrictions currently impeding study of medical marijuana and allow more users to acquire treatment if necessary. Each of these goals is consistent with sound economic, criminal justice, and public health policies.

Lessons learned from other countries suggest that decriminalization or legalization of *all* drugs would be preferable to the current prohibition regime. In the words of attorney and NLG Drug Policy Committee co-Chair Jesse Stout: “While ending the incarceration of marijuana users is an important step, ending the incarceration of all drug users would be even more useful. All the harms of drug use are exacerbated by incarceration, and these harms can be reduced by replacing imprisonment with social services, including drug treatment. Further, replacing incarceration with services such as housing and education would create substantial cost savings.”¹⁸³

Studies of other products and activities such as tobacco, alcohol, and gambling offer insights for the shift to legalization.¹⁸⁴ In particular, legalization advocates have cited the regulation of alcohol to bolster the case for ending prohibition. Alcohol is legal; nevertheless, it causes 3-4 times the dependence of cannabis products and ten times as much crime and violence.¹⁸⁵ The models used for tobacco, alcohol, and gambling can guide policy decisions for regulating cannabis. Yet, it is important to keep in mind that socioeconomic disparities and access to social support networks tend to be better indicators of drug use than drug laws and policies.¹⁸⁶ Preliminary research suggests that income inequality is strongly correlated to higher levels of drug use.¹⁸⁷ Thus, in addition to the specific recommendations below, the NLG encourages policy makers and advocates to recognize that drug abuse is the product of broader social and economic factors.

Recommendations

Based on our work and analysis, the NLG makes the following recommendations for legal practitioners, politicians, and drug policy reform advocates:

1. Reframe drug use so that it is considered a social and public health issue and not a criminal justice problem. Research shows that punitive drug policies do not decrease drug use. Legalization advocates should therefore push for harm-reduction strategies to address health-related drug problems and work to increase government funding for treatment and education. The use of drug courts to mandate treatment is not enough; these courts maintain a criminal justice approach, make treatment contingent on a guilty plea, and often do not reach those with serious drug problems. Other countries such as Portugal have implemented drug policy models that are designed to deal with the social and health problems created by drug use; these models offer a great deal of insight into how the United States could reformulate its approach to drugs.

2. Revisit treaties such as the 1961 Single Convention on Narcotic Drugs to challenge the punitive international drug policy framework. Current international conventions and the agencies that enforce them need to take a more pragmatic and health-oriented approach to drugs. The experiences of other countries that experimented with decriminalization and *de facto* legalization show that relaxing penalties for drugs does not lead to significant increases in usage. The next Special Session of the UN General Assembly on the drug problem in 2016 is an ideal time to radically revise international drug policy. In the meantime, these international treaties should not be used to challenge the current process of legalization taking place in the United States. Rather, the trend of states allowing the use and possession of medical and recreational marijuana should be an indication that the time has come to amend or abolish current drug treaties.

3. Reclassify marijuana from its current status as a Schedule I substance. Mounting scientific and anecdotal evidence supports the therapeutic benefits of marijuana; however, the DEA and NIDA continue to insist that cannabis is a dangerous drug with no proven medical applications. Legal practitioners should continue to assist groups like Americans for Safe Access in attempts to reclassify cannabis. Rescheduling marijuana to a more appropriate class would allow its use under the current version of the 1961 Single Convention and provide opportunities for more meaningful research on its medicinal capacity. Additionally, it is imperative to continue to challenge the federal government's attack on the medical marijuana movement in California and other states.

4. Support the right of states to legalize medical and/or recreational marijuana for adult use without federal interference or sanctions. Currently, two states have voted through referendum to legalize recreational use of marijuana for adults. Fifteen states have passed laws decriminalizing marijuana and eighteen states plus the District of Columbia allow possession of medical marijuana. More states have depenalized marijuana use and possession and there are several legislative attempts to relax prohibition at the federal level. Advocates of medical and recreational adult use cannabis should continue to work on state legalization initiatives through referenda where possible and through legislation where necessary. These efforts should be accompanied by support

for the multiple federal bills currently under consideration to allow states' autonomy in the realm of drug laws.

5. End the practice of civil asset forfeiture by law enforcement agencies. Waiver programs and seizures that take place during suspected drug arrests lead to skewed police priorities, unjust treatment of drug offenders, militarization of US police departments, increased police corruption, and an emphasis on drug arrests that do little to increase public safety. Funding for police departments needs to be de-linked from the number of drug arrests performed. Interim solutions include reassigning seizure money to a general fund and making forfeiture laws require criminal convictions before enabling the government seizure of any property.

6. Connect legalization efforts to the abolishment of the for-profit prison industry, which benefits from growing levels of incarceration. Scholars, journalists, attorneys, legal workers, and activists must constantly expose and challenge the private prison corporations, which lobby for harsher sentences, increased jail populations, fewer opportunities for parole, and more offenses that lead to jail time. Legal practitioners should continue to work with groups such as Families Against Mandatory Minimums to repeal harsh sentencing guidelines and laws that disproportionately affect people of color. The NLG calls for the release of all nonviolent drug offenders—either on the basis of time served, or into community programs that provide an alternative to incarceration.

Endnotes

¹ Marijuana is also known by its Latin genus name *cannabis*—the terms are used interchangeably throughout this paper.

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³ Joel Stein, “The New Politics of Pot,” *CNN*, October 28, 2002. Available at: <http://archives.cnn.com/2002/ALLPOLITICS/10/28/timep.politics.pot.tm/index.html>. See also: Gary Langer, “High Support for Medical Marijuana,” *ABC News*, January 18, 2010. Available at: <http://abcnews.go.com/PollingUnit/Politics/medical-marijuana-abc-news-poll-analysis/story?id=9586503>.

⁴ “National Poll Shows Record High Majority,” *Marijuana Policy Project*. Available at: <http://www.mpp.org/media/press-releases/national-poll-shows-record.html>.

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¹⁰ Specifically, this analysis has been shaped by the work and writing of lawyers and legal scholars Michelle Alexander and Glenn Greenwald, journalist Christian Parenti, and social historian Martin Lee.

¹¹ Robert J. MacCoun and Peter Reuter, *Drug War Heresies: Learning from other Vices, Times, and Places* (London: Cambridge University Press, 2001).

¹² Rosalie L. Pacula, Robert MacCoun, Peter Reuter, Jamie Chriqui, Beau Kilmer, Katherine Harris, Letizia Paoli, Carsten Schäfer, “What Does it Mean to Decriminalize Marijuana? A Cross-National Empirical Examination,” *Advances in Health Economics and Health Services Research*, Vol. 16 (2005): 347 – 369.

¹³ Jonathan P. Caulkins et al., *Marijuana Legalization: What Everyone Needs to Know* (London: Oxford, 2012).

¹⁴ Harry Levine and Deborah Peterson Small, *Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City, 1997-2007* (New York Civil Liberties Union, 2008).

¹⁵ Rosalie Liccardo Pacula, Jamie F. Chriqui, Joanna King, “Marijuana Decriminalization: What does it mean in the United States?” NBER Working Paper No. 9690 (2003). Available at: <http://www.nber.org/papers/w9690>.

¹⁶ *Ibid.*

¹⁷ The Shafer Commission (also known as the National Commission on Marijuana and Drug Abuse) technically defined the term decriminalization in the United States in 1972 as those policies in which possession of marijuana for personal use or casual distribution of small amounts for no remuneration was not considered a criminal offense (National Commission on Marijuana and Drug Abuse, 1972). See also Pacula et al., “What Does it Mean to Decriminalize Marijuana?” Rosalie Pacula and colleagues have argued that “it is clear that today this classification of US states is inappropriate for evaluating the effect of criminalizing marijuana across the states” (14).

¹⁸ Pacula et al., “What Does it Mean to Decriminalize Marijuana?”

¹⁹ This was the model for alcohol prohibition. Under the Volstead Act, there were no penalties for the personal use of alcohol, but manufacturing and distributing were criminal offenses.

²⁰ Caulkins et al., *Marijuana Legalization*.

²¹ Pacula et al., “What Does it Mean to Decriminalize Marijuana?”

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- ²² Peter H. Reuter, "What Can Be Learned From Other Countries," RAND Working Paper (2010). Available at: http://192.5.14.43/content/dam/rand/pubs/working_papers/2010/RAND_WR771.pdf.
- ²³ The Single Convention on Narcotic Drugs remains the framework of current drug control policies. As of 2012, 184 countries are signatories to the 1972 version of this convention.
- ²⁴ *War on Drugs: Report of the Global Commission on Drug Policy* (June 2011).
- ²⁵ These Latin terms refer to formal laws (*de jure*) and actual practice (*de facto*).
- ²⁶ These three European nations have removed penalties for possession of small amounts of any psychoactive substance: Italy (since 1973), Spain (about 1980) and Portugal (2001). In Italy, a first offense produces a warning but a second offense will lead to administrative sanctions. In Spain, there is an administrative sanction for use or possession in a public place; there is no fine for use in private settings. In Portugal, possession is still an arrestable offense, but the arrestee meets with a three-person commission which decides whether the appropriate response is a fine or treatment.
- ²⁷ The Dutch adopted a non-enforcement policy in 1976 for violations involving personal possession of up to 30 grams of marijuana (later decreased to 5 grams in 1995). Netherland's policy laid out in the 1975 Opium Act also draws a distinction between hard drugs (heroin and cocaine) and soft drugs (hashish and marijuana).
- ²⁸ Reuter, "What Can Be Learned From Other Countries?"
- ²⁹ Ibid.
- ³⁰ Kara Godbehere Goodwin, "Is the End of the War in Sight?: An Analysis of Canada's Decriminalization of Marijuana and the Implications for the United States 'War on Drugs,'" *Bepress Legal Series*, Working Paper 123 (2004). Available at: <http://law.bepress.com/expresso/eps/123/>. (More recently, Canadian Prime Minister Stephen Harper has started moving in the opposite direction by increasing criminal penalties for some marijuana-related crimes and instituting new mandatory minimum sentencing for cultivation and sales.)
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- ³⁵ Greenwald, "Drug Decriminalization in Portugal."
- ³⁶ MacCoun and Reuter, *Drug War Heresies*.
- ³⁷ It remains unclear what sanctions, if any, would be taken against any country that violated the conventions by legalizing marijuana.
- ³⁸ Robin Room, Benedikt Fischer, Wayne Hall, Simon Lenton, and Peter Reuter, *Cannabis Policy: Moving Beyond Stalemate* (London: Oxford University Press, 2010).
- ³⁹ A country is allowed to withdraw and then rejoin with specific reservations only if less than one-third of the convention signatories object within a year's time. The status of Bolivia's request will not be clear until January 2013. For more, see TNI/WOLA Drug Law Reform Project, "Bolivia Withdraws from the UN Single Convention on Narcotic Drugs," June 30, 2011. Available at: http://www.wola.org/news/bolivia_withdraws_from_the_un_single_convention_on_narcotic_drugs.

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- ⁴⁰ This was clarified by the US Court of Appeals in *NORML v. Ingersoll* in 1974. For more, see Andrew Reid, “Negotiating the Abyss of Cannabis Prohibition: Medical Marijuana, the Federal Controlled Substances Act, and States’ Rights.” (Forthcoming article quoted with permission).
- ⁴¹ Image courtesy of Wikimedia Commons. This file is licensed under the Creative Commons Attribution-Share Alike 3.0 Unported license. Available at:
http://en.wikipedia.org/wiki/File:Legality_of_cannabis_for_medical_purposes.png.
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- ⁴³ Martin Lee, *Smoke Signals: A Social History of Marijuana- Medical, Recreational, and Scientific* (New York: Scribner, 2012), 271.
- ⁴⁴ Attorney General Eric Holder, for example, commented: “There are a number of issues that have to be considered, among them the...treaty obligations with nations outside the United States.” Devin Dwyer, “Marijuana Not High Obama Priority,” *ABC News*, December 14, 2012. Available at: <http://abcnews.go.com/Politics/OTUS/president-obama-marijuana-users-high-priority-drug-war/story?id=17946783>.
- ⁴⁵ Michael Tarm, “Ex-DEA heads, U.N. panel urge feds to nullify Wash., Colo. pot laws,” *Seattle Times*, March 5, 2013.
- ⁴⁶ Lee, *Smoke Signals*. The role of the other textile industries, especially cotton, should not be overlooked in an analysis of the prohibition of hemp as a crop.
- ⁴⁷ The Marijuana Tax Act of 1937 made possession or transfer of cannabis illegal throughout the United States under federal law, excluding medical and industrial uses, in which a prohibitively expensive excise tax was required.
- ⁴⁸ Lee, *Smoke Signals*.
- ⁴⁹ *Ibid*, Chapter 2.
- ⁵⁰ Lee, *Smoke Signals*, 48. Anslinger was eventually fired by President Kennedy in 1962, but his anti-marijuana propaganda remained in the public consciousness long after.
- ⁵¹ This report was commissioned by Mayor Fiorello LaGuardia in New York City in 1939 who tasked a committee of doctors and scientists from the New York Academy of Medicine with assessing the threat of marijuana. Like many other reports on the topic, the LaGuardia report found that marijuana was not dangerous or addictive, and called for more research into its curative potential.
- ⁵² Including efforts to push the American Medical Association to deny the therapeutic benefits of cannabis; by 1942, marijuana was removed from the US Pharmacopoeia, the nation’s official list of medicines.
- ⁵³ For example, in the 2011 Drug Enforcement Agency report, *DEA Position on Marijuana*, the agency continues to claim that cannabis has no medicinal value, leads to mental health issues, is a “gateway” to more dangerous drugs, and increases juvenile crime. The full report is available at:
http://www.justice.gov/dea/docs/marijuana_position_2011.pdf.
- ⁵⁴ The CSA is the implementing legislation for the 1961 Single Convention on Narcotic Drugs.
- ⁵⁵ Lee, *Smoke Signals*, 134.
- ⁵⁶ The full report is at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1749335/pdf/bullnyacadmed00168-0058.pdf>.
- ⁵⁷ Pacula et al., “Marijuana Decriminalization: What does it mean in the United States?”
- ⁵⁸ It is interesting to note that Nixon actually allotted more money to treating than policing drug use when the War on Drugs was first launched. Eugene Jarecki, *The House I Live In* (2012).
- ⁵⁹ Brian Mann, “The Drug Laws That Changed How We Punish,” *NPR*, February 14, 2013. Available at:
<http://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish>.
- ⁶⁰ The Fair Sentencing Act of 2010 reduced the crack/powder disparity from 100-to-1 to 18-to-1, and the federal sentencing commission made the adjustment retroactive, shortening the sentences of about 13,000 people.
- ⁶¹ See for example, Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (New York City: New Press, 2012) and Dylan Ratigan, “The War On Drugs Is Nothing But Institutionalized Racism,” *Business Insider*, January 16, 2012. Available at: http://articles.businessinsider.com/2012-01-16/home/30631016_1_drug-arrests-drug-money-drug-trade.

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