Madam Chair, Senate Human Services Committee,

I am Jody Vetter from District 32. I am the chair for the ND for Freedom of Cannabis Act. Our measure has been approved for circulation and we have 600 petitions spread across the state. We are a North Dakotan grassroots patient driven movement. We have no out of state interests or money. I am neutral on Bill 1420 as written.

I am of course for legalization but there are areas of concern with this bill.

We really need to move passed the thought that somehow possessing cannabis is a criminal act based on amounts of possession.

Why are there still criminal charges for possession? How is possessing one ounce of cannabis not a crime but possessing 2 ounces of cannabis is a class B misdemeanor? The federal government is talking seriously of finally moving forward with not just decriminalizing cannabis but ending federal prohibition of the plant.

I urge you to amend the criminal charges for possession of cannabis to civil penalties.

I believe criminal charges for cannabis possession is morally wrong. I have provided an essay from the Indiana law journal at Indiana University titled Liberty Lost: The Moral Case for Marijuana Law Reform.

This essay addresses whether cannabis criminal laws diminish fundamental individual rights, and whether there are grounds that justify doing so.

The authors present two arguments corresponding to two distinct liberty concerns implicated by laws that both ban cannabis use and punish its users.

The first argument opposes criminalization and demonstrates that cannabis use does not establish the kind of wrongful conduct that is a requirement for just punishment. The second argument demonstrates that even without criminal penalties, prohibition of cannabis violates a moral right to exercise autonomy in personal matters.

This is where home cultivation rights come up. I was told there is very little appetite for home cultivation from legislators, but I can tell you, having traveled across the state and spoke with several thousand people there is a large appetite for home cultivation from North Dakotans.

North Dakotans love freedom, personal growing of cannabis included.

I find it very hypocritical that there is no problem with me running around with a concealed gun but it's dangerous to grow a medicinal plant with no possibility of death by over consumption.

I urge you add an amendment for some type of home cultivation. One plant per private residence at the very least. Home grow helps with keeping commercial prices reasonable and shown it does not lead to more crime. Eighteen states allow home cultivation, not one state has ever introduced legislation to repeal or scale back on home growing.

To think you can control the amount a grown adult consumes over a two-week period is illogical. These types of restrictions only fuel black-market sales.

There is concern for pricing. We know medical cannabis is very expensive at $440.00 an ounce plus tax. I can't see how people are going to pay prices like that. That pricing is four times higher than other states. We know high prices also lead to more black-market sales. That is the very thing we want to avoid.

Lastly, I leave you with an excerpt from the essay Liberty Lost: A Moral Case for Marijuana Reform. "Whatever the political dynamics, we should remember that moral rights are also at stake-the rights to a sphere of liberty in personal matters, to prosecutions based on the principles of just punishment, and most fundamentally, to a state that respects the individuality and autonomy of its people. These civil libertarian concerns, well recognized in other contexts, should also inform legislators and policy makers as marijuana law reform efforts move forward."

Thank you,

Jody Vetter

PETITION TITLE

This initiated measure would add a new section to article I of the North Dakota constitution, which would provide that it is not unlawful for a person to possess, grow, process, or transport not more than 12 cannabis plants for personal use. It would provide that it is lawful to consume cannabis, as long as the cannabis is not consumed openly in public other than as provided by law, and would provide that it is lawful to transfer cannabis to another person without receiving payment in return. It would authorize the legislature to enact laws to license and regulate the commercial sale of cannabis and would provide that it is unlawful to cultivate, harvest, process, package, transport, possess, or sell cannabis for commercial purposes without such a license. It would provide that it is unlawful to sell or transfer cannabis to any person under the age of 21 unless for medical purposes as prescribed by law.

FULL TEXT OF THE MEASURE

IF MATERIAL IS UNDERSCORED, IT IS NEW MATERIAL WHICH IS BEING ADDED. IF MATERIAL IS OVERSTRUCK BY DASHES, THE MATERIAL IS BEING DELETED. IF MATERIAL IS NOT UNDERSCORED OR OVERSTRUCK, THE MATERIAL IS EXISTING LAW THAT IS NOT BEING CHANGED.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF NORTH DAKOTA:

SECTION 1. An amendment to the North Dakota Constitution is proposed to the people. If the amendment is adopted, a section shall be added to Article I of the North Dakota Constitution to read as follows:

Section 26. (a) It is hereby declared that it is not unlawful, and it shall not be an offense under law or be a basis for seizure or forfeiture of assets under law for a person who is 21 years of age or older to;

(1) possess, use, purchase, or transport cannabis, cannabis accessories, or cannabis infused products, as described in this section;

(2) possess, grow, process, or transport for personal use no more than 12 cannabis plants, with six or fewer being mature, flowering cannabis plants, provided that the cannabis produced from the plant is not made for sale;

(3) consume cannabis, provided that the cannabis is not consumed openly in public except in a manner provided by law; and

(4) transfer an amount of cannabis as prescribed by law without remuneration to a person who is 21 years of age or older.

(b) The legislature may prescribe by law a manner to license and regulate cultivation, manufacturing, harvesting, processing, packaging, transporting, displaying, possessing, and selling of cannabis and cannabis infused products for commercial purposes.

(c) It is unlawful to cultivate, manufacture, harvest, process, package, transport, display, possess or sell cannabis or cannabis infused products for commercial purposes without having first obtained a valid license as prescribed by law.

(d) It is unlawful to sell or transfer cannabis, a cannabis infused product, or a cannabis accessory to any person who is under the age of 21 years, except that medical cannabis may be sold or transferred to a person under 21 years, as prescribed by law.

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Liberty Lost: The Moral Case for Marijuana Law Reform

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Liberty Lost: The Moral Case for Marijuana Law Reform†

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Marijuana policy analyses typically focus on the relative costs and benefits of present policy and its feasible alternatives. This Essay addresses a prior, threshold issue: whether marijuana criminal laws abridge fundamental individual rights, and if so, whether there are grounds that justify doing so. Over 700,000 people are arrested annually for simple marijuana possession, a small but significant proportion of the 100 million Americans who have committed the same crime. In this Essay, we present a civil libertarian case for repealing marijuana possession laws. We put forward two arguments corresponding to the two distinct liberty concerns implicated by laws that both ban marijuana use and punish its users. The first argument opposes criminalization and demonstrates that marijuana use does not constitute the kind of wrongful conduct that is a prerequisite for just punishment. The second argument demonstrates that even in the absence of criminal penalties, prohibition of marijuana use violates a moral right to exercise autonomy in personal matters—a corollary to John Stuart Mill's harm principle in the utilitarian tradition, or, in the nonconsequentialist tradition, to the respect for personhood that was well described by the Supreme Court in its Lawrence v. Texas *opinion. Both arguments are based on principles of justice that are uncontroversial in other contexts.*

INTRODUCTION

The federal government and thirty-seven states make possession of marijuana a criminal offense punishable by imprisonment.[1] Federal law categorizes marijuana with

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1. 21 U.S.C. § 844(a) (2006) (stating that possession of a controlled substance is unlawful); *see also id.* § 812(c) sched. I(c)(10) (2006) (listing marijuana as a Schedule I controlled substance). Under federal law, marijuana possession is punishable by one year in prison and a minimum fine of $1000. *Id.* § 844(a). For a compilation of state marijuana laws and their penalties, see Nat'l Org. for the Reform of Marijuana Laws, State by State Laws, http://www.natlnorml.org/index.cfm?Group_ID=4516.

the most dangerous of illicit drugs,[2] and the White House Office of National Drug Control Policy (ONDCP) has generally treated marijuana control as a top priority.[3] In recent years, federal and state laws have resulted in the arrest of more than 700,000 Americans annually for marijuana possession,[4] a crime that almost 100 million Americans have committed.[5]

There are good reasons to believe that these laws have been counterproductive, as many critics have charged. Arguably, marijuana prohibition diverts resources from more pressing drug- or crime-control agendas; encourages discriminatory enforcement; stymies ameliorative regulation; and consigns users to deal with criminal drug traffickers, if not lawyers, courts, and jails.[6] There are many who dispute these claims;

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2. Under the federal drug laws, marijuana is designated a Schedule I controlled substance, a status reserved for drugs with the most serious potential for abuse, no medical benefit, and no safe method of use. 21 U.S.C. § 812(b)(1) (2006). For a detailed description of why marijuana does not satisfy the three tenets of § 812(b)(1), see *infra* note 78. This status places marijuana on a par with heroin, and in a graver category than cocaine and OxyContin, which are both included in Schedule II. 21 U.S.C. § 812(c) sched. II(a).

3. *See* Sally Satel, Commentary, *A Whiff of "Reefer Madness" in U.S. Drug Policy*, N.Y. TIMES, Aug. 16, 2005, at F6 (commenting that ONDCP places more emphasis on controlling marijuana than methamphetamine, heroin, or cocaine because marijuana is a gateway to more dangerous drugs); *see also* Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, HARM REDUCTION J., Feb. 9, 2006, http://www.harmreductionjournal.com/contents/3/1/6 (stating that "since 1990, the primary focus of the war on drugs has shifted to low-level marijuana offenses"). Barry McCaffrey, drug czar under Bill Clinton, and John Walters, drug czar under George W. Bush, both invested heavily in advertising against marijuana, which they saw as the key to winning the War on Drugs. Ben Wallace-Wells & Eric Magnuson, *How America Lost the War on Drugs*, ROLLING STONE, Dec. 13, 2007, at 107, 110. Whether this policy continues under the Obama administration remains to be seen.

4. In 2006, there were approximately 742,900 arrests for possession of marijuana, constituting 39.1% of the roughly 1.9 million drug arrests. CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, PERSONS ARRESTED: CRIME IN THE UNITED STATES 2006 (2007), http://www.fbi.gov/ucr/cius2006//arrests/index.html [hereinafter CRIME IN THE UNITED STATES 2006]. In 2005, there were almost 767,000 marijuana arrests, and nearly 680,000 of them were for marijuana possession. CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, PERSONS ARRESTED: CRIME IN THE UNITED STATES 2005 (2006), http://www.fbi.gov/ucr/05cius/arrests/index.html; *see also* JIM LEITZEL, REGULATING VICE: MISGUIDED PROHIBITIONS AND REALISTIC CONTROLS 274 tbl.A.2 (2008) (finding that 81% of all 2005 drug arrests and 88% of all marijuana arrests were for possession rather than sale or manufacture).

5. Citing the *2007 National Survey on Drug Use and Health*, the ONDCP reports that "an estimated 100 million Americans aged 12 or older have tried marijuana at least once in their lifetimes, representing 40.6% of the U.S. population in that age group." Office of Nat'l Drug Control Policy, Marijuana Facts & Figures, http://www.whitehousedrugpolicy.gov/drugfact/marijuana/marijuana_ff.html#extentofuse. In 2002, a poll conducted by Time and CNN found that as many as 47% of Americans had tried the drug. Joel Stein, *The New Politics of Pot: Can It Go Legit?: How the People Who Brought You Medical Marijuana Have Set Their Sights on Lifting the Ban for Everyone*, TIME, Oct. 27, 2002, at 56.

6. *See* Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y & L. 43 (2009). For other criticism of marijuana criminalization, see generally CANADIAN SENATE SPECIAL COMM. ON ILLEGAL DRUGS, CANNABIS:

but, both proponents and opponents of marijuana prohibition generally argue in pragmatic terms: their focus is on what will work best to achieve either "a drug-free America" (in the government's rendition) or a reduction of harm to users (in the reformer's rendition).[7]

Such debates are crucial elements in any examination of marijuana law and policy, but they ignore the deeper level of justification that may be required for restraints on individual liberty, of which marijuana criminalization is arguably an instance. Restraints on religious practice, for example, cannot properly be evaluated by merely calculating the utilitarian costs and benefits; something of greater moral weight is required to override the fundamental right to free exercise of religion. A key threshold issue regarding the prohibition and criminalization of marijuana use is whether such laws implicate fundamental individual rights, and, if so, what grounds are required to justify doing so.

In this Essay, we argue that these laws do unjustifiably infringe upon fundamental moral rights. We present a nonconsequentialist, civil libertarian case against marijuana prohibition and criminalization based on the requirements of liberty and just punishment. Our focus is on an individual's *moral* rights—the kind of human rights that *should* be reflected in law, whether they are or not. We recognize that courts are unlikely to revisit precedents generally upholding marijuana crimes against constitutional challenges, at least in the near term.[8] Our concern here, however, is *what*

OUR POSITION FOR A CANADIAN PUBLIC POLICY (2002), *available at* http://www.parl.gc.ca/common/Committee_SenRep.asp?Language=E&Parl=37&Ses=1&comm_id=85 (concluding that criminalization of cannabis is not supported by scientific data and criminalization policies have been ineffective); ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES & PLACES (2001) (analyzing the legitimacy and effectiveness of American drug policy); NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972), *available at* http://www.druglibrary.org/Schaffer/Library/studies/nc/ncmenu.htm (arguing that discouraging the use of cannabis may be desirable but that criminalization of possession for personal use is a socially self-defeating means to that objective); Duncan Campbell, *Ex-Drugs Policy Director Calls for Legalisation*, GUARDIAN (London), Aug. 13, 2008, at 6, *available at* http://www.guardian.co.uk/politics/2008/aug/13/drugs.legislation.

7. For two prominent exceptions that assess exclusively the moral rights at stake in the drug war generally, see DOUGLAS N. HUSAK, DRUGS AND RIGHTS (1992); Michael Moore, *Liberty and Drugs*, *in* DRUGS AND THE LIMITS OF LIBERALISM 61 (Pablo De Greiff ed., 1999).

8. Many courts have rejected constitutional challenges to marijuana possession laws. *See, e.g.*, John C. Williams, Annotation, *Constitutionality of State Legislation Imposing Criminal Penalties for Personal Possession or Use of Marijuana*, 96 A.L.R.3d. 225 (1979) (providing a long list of state court decisions upholding marijuana-possession convictions). Specifically, courts have rejected claims that marijuana use is protected by the Free Exercise Clause and state analogs. *E.g.*, United States v. Rush, 738 F.2d 497, 511–13 (1st Cir. 1984); United States v. Middleton, 690 F.2d 820, 824–26 (11th Cir. 1982); State v. Hardesty, 204 P.3d 407, 413, 418 (Ariz. Ct. App. 2008), *vacated*, 214 P.3d 1004 (Ariz. 2009); State v. Balzer, 954 P.2d 931, 942 (Wash. Ct. App. 1998). Most courts have also rejected claims that personal marijuana use is a fundamental right protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g.*, United States v. Fogarty, 692 F.2d 542, 547 (8th Cir. 1982) (upholding the classification of marijuana as a Schedule I substance on a rational-basis test, and rejecting strict-scrutiny analysis because "there is no constitutional right to import, sell, or possess marijuana"); Nat'l Org. for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 130–34 (D.D.C. 1980) (holding that personal use of marijuana is not a fundamental right). *But see* Ravin

the law should be, not whether existing law satisfies the constitutional minimum, and in making that determination, legislators, no less than judges, should attend to the claims of liberty and human rights that may be at stake.

Prevailing marijuana-possession laws contain two components: the ban on marijuana use ("prohibition"), and the criminal punishment imposed on its users. Prohibition need not include criminal penalties for possession; alcohol prohibition did not,[9] and the decriminalization movement seeks the same for marijuana.

These two measures—prohibiting use and punishing users—each implicate individual liberty, but they do so in different ways that raise very different concerns. Prohibition only targets access to the drug (and the freedoms that are lost by its unavailability), and it raises the question of whether individuals have a moral right to use marijuana. By contrast, criminally punishing a user may confiscate her freedom altogether and always inflicts moral censure. Such punishment is justifiable only if the defendant deserves it. It is not enough that the citizenry will benefit from punishing marijuana users, for example, by deterring the drug trade; the offender must have engaged in some blameworthy, wrongful conduct that can justify moral and legal guilt.[10] As C.S. Lewis wrote, "Desert is the only connecting link between punishment

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v. State, 537 P.2d 494 (Alaska 1975) (holding marijuana use and possession in one's home are protected under a state constitutional privacy right). We can, however, envision a different result in the future if attitudes toward marijuana change, or if the Supreme Court's recent libertarian interpretation of the right to privacy takes root. *See infra* Part II.

9. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. The Eighteenth Amendment prohibited the manufacture, sale, and transportation of alcohol, but the possession and consumption of alcohol remained legal during prohibition. Lloyd C. Anderson, *Direct Shipment of Wine, the Commerce Clause and the Twenty-First Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1, 12 (2004).

10. Under the retributive principle, punishment may not be inflicted on the innocent or on the guilty beyond their desert, even if doing so would achieve a greater good for others. Desert is usually taken to be a function of the gravity of the crime and the blameworthiness of the criminal. Accordingly, it is not acceptable to punish the mother of a suicide bomber, even if it is the *only* way to deter future bombings. Nor can desert be based on the mere fact that the defendant freely chose to violate a duly passed law. Otherwise, any criminal law regime would be self-justifying, so that criminalizing singing would justify punishing a yodeler. What is missing from both of these examples is blameworthy conduct that underwrites moral guilt.

The retributive principle most centrally embodies respect for the right of autonomous individuals to determine their futures. For extended treatment of the principle as applied to criminal law, see JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY (1970); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans., Bobbs-Merrill Co. 1965) (1797) (propounding the "formula of humanity"); JOHN KLEINIG, PUNISHMENT AND DESERT (1973); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); Sanford H. Kadish, *Why Substantive Criminal Law—A Dialogue*, 29 CLEV. ST. L. REV. 1, 10 (1980) ("It is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy."); Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968).

There are a few theorists, however, who defend punishing the innocent if sufficient benefits would result. *See, e.g.*, Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124 (2000); J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, *in* UTILITARIANISM 3, 69–72 (John Jamieson Carswell ed., 1973). That theory underlies strict-liability laws in some states that arguably punish blameless conduct for utilitarian reasons. But even utilitarians who are willing to trade fairness for utility would still have great difficulty

and justice."[11]

Are these necessary conditions satisfied in the case of American marijuana laws? We first consider whether criminal sanctions can be justified and then turn to prohibition laws that simply put marijuana beyond reach.

I. PUNISHING USERS

A. Grounds Purported to Justify Criminalization

Is marijuana possession—or the marijuana use for which possession is a proxy—the kind of wrongful conduct that is a prerequisite for criminal punishment of its users? At its most expansive, the indictment against marijuana use puts forth four types of putative moral wrongs inflicted by marijuana use to justify criminally punishing its users. Marijuana use is alleged to inflict harm on others; inflict harm on users; make users unproductive members of society; and be immoral in itself.

But two questions must be asked of each claim: Does marijuana use actually perpetrate the wrong alleged? And is this type of wrong sufficient to justify criminal penalties? We consider each claim in turn.

1. Harm to Others

Undeniably, acts that seriously and wrongfully injure others, or seriously risk injury to others, can be criminalized. Such an act, coupled with mens rea, is the paradigmatic case warranting criminal penalties. Thus, the question here is not one of principle but one of fact: does marijuana use wrongfully injure others?

No one can reasonably claim that the private use of marijuana at home inflicts direct harm on others the way a battery does. The claim must be that marijuana use has further effects that do inflict harm. One way this might be so is if marijuana regularly lead users to engage in subsequent criminal activity. If marijuana stimulated aggression or was addictive and expensive enough to lead users to engage in crime to finance their habits, the state might treat marijuana possession as an inchoate crime akin to reckless driving, possession of burglarious implements, or other acts that threaten imminent and

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defending marijuana criminalization on that basis. Because each person's happiness (or alternative utility measure) counts equally, the harms inflicted on the defendant by his loss of liberty must count in the balance along with the costs involved in fostering criminal enterprises dependent upon a black market; devoting large amounts of police, court, and prison resources to marijuana law enforcement; and/or the harms that result from diverting resources away from more destructive crimes. *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION (C.K. Ogden ed., Richard Hildreth trans., Morrison & Gibb, Ltd. 1931) (1802); 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 10 (1984) [hereinafter 1 FEINBERG, HARM TO OTHERS] (listing practical costs resulting from any penal statute and concluding that "merely to show that there is a morally relevant reason for a particular penal statute is not yet to show that it is sufficient or conclusive reason in the case at hand").

11. C.S. Lewis, *The Humanitarian Theory of Punishment*, *in* PHILOSOPHY AND CONTEMPORARY ISSUES 71, 72 (John R. Burr & Milton Goldinger eds., 1972). Lewis adds that when the focus of criminal punishment becomes deterrence or rehabilitation rather than desert, "instead of a person, a subject of rights, we now have a mere object, a patient, a 'case.'" *Id.*

serious harm. But no one can reasonably argue that marijuana generally causes its users to engage in crime, and ample research shows that it does not.[12]

The alternative that drug-war proponents invoke is downstream, noncriminal harm allegedly caused by marijuana use. James Q. Wilson justifies criminalization of some drugs because they result in "more accidents, higher insurance premiums, bigger welfare costs, and less effective classrooms."[13] We accept that marijuana use cannot be described as wholly self-regarding because, like almost everything else we do, it has an impact on others. But such downstream effects, even bad ones, cannot alone justify criminal punishment, or we would be punishing people for eating fatty foods and drinking alcohol.

There are at least two reasons why such indirect harms are neither wrongful nor blameworthy in the way just punishment requires. First, the chain of causation from an individual's marijuana use to Wilson's litany of harms is so distended, and so dependent on volitional acts by others, that no concept of proximate causation used in criminal law could connect the two. And second, causing damage to another—even with intent to do so—is not enough to justify the criminal sanction; the harm must

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12. *See, e.g.*, BRITISH ADVISORY COUNCIL ON THE MISUSE OF DRUGS, THE CLASSIFICATION OF CANNABIS UNDER THE MISUSE OF DRUGS ACT 1971 (2002), *available at* http://drugs.homeoffice.gov.uk/publication-search/acmd/cannabis-class-misuse-drugs-ct?view=Binary; NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* note 6, at 68–76; Peter N.S. Hoaken & Sherry H. Stewart, *Drugs of Abuse and the Elicitation of Human Aggressive Behavior*, 28 ADDICTIVE BEHAVS. 1533 (2003).

Faced with a similarly tenuous assertion, the Supreme Court stated, "[g]iven the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." Stanley v. Georgia, 394 U.S. 557, 567 (1969). The inchoate-crime argument comes closer to the mark when applied to heroin or crack cocaine, but even use of these drugs would be difficult to fit into existing doctrine. Cases holding that commission of an inchoate act is sufficient to constitute a criminal attempt do so on the basis that it is a "substantial step" toward the commission of a crime (or in some states, has sufficient proximity to it) and was done with specific intent to commit it. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 6.2(c), (d) (4th ed. 2003). But even in the case of heroin or cocaine, use will not constitute a substantial step or proximate act most of the time, so it would be hard to justify punishing all who use the drug rather than only those who commit subsequent criminal acts. In an earlier era, John Stuart Mill took this position regarding laws against drunkenness: if an intoxicated person assaults another, punish him for assault, not for intoxication, he argued. JOHN STUART MILL, ON LIBERTY 159 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

13. James Q. Wilson, *Drugs and Crime*, *in* DRUGS AND CRIME 521, 524 (Michael Tonry & James Q. Wilson eds., 1990). The ONDCP, under drug czar William Bennett, shared Wilson's view, stating that "[d]rug users make inattentive parents, bad neighbors, poor students, and unreliable employees—quite apart from their common involvement in criminal activity." OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 7 (1989). Nancy Reagan conveyed the same idea in more hyperbolic form when she described all casual drug users as "accomplice[s] to murder." Stephen Chapman, *Nancy Reagan and the Real Villains in the Drug War*, *in* THE CRISIS IN DRUG PROHIBITION 119, 119 (David Boaz ed., 1991). Of course, the prohibition law that leaves drug production to organized crime would make the government an "accomplice to murder" by the same theory.

result from a wrongful act that invades some moral right of another.[14] John F. Kennedy may have destroyed the haberdashery industry by refusing to wear a hat throughout his presidency, but he did not do so by invading any right. Similarly, the student who Wilson thinks will perform poorly in school invades no one's rights by doing so.

If marijuana criminalization cannot be justified on grounds of harm to others, the case for criminalization is severely weakened. The consensus that supports criminal penalties for acts that inflict harm on others breaks down in the absence of such victimization. A great number of Americans probably would subscribe to Mill's "harm principle," which holds that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is . . . to prevent harm to others . . . . Over himself, over his own body and mind, the individual is sovereign."[15] Nevertheless, the ONDCP and other criminalization proponents believe criminal punishment is warranted on one or more other grounds that we explore next.

2. Sins of Omission

Someone who fails a friend in need or contributes nothing to the community might be said to damage others by her absence. On this view, if marijuana users are constantly in a haze, or fall prey to the so-called "amotivational syndrome," they may damage society by inaction—by failing to contribute to it.

Some people may describe such contributions as morally virtuous but not morally required.[16] Others might deem them moral duties and the failure to perform them morally wrong.[17] But few would argue that failing to contribute to society is a sufficient ground for criminal punishment. As every law student is taught, criminalizing omissions is alien to the American criminal law tradition absent a legal duty between the actor and the person in need. A parent may be convicted of criminal homicide for failing to rescue his child if he can, but even Heimlich would bear no criminal liability for failing to save a stranger choking at the next table.[18] And there are good reasons for

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14. *See* 1 FEINBERG, HARM TO OTHERS, *supra* note 10; MILL, *supra* note 12. Mill argued, on social contract grounds, that we each must "observe a certain line of conduct towards the rest." MILL, *supra* note 12, at 139. On one side of the line, subject to state compulsion, are (1) the burdens required for mutual protection and (2) not injuring certain interests of others, "which, either by express legal provision or tacit understanding, ought to be considered as rights." *Id.* On the other side of the line, and exempt from state compulsion, are "[t]he acts of an individual [that] may be hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights." *Id.*

15. MILL, *supra* note 12, at 80. For modern elaborations of the harm principle, see 1 FEINBERG, HARM TO OTHERS, *supra* note 10; H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963); Dennis J. Baker, *Constitutionalizing the Harm Principle*, 27 CRIM. JUST. ETHICS 3 (2008) (arguing that wrongful harm to others provides the only moral justification for sending people to jail).

16. *See* JAN NARVESON, THE LIBERTARIAN IDEA 39–40 (Broadview Press 2001) (1988).

17. *See, e.g.*, Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFFAIRS 229 (1972) (arguing that the failure of people in affluent nations to help others in need is morally unjustifiable).

18. Criminal law casebooks continue to use the famous case of *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962) (reversing involuntary manslaughter conviction based on failure to

generally limiting an individual's responsibility to acts of commission, and excluding sins of omission, having to do with respect for a rational, self-directing person's right to control the essential shape of her own life.[19]

If one's failure to rescue a stranger in dire straits is properly beyond the reach of criminal sanctions, one's failure to contribute to society must be as well, a fortiorari; and if these failures are not crimes, how can it be a crime to use a drug, which, by hypothesis, merely makes such a failure somewhat more likely?

The other, alternative ground for rejecting this claim is that its application to marijuana use is not empirically well supported. Recent research casts doubt on the amotivational-syndrome claim,[20] and numerous other activities, including video gaming and television watching, may well have a greater immobilizing influence than marijuana use. There are too many counterexamples of cultural icons who used marijuana regularly during highly fertile periods—for example, Robert Altman, Charles Baudelaire, the Beatles, Francis Crick, Ken Kesey, Richard Feynman, Steven Jay Gould, Allen Ginsberg, Aldous Huxley, Jack Kerouac, Robert Parish, Diego Rivera, Carl Sagan, and Rick Steves[21]—and too many political candidates for high office who have admitted using marijuana[22] for anyone to be confident that the typical marijuana user is destined to lead an unproductive existence.

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feed baby because no instruction requiring finding of legal duty), and/or *Pace v. State*, 224 N.E.2d 312 (Ind. 1967) (reversing a robbery conviction because defendant was merely present in the car in which a robbery took place), to illustrate this principle. *See, e.g.*, JOSHUA DRESSLER, CASES AND MATIERIALS ON CRIMINAL LAW 137, 883 (4th ed. 2007).

19. If duties extended beyond that point, there would be no end to one's obligations regarding strangers and no space for the special responsibilities one should feel toward family, friends, community, and one's own life. The deontological distinctions that limit the scope of our obligations—between acts and omissions and between intended and unintended consequences—place us in control of our own lives, and, most of the time, correspond to our everyday intuitions about moral requirements.

20. *See* Peter L. Nelson, *Cannabis Amotivational Syndrome and Personality Trait Absorption: A Review and Reconceptualization*, 14 IMAGINATION COGNITION & PERSONALITY 43 (1994).

21. *See, e.g.*, MARTIN BOOTH, CANNABIS: A HISTORY 267–68 (2003) (Huxley); LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA, THE FORBIDDEN MEDICINE 141 (1993) (Gould); MARTIN H. LEVINSON, THE DRUG PROBLEM: A NEW VIEW USING THE GENERAL SEMANTICS APPROACH 85 (2002) (Baudelaire); PATRICK MCGILLIGAN, ROBERT ALTMAN: JUMPING OFF THE CLIFF 245–47 (1989) (Altman); BARRY MILES, JACK KEROUAC: KING OF THE BEATS 141 (1998) (Kerouac); BARRY MILES, PAUL MCCARTNEY: MANY YEARS FROM NOW 184–93 (1997) (Beatles); PAUL PERRY, ON THE BUS: THE COMPLETE GUIDE TO THE LEGENDARY TRIP OF KEN KESEY AND THE MERRY PRANKSTERS AND THE BIRTH OF THE COUNTERCULTURE 113 (1990) (Kesey); MATT RIDLEY, FRANCIS CRICK: DISCOVERER OF THE GENETIC CODE 156 (2006) (Crick); ANDREW WEIL & WINIFRED ROSEN, FROM CHOCOLATE TO MORPHINE: EVERYTHING YOU NEED TO KNOW ABOUT MIND-ALTERING DRUGS 19 (1998) (Rivera); Nicole Brodeur, *Rick Steves Is Just a NORML Guy*, SEATTLE TIMES, Mar. 14, 2006, at B1 (Steves); Allen Ginsberg, *The Great Marijuana Hoax: First Manifesto to End the Bringdown*, ATLANTIC MONTHLY, Nov. 1966, at 104, 107–11 (Ginsberg); *Parish Admits Validity of Marijuana Charge*, N.Y. TIMES, Feb. 26, 1993, at B8 (Parish); Lester Grinspoon, *To Smoke or Not to Smoke: A Cannabis Odyssey*, MARIJUANA USES, Apr. 20, 2009, http://marijuana-uses.com/essays/001.html [hereinafter Grinspoon, *To Smoke*] (Feynman); Carl Sagan, *Mr. X*, MARIJUANA USES, http://www.marijuana-uses.com/essays/002.html (Sagan).

22. Katherine Q. Seelye, *Obama Offers More Variations from the Norm*, N.Y. TIMES, Oct.

3. Morality Alone

How one lives one's life raises fundamental questions of value; what constitutes a life worth living has been a central ethical question for millennia. But answering that question for oneself is one thing; jailing those whose answers differ from the government's, as Bush administration drug czar John Walters suggested, is a far different one. Walters argued that marijuana "destroys the soul" and that the extreme "moral poverty" of its users requires "stiff and certain punishment."[23]

Can incarceration of marijuana users be justified on this basis? Or on the perceived immorality of living a self-indulgent life, or substituting an artificial paradise for one's natural, God-given lot? The criminal law has sometimes been used to enforce morality for morality's sake, as with the criminalization of homosexual acts, but rarely anymore. There are two problems. First, too many people now doubt that conduct can be immoral if it neither risks nor produces harmful effects; the views of earlier natural law theorists that entirely private conduct such as masturbation is immoral mystifies them. Second, multicultural societies now see too clearly the illegitimacy of enforcing the moral code of some upon others who disagree with it in the absence of harm to others.[24] They know that one era's condemnation of certain victimless behavior as

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24, 2006, at A21 (reporting on Barack Obama's marijuana-use admission and contrasting it with former President Bill Clinton's admission); *see also* JOSEPH R. BLANEY & WILLIAM L. BENOIT, THE CLINTON SCANDALS AND THE POLITICS OF IMAGE RESTORATION 59–62 (2001) (discussing how political figures such as Bill Clinton and Clarence Thomas restored their images after admissions of marijuana use).

23. RUDOLPH J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 57 (2004) (quoting WILLIAM J. BENNETT, JOHN J. DIIULIO & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS (1996)).

24. Joel Feinberg takes this position in his seminal work. 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988). He subscribes to a modified version of Mill's harm principle, in which "harm" refers to "those states of set-back interest that are the consequence of wrongful acts or omissions by others." 1 FEINBERG, HARM TO OTHERS, *supra* note 10, at 215.

Two who famously disagree, and argue that private consensual conduct not affecting others that is deemed immoral may be criminalized, are Justice Antonin Scalia and Lord Devlin. Justice Scalia dissented in the *Lawrence v. Texas* antisodomy case, arguing that the majority's ruling "effectively decrees the end of all morals legislation," explicitly including laws against masturbation. Lawrence v. Texas, 539 U.S. 558, 590, 599 (2003) (Scalia, J., dissenting). For Scalia, immorality is a sufficient and constitutional ground for criminalization.

Lord Devlin's argument is quite different. In response to Britain's *Wolfenden Report*, which recommended eliminating criminalization of homosexuality, Lord Devlin wrote a celebrated essay justifying the continued criminalization of conduct deemed immoral, not for morality's sake, but because if the criminal system looks the other way in the face of popular outrage, a social breakdown will ensue. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 1–26 (1965). As such, his argument was a peculiar species of the harm-to-others argument, and perhaps was a precursor to theories propounded in recent years by "broken windows" social scientists and others who view law as a way for felicitous norms that control populations to be created or maintained. *See also* James Q. Wilson, *Against the Legalization of Drugs*, COMMENTARY, Feb. 1990, at 21, 26. Wilson argues against decriminalization of *cocaine* on the grounds that "dependency on certain mind-altering drugs is a moral issue and that their illegality rests in part on their immorality." We treat cocaine differently than nicotine, he writes, because "nicotine

immoral often looks like sheer prejudice in a later one. Perhaps that is why the Supreme Court overruled its decision upholding the criminalization of homosexual sex a mere sixteen years after handing it down. Finding homosexual sex constitutionally protected in *Lawrence v. Texas*, the Supreme Court wrote, "the fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[25]

4. Harming One's Own Welfare

Is the case for criminalization any stronger if the supposed immorality has the effect of harming one's own welfare? (Whether marijuana in fact does harm its users is disputed.)[26] Harms to oneself may warrant state intervention and sometimes even civil laws prohibiting use—we take up that question momentarily—but even in those cases,

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does not destroy the user's essential humanity. Tobacco shortens one's life; cocaine debases it. Nicotine alters one's habits, cocaine alters one's soul . . . ." *Id.* But he notes that marijuana presents a different problem from cocaine or heroin and takes no position on its decriminalization. *Id.* at 23.

25. 539 U.S. at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Invalidating a law criminalizing homosexual sodomy, the Court observed that "'[o]ur obligation is to define the liberty of all, not to mandate our own moral code.'" *Id.* at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)). In his dissent, Justice Scalia proclaimed that *Lawrence* "effectively decrees the end of all morals legislation." *Id.* at 599.

26. Most research studies have concluded that the casual use of marijuana is not harmful to most users, or at least not as harmful as cigarettes, alcohol, and most other recreational drugs. *See, e.g.*, ADVISORY COMM. ON DRUG DEPENDENCE, CANNABIS (1968), *available at* http://www.ukcia.org/research/wootton/index.htm; BRITISH ADVISORY COUNCIL ON THE MISUSE OF DRUGS, *supra* note 12, at 11 (finding that even heavy use of marijuana "is not associated with major health problems for the individual or society"); COMM. ON SUBSTANCE ABUSE AND HABITUAL BEHAVIOR, NAT'L RESEARCH COUNCIL, AN ANALYSIS OF MARIJUANA POLICY (1982), *available at* http://www.nap.edu/openbook.php?record_id=662; INT'L INFO. & COMMC'N DIV., NETH. MINISTRY OF FOREIGN AFFAIRS, Q & A: DRUGS: A GUIDE TO DUTCH POLICY (2002); DAVID MCDONALD, RHONDA MOORE, JENIFER NORBERRY, GRANT WARDFLAW & NICILA BALLENDEN, NAT'L TASK FORCE ON CANNABIS, LEGISLATIVE OPTIONS FOR CANNABIS IN AUSTRALIA (1994); NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* note 6 at 130–31 (recommending decriminalization, finding that "experimental" or "intermittent use" resulted in little danger of physical and psychological harm); Editorial, *Dangerous Habits*, 352 THE LANCET 1565 (1998) (summarizing study finding cannabis less of a threat than alcohol or tobacco and also that moderate indulgence in cannabis has little ill effect on health); *cf.* ROBIN ROOM, BENEDIKT FISCHER, WAYNE HALL, SIMON LENTON & PETER REUTER, THE BECKLEY FOUND., CANNABIS POLICY: MOVING BEYOND THE STALEMATE (2008), http://www.beckleyfoundation.org/pdf/Conclusions_and_Recommendations.pdf (concluding that the "probability and scale of harm among heavy cannabis users is modest compared with that caused by many other psychoactive substances, both legal and illegal, in common use, namely, alcohol, tobacco, amphetamines, cocaine and heroin"). Other studies have found marijuana detrimental to physical and mental health. *See, e.g.*, George C. Patton, Carolyn Coffey, John B. Carlin, Louisa Degenhardt, Micheal Lynskey & Wayne Hall, *Cannabis Use and Mental Health in Young People: Cohort Study*, 325 BRIT. MED. J. 1195, 1195–98 (2002) (finding a possible link between marijuana use and increased risk for depression and anxiety); *see also* NAT'L INST. ON DRUG ABUSE, INFOFACTS: MARIJUANA (2009), http://www.drugabuse.gov/PDF/InfoFacts/Marijuana09.pdf (citing studies).

harm to oneself cannot be seen as the type of moral wrong that should be criminally punished. An act harmful to self-interest may reflect a weak will rather than a bad one, or poor judgment rather than criminal intent. It is difficult to fit self-inflicted harms into the idea of desert, which ethicist James Rachels defines as the principle that "[p]eople deserve to be treated in the same way that they have (voluntarily) treated others."[27]

The other problem concerns the equal respect the government owes to all its citizens. Few people believe that marijuana is more harmful to users than presently legal (but regulated) substances such as nicotine or alcohol.[28] If marijuana is not more harmful, then throwing only some people into the maw of the criminal justice system while leaving others free to indulge their no-more-important pleasures cannot be justified on grounds of danger to the user alone.

None of the four putative grounds for punishing marijuana users successfully establishes that they committed the kind of wrongful, blameworthy conduct that deserves criminal punishment. To quote C.S. Lewis once more: "take away desert and the whole morality of the punishment disappears."[29]

B. Disproportionate Punishments

Defenders of the present marijuana laws must argue not only that criminalization is justifiable but also that the punishment fits the crime. That too, is a difficult case to make. It is true that only a small minority of first offenders receive sentences of incarceration.[30] But those who are not imprisoned are still likely to experience disproportionate suffering if arrested for marijuana use.[31] These other unlucky users, annually numbering between 700,000 and 800,000,[32] will still lose their liberty through arrest and/or pretrial detention for some period of time and have their lives centered around lawyers, trial courts, legal fees, and probation officers for the following year or more. Those who are convicted will be handicapped by legally imposed civil disabilities, including ineligibility for government grants and contracts,[33] public

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27. James Rachels, *Punishment and Desert*, *in* ETHICS IN PRACTICE: AN ANTHOLOGY 470, 473 (Hugh LaFollette ed., 1997).

28. *See, e.g.*, *Dangerous Habits*, *supra* note 26, at 1565.

29. Lewis, *supra* note 11, at 74.

30. *See* MACCOUN & REUTER, *supra* note 6, at 344 (reporting that annually between 1990 and 1995, about 4000 people received federal prison sentences for marijuana offenses and approximately 11,000 people received state sentences; the proportion of offenders convicted of offenses involving sale is not reported).

31. We describe this suffering, and the inhumane outlook that has produced it, in more detail in our companion article, *No Rational Basis*, from which these two paragraphs are adapted. Blumenson & Nilsen, *supra* note 6, at 59–62.

32. In 2006, 43.9% of the 1,889,810 total arrests for drug-abuse violations were for marijuana—a total of 829,627. *See* CRIME IN THE UNITED STATES 2006, *supra* note 4.

33. Grants, licenses, contracts, and some other federal benefits are restricted as to drug offenders. 21 U.S.C. § 862 (2006). At the court's discretion, first offenders convicted of a federal or state drug *possession* offense may be rendered ineligible for all federal benefits for up to one year, and second offenders may remain ineligible for up to five years. *Id.* § 862(b). The sanctions may be waived if offenders declare themselves to be addicts and undergo treatment or are declared rehabilitated. *Id.* § 862(b)(2).

housing,[34] and, depending on the state, driver's licenses,[35] occupational licenses,[36] and voting.[37] Offenders may even forfeit their land, house, or bank account under laws that transfer most of the drug "instrumentalities" or "proceeds" to the budget of the law-enforcement agency that seized them.[38] Another law strips college students of their federal student loans for a single marijuana-possession offense.[39] A high school student

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34. The Supreme Court has even upheld the eviction of a drug user's *parents* on the basis of their child's drug use, even if the drug use took place outside of the home and the parents knew nothing about it. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (interpreting 42 U.S.C. § 1437d(*l*)(6) (2000)); *see also* 42 U.S.C. § 13661(a) (2006) (providing that a person previously evicted from federally assisted housing by reason of drug-related criminal activity is ineligible for admission to any federally assisted housing for three years).

35. Offenders may forfeit their licenses even when the marijuana arrest had nothing to do with driving or being in a car. *E.g.*, FLA. STAT. ANN. § 322.055 (West 2005); GA. CODE ANN. § 40-5-75 (2007); VA. CODE ANN. § 18.2-259.1 (2004); *see also* 23 U.S.C. § 159 (2006) (denying portion of highway funds to states that do not suspend the driver's license of drug felons).

36. 18 U.S.C. §§ 3563(b)(5), 3583(d) (2006); 21 U.S.C. § 862(a)–(d) (2006); U.S. SENTENCING GUIDELINES MANUAL §§ 5F1.5(a), 5F1.6 (2008) (authorizing sentencing court to place occupational restrictions as conditions of probation and setting limitations on federal benefits, including professional licenses, commercial licenses, grants, contracts, and loans); *see also* 29 U.S.C. § 1111 (2006) (setting forth rules of ineligibility for listed positions involving employee-benefit plans); Kathleen M. Olivares, Velmer S. Burton & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, FED. PROBATION, Sept. 1996, at 10 (noting six states permanently restrict felons from public office, ten states leave the discretion to hire with the employer, twelve states apply a test to determine if the conviction bears on the offender's ability to handle the job, and only seventeen states allow public employment after the completion of the prison sentence).

37. As of 2003, thirty-six states and the District of Columbia permitted all felons to vote after prison release or sentence completion; another seven states permitted some felons to vote after sentence completion; in the other seven states, the right to vote can be restored only after executive or legislative clemency. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS STANDARD 37 n.47 (3d ed. 2004).

38. 21 U.S.C. § 881(a) (2006). Seizures accomplished exclusively by state or local agencies may be "adopted" by the federal government whenever the conduct giving rise to the seizure is in violation of federal law. OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON SEIZED AND FORFEITED PROPERTY (1990), *available at* http://www.usdoj.gov/ag/readingroom/seized.htm#federal. When the federal government has "adopted" a state forfeiture case, 80% of judicially or administratively forfeited assets are allocated to the state or local agency for law-enforcement purposes, and the remaining 20% goes to the federal government. ASSET FORFEITURE AND MONEY LAUNDERING SECTION, U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 12 (2009), *available at* http://www.usdoj.gov/criminal/afmls/pubs/ pdf/guidetoeq09.pdf. In joint seizures, the share is allocated on a case-by-case determination based on the amount of work each agency performed. § 881(e)(3); *see also* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44–55 (1998).

39. 20 U.S.C. § 1091(r) (2006). This 1998 law suspends or forever terminates a drug offender's eligibility for federal college loans and grants. Initially, the law applied to anyone with a conviction at any time, but a recent amendment excludes convictions prior to college. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 8021(c), 120 Stat. 4, 178 (2006). The periods of ineligibility vary depending upon the number of convictions and whether they

risks mandatory expulsion under zero-tolerance drug policies in an estimated eighty-eight percent of public schools;[40] an immigrant may face deportation;[41] a parent risks losing child custody to protection agencies or the other parent; the unemployed confront job application forms eliciting their criminal records; and all offenders remain at serious risk of incarceration for a probation violation or a second arrest. And apart from such consequences there is the criminal conviction, a public mark of societal condemnation that in itself is no small thing.[42]

One must juxtapose lives turned upside down in these ways with the nature of the offense, no different than the activities of millions of other Americans who use other intoxicating substances for similar reasons. Such grossly disproportional punishments can hardly be said to fit the offender's crime.

II. PREVENTING USE

As we noted, even in the absence of criminal penalties, outlawing the use of marijuana raises separate liberty concerns. How that putative liberty should be described is a significant and consequential question; recall that the Supreme Court found no "right to engage in homosexual sodomy" in *Bowers v. Hardwick*[43] but later overruled that case because the Constitution guarantees a "right to autonomy in intimate relations."[44] Similarly, some people may dismiss the issue here as merely a

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resulted from possession or distribution of drugs—from a year of ineligibility for a single possession conviction to permanent ineligibility for a second distribution or third possession conviction. § 1091(r)(1). For a discussion of the constitutional and legal infirmities of this law, see Eric Blumenson & Eva Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 68–71 (2002).

Tom Angell, a spokesman for Students for Sensible Drug Policy, reports that "more than 200,000 college students have lost financial aid in the past 10 years because of drug convictions." Matthew Huisman & Jason Millman, *As Frank Prepares Marijuana Bill, States Make Own Efforts*, S. COAST TODAY.COM, Apr. 6, 2008, http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20080406/NEWS/804060373.

40. PHILLIP KAUFMAN, XIANGLLEI CHEN, SUSAN P. CHOY, SALLY A. RUDDY, AMANDA K. MILLER, KATHRYN A. CHANDLER, CHRISTOPHER D. CHAPMAN, MICHAEL R. RAND & PATSY KLAUS, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., INDICATORS OF SCHOOL CRIME AND SAFETY, 1999, at 119 tbl.A1 (1999), *available at* http://nces.ed.gov/pubs99/1999057.pdf; *see also* Anne Davis, *Zero Tolerance Is Too Severe, Father Says Policy Is Subject of Meeting*, MILWAUKEE J. SENTINEL, Nov. 17, 1999, at 1 (reporting on a two-year expulsion applied to a first offender caught with marijuana in a Milwaukee school). *See generally* Eric Blumenson & Eva Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. REV. 65 (2003) (providing an overview of zero-tolerance expulsions).

41. 8 U.S.C. § 1227(a)(2)(B)(i) (2006). Because this provision also authorizes deportation of anyone who is a "drug abuser or addict" even absent a conviction, *id.* § 1227(a)(2)(B)(ii), state decriminalization does not necessarily provide protection from deportation. Only deletion of marijuana from the federal Controlled Substances Act, 21 U.S.C. § 812 (2006), would do so. 42 C.F.R. § 34.2(g), (h) (2008).

42. *Cf.* Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("The stigma this criminal statute imposes . . . is not trivial. . . . [I]t remains a criminal offense with all that imports for the dignity of the persons charged.").

43. 478 U.S. 186, 191 (1986), *overruled by Lawrence*, 539 U.S. 558.

44. *Lawrence*, 539 U.S. at 578. The Court noted in *Lawrence* that it had previously misapprehended the issue as "simply the right to engage in certain sexual conduct," which

question of whether there exists a fundamental "right to smoke marijuana," while others might describe the right at issue, with Justice Brandeis, as the right to be let alone absent good reason,[45] or with Kant, as the right to self-rule.[46] Other moral rights are arguably at stake, including the rights to control one's body, to freedom of thought, to privacy in one's home, and to the pursuit of happiness. If any such individual rights are involved, preventing marijuana use needs more justification than a collective cost-benefit analysis alone.

The idea common to all these descriptions is that each person has certain fundamental interests that must be under the individual's exclusive control and immune from state interference. The Supreme Court has expressed this idea using the rubric of a constitutional right to privacy[47] (and the Alaska Supreme Court has found private marijuana use in one's home protected under its state version of the right).[48] In *Lawrence v. Texas*, the case that overturned *Bowers*, the Court described that right in the following terms:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.
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demeaned "the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.* at 567.

45. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The Founders] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

46. In Kant's philosophy, we are rational and moral agents who can each discern right and wrong for ourselves; if the state does that for us, it denies us the respect due our autonomy, and it also destroys our capacity to act morally, which can only come from the autonomous exercise of one's own reason. *See* IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS, 199–201 (Arnulf Zweig trans. & ed., Thomas E. Hill, Jr. ed., Oxford Univ. Press 2002) (1785).

47. The constitutional right to privacy stems from the Supreme Court's recognition that the Due Process Clause encompasses not only procedural due process but substantive due process as well; a state infringement on fundamental rights is unconstitutional, however fair the procedure. Collins v. Harker Heights, 503 U.S. 115, 125 (1992). The Court has rejected the idea that the Due Process Clause protects any generalized autonomy right, however. Washington v. Glucksberg, 521 U.S. 702, 727 (1997). Instead, the Court will recognize as constitutionally protected only those rights that are (1) "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" *id.* at 721 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)), and (2) "carefully" defined and described, *id.* at 722. Given the Court's distinction between liberty, broadly understood, and the individual liberties recognized as constitutional guarantees—assuming *Lawrence* does not portend a doctrinal shift—the moral rights argument we put forward here should not be read as a prediction that the Supreme Court would find such a moral right contained in the Constitution as a legal guarantee.

48. Ravin v. State, 537 P.2d 494 (Alaska 1975).

> . . . "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. . . .The petitioners are entitled to respect for their private lives."[49]

Obviously, one's right to privacy, or what we might more affirmatively describe as a right to self-ownership or self-rule, is limited. According to Mill, the right is limited only by the harm principle: we must be free to choose for ourselves up to the point we would harm or risk harm to others.[50] Justice Kennedy's opinion in *Lawrence* can be read as adding a second limitation on the right of self-rule, one that would permit paternalism in some areas that are removed from the reasons for respecting individual autonomy. In Kennedy's opinion for the Court, the right to self-rule apparently protects only the realm most closely related to the essential attributes of personhood.[51] Requiring drivers to use seatbelts may not interfere with these attributes, but denying individuals freedom of thought and expression, or the freedom to choose their intimate relations, clearly does.

In assessing where marijuana use falls on this spectrum, one must attend to the reasons individuals offer for using it. These reasons are almost completely absent from drug policy analyses.[52] Here is naturalist Michael Pollan's description:

> All those who write about cannabis's effect on consciousness speak of the changes in perception they experience . . . . [T]hese people invariably report seeing, and hearing, and tasting things with a new keenness, as if with fresh eyes and ears and taste buds.
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> . . . .
>
> It is by temporarily mislaying much of what we already know (or think we know) that cannabis restores a kind of innocence to our perceptions of the world
> . . . .
>
> There is another word for this extremist noticing—this sense of first sight unencumbered by knowingness, by the already-been-theres and seen-thats of the adult mind—and that word, of course, is *wonder*.[53]

Pollan finds using marijuana edifying because it opens the door to thoughts, insights, and experiences he finds valuable. Rick Steves, the Public Broadcasting Service travel guru, says that his outlook and writing have been sharpened by using

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49. *Lawrence*, 539 U.S. at 562, 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

50. MILL, *supra* note 12, at 9.

51. *Lawrence*, 539 U.S. at 574.

52. *See* MACCOUN & REUTER, *supra* note 6, at 70 (citing R.S. Gable, *Opportunity Costs of Drug Prohibition*, 92 ADDICTION 1179 (1997)).

53. MICHAEL POLLAN, THE BOTANY OF DESIRE: A PLANT'S-EYE VIEW OF THE WORLD 166–68 (2001) (emphasis in original).

marijuana.[54] Some other users say that temporarily changing the way they perceive and experience the world increases their self-awareness, or frees up some creative potential within them, or opens them up to more spiritual feelings.[55] In the past year, the Italian Court of Cassation reversed a marijuana conviction on such grounds, accepting the Rastafarian defendant's contention that marijuana helped him achieve a "psychophysical state connected to contemplative prayer."[56] On the other hand, many former users and other critics would find these self-assessments to be delusional. Law professor Michael Moore considers most such claims to be "grandiose descriptions of what in fact is a pretty pathetic condition" and writes that "[o]ne has to be high on [drugs] already in order to be able to judge the states induced as any kind of path to profundity or 'authenticity.'"[57]

One need not resolve this dispute concerning marijuana's value to recognize that at least for its users, banning marijuana *does* implicate their freedom of thought and sometimes even the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[58] That is one reason why a ban on marijuana cuts so close to core aspects of personhood—to the freedom of thought and religion that are necessary to respect an autonomous being's ability to choose what to think and what kind of person to be. That such thoughts, and such an identity, are not esteemed by a majority of Americans and their government is really beside the point: the very idea of this liberty is to protect each individual's sovereignty in this realm (as the Supreme Court long ago recognized).[59] Yet according to President Nixon's

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54. Kevin Berger, *The Other Side of Rick Steves*, SALON.COM, Mar. 20, 2009, http://www.salon.com/mwt/feature/2009/03/20/rick_steves/print.html.

55. *See, e.g.*, ANDREW WEIL, THE NATURAL MIND: AN INVESTIGATION OF DRUGS AND THE HIGHER CONSCIOUSNESS 149–87 (rev. ed. 1986) (describing the expanded thinking that results from marijuana use); Lester Grinspoon, *Learn*, MARIJUANA USES, http://www.marijuana-uses.com/learn.html (describing "marijuana's capacity to catalyze ideas and insights, heighten the appreciation of music and art, or deepen emotional and sexual intimacy"); Grinspoon, *To Smoke*, *supra* note 21 (describing "such disparate uses as the magnification of pleasure in a host of activities ranging from dining to sex, the increased ability to hear music and see works of art, and the ways in which it appears to catalyze new ideas, insights and creativity").

56. Peter Popham, *Rastas Can Use Cannabis, Italian Court Rules*, INDEPENDENT (United Kingdom), July 12, 2008, at 32. In a second possession case, the court reversed the conviction of a shepherd, finding the defendant justified in using it to help him endure a "long and solitary period . . . in the countryside and the mountains." Peter Popham, *Silence of Lambs Justifies a Joint for Lonely Shepherd*, INDEPENDENT (United Kingdom), Mar. 21, 2009, at 32.

57. Moore, *supra* note 7, at 101.

58. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

59. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) ("[I]n a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); Stanley v. Georgia, 394 U.S. 557, 565–66 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. . . . [The idea that] the State has the right to control the moral content of a person's thoughts. . . . is wholly inconsistent with the philosophy of the First Amendment. . . . [Government] cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."); Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("[Freedom of thought] is the matrix, the indispensable condition, of nearly every other form of freedom. . . . [T]he domain of

National Commission on Marijuana, the war against marijuana, then beginning in earnest, was fueled by fear that the drug caused users to reject the "established value system."[60]

A more quotidian moral right, perhaps less exalted but no less important, is recognized in the Declaration of Independence as an inalienable right to the pursuit of happiness.[61] This right should protect those who seek affective rather than cognitive benefits from marijuana—users for whom it serves as a relaxant, a social lubricant, an antidepressant, or a palliative.[62] The right to pursue happiness in one's own way is worthy of respect, and many Americans disdain the Iranian government because it affords none. There, the government bans certain dress and music that it deems decadent.[63] Here, the default position is that people should be free to pursue their individual and idiosyncratic tastes in recreation, including even such risky ones as boxing and mountain climbing.[64] Only in a few cases does the majority presume to control the personal pleasures of a minority; marijuana use, even privately at home, is one of them.[65]

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liberty . . . include[s] liberty of the mind as well as liberty of action."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They believed that freedom to think as you will and speak as you think are means indispensible to the discovery and spread of political truth . . . .").

60. NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* note 6, at 8–9.

61. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Although the pursuit of happiness appears in the Declaration of Independence rather than the Constitution, members of the Supreme Court have found that the "right to life, liberty, and the pursuit of happiness, is inalienable." *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 384 (1866) (Miller, J. dissenting). These rights are fundamental and can only be removed by due process of law. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 89 (1872). The Court has cited the pursuit of happiness when assessing the voting rights of African-Americans, *see* United States v. Reese, 92 U.S. 214, 248 (1875) (Hunt, J. dissenting), the right to contraception, *see* Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (Goldberg J., concurring) (citing Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J. dissenting)), and the freedom to marry, *see* Loving v. Virginia, 388 U.S. 1, 12 (1967). More recently, the Supreme Court has neglected to find that the pursuit of happiness permits a prisoner to refuse antipsychotic drugs, *see* Washington v. Harper, 494 U.S. 210, 238 (1990) (Stevens J., concurring in part, dissenting in part) (citing Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J. dissenting)), or grants prisoners the right to DNA testing, *see* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2333 (2009) (Stevens, J., dissenting).

62. *See, e.g.*, WEIL & ROSEN, *supra* note 21, at 116 ("Regular users may find that pot makes them relaxed or more sociable without greatly affecting their perceptions or moods.").

63. Ali Akbar Dareini, *Crackdown Issued on Dress Code*, VIRGINIAN PILOT, Apr. 24, 2007, at A10; Nasser Karimi, *Iran Revives Broadcast Ban on Western Music*, WASH. POST, Dec. 20, 2005, at A25.

64. Justice Brandeis's "right to be let alone," Olmstead v. United States, 277 U.S. 438, 478 (1928) (Branseis J., dissenting), formulation eventually was adopted by the Court in *Stanley v. Georgia*. 394 U.S. at 564 ("[The] makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.").

65. That marijuana use often takes place in the privacy of one's home greatly compounds the violation. As the Alaska Supreme Court stated in finding that the state constitutional right to privacy should be extended to the marijuana use in one's home, "[i]f there is any area of human

This is not to say that the state should be unconcerned with marijuana use, because it does present risks to health and safety, and both state and federal governments have important roles to play in eliminating or reducing those risks. In liberal societies such as ours, where the presumption is that individuals have the right to decide how to live their lives for themselves, the government safeguards us not by making the decisions for us but by helping us to make wise decisions with full knowledge. Thus the government does not legislate your weight or dictate your diet, but it labels food and advises on its health effects. Political philosopher William Talbott argues that the *fundamental idea* underlying human rights is that people "should be guaranteed what is necessary to be able to make their own judgments about what is good for them [and] to be able to give effect to those judgments in living their lives."[66]

Certainly, there are exceptions to this principle where the government properly places something beyond the reach of its citizens for good reason. Many would include among them instances where: (1) the dangers of a trivial activity are very great; (2) a safer alternative can equally satisfy the consumer; (3) the individual is a child or lacks rationality; (4) collective action is able to accomplish things impossible by individual choice; or (5) the activity would result in an addiction so powerfully destructive of autonomy as to amount to a form of slavery, which may be true of certain drugs.[67] Liberty rights can be overcome by sufficiently compelling grounds.[68] But marijuana does not present any such reason. As Pollan writes, "The war on drugs is in [reality] a war on *some* drugs, their enemy status the result of historical accident, cultural prejudice, and institutional imperative."[69]

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activity to which a right to privacy pertains more than any other, it is the home." Ravin v. State, 537 P.2d 494, 503 (Alaska 1975). The court also noted the special rights afforded to conduct at home in the United States Supreme Court's privacy jurisprudence. *Id.* at 502–03; *see also Stanley*, 534 U.S. at 565 (stating that the defendant was merely "asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home").

66. WILLIAM J. TALBOTT, WHICH RIGHTS SHOULD BE UNIVERSAL? 11 (2005).

67. Mill's view is that "[t]he principle of freedom cannot require that [a person] should be free not to be free." MILL, *supra* note 12, at 164. Even if the activity had the effect of reducing autonomy in a minority of people, it is a further question whether we should sacrifice the freedom of many because of the abuse of a few—as we recognize in the case of alcohol.

68. The case we make for marijuana legalization neither precludes nor supports similar arguments about other drugs. We may indeed have reason to reform laws governing other substances, but any such reform must be predicated on careful study of the real harms, costs, and benefits of the particular drug at issue and whether they constitute the kind of exception listed above.

69. Michael Pollan, *Opium, Made Easy: One Gardener's Encounter with the War on Drugs*, HARPER'S MAG., Apr. 1997, at 35. Bakalar and Grinspoon agree that drug prohibition has been generated by history, not reason. JAMES BAKALAR & LESTER GRINSPOON, DRUG CONTROL IN A FREE SOCIETY 68 (1984). They argue that Prohibition was repealed not because of "scandals, inefficiencies and nasty side effects (these were never considered good reasons to repeal other drug laws)," but because the middle class became less puritanical and wanted to drink alcohol. *Id.* at 86.

> [U]nlike opium and cocaine, alcohol was not an exotic substance with powers that were frightening because mysterious. It was too familiar to be branded with the narcotic stigma and too closely associated with innocent fun in too many respectable people's minds to be purely a drug menace. Penalties for purchase and possession of alcohol were never imposed, much less enforced. Alcohol use was

CONCLUSION

The case for revisiting marijuana laws has special salience today because, for the first time in decades, serious marijuana law reform appears to be achievable. Reform bills or ballot initiatives have recently been approved in a number of jurisdictions,[70] President Obama and his new drug czar have suggested treating rather than jailing nonviolent drug offenders,[71] and Attorney General Holder has ordered a stop to federal

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never reduced to the categories of medicine and vice.

Id. at 87–88.

70. Marijuana Policy Project, 2008 Ballot Initiatives (2009), http://www.mpp.org/library/2008-ballot-initiatives.html. The Marijuana Policy Project reports that in Massachusetts, voters decriminalized possession of less than one ounce of marijuana, substituting a $100 civil fine, by a margin of 65% to 35%, MASS. ANN. LAWS ch. 94C, § 32L (LexisNexis Supp. 2009); that in Michigan, voters changed the law to allow for medicinal use of marijuana on a doctor's recommendation by a margin of 63% to 37%, MICH. COMP. LAWS ANN. § 333.26424 (West Supp. 2009); and that in Hawaii County, Hawaii; Fayetteville, Arkansas; and several Massachusetts towns, voters approved local ballot initiatives making enforcement of adult marijuana-possession laws the lowest law-enforcement priority, by substantial majorities in each case. Marijuana Policy Project, *supra*. However, California's Proposition 5, which would have substituted treatment for incarceration for many nonviolent offenders and made marijuana possession a civil infraction, was defeated 60% to 40%. *Id.* More than a dozen legislatures have taken up measures to either reduce penalties for marijuana use or allow its use for treatment purposes. Jesse McKinley, *For Marijuana Advocates, Not-So-Secret Holiday Hints at Change*, N.Y. TIMES, Apr. 20, 2009, at A13.

Recent polls also show substantial public support for marijuana law reform. For instance, a 2008 poll showed an extraordinary 72% of Massachusetts voters supported decriminalization over current criminal penalties. Voters Say Yes to Decriminalizing Marijuana (Aug. 13, 2008), http://www.suffolk.edu/30284.html. A 2009 California poll showed 56% of voters in favor of legalizing and taxing marijuana. Rebecca Cathcart, *Schwarzenegger Urges a Study on Legalizing Marijuana Use*, N.Y. TIMES, May 7, 2009, at A21. Point-blank questions in nationwide polls show a sentiment that may be surprising given the ONDCP's massive antimarijuana advertising budget. For example, a 2002 CNN-Time poll found 72% of people supported eliminating incarceration as a penalty for recreational marijuana use and 80% supported legalized medical marijuana. Stein, *supra* note 5, at 57. A 2005 Gallup poll showed 36% of people favored outright legalization (and in the Western states, 47% for, versus 49% against). Joseph Carroll, *Who Supports Marijuana Legalization?*, GALLUP, Nov. 1, 2005, http://www.gallup.com/poll/19561/Who-Supports-Marijuana-Legalization.aspx?. A November 2004 American Association of Retired Persons (AARP) poll showed 72% of people middle aged or older approved legalizing marijuana when a physician recommends it. *AARP Poll Shows Most Support Legalizing Medicinal Marijuana*, N.Y. TIMES, Dec. 19, 2004, at A36. Regarding drug policy generally, a September 2008 Zogby poll reported 76% of likely voters deemed the drug war a failure. *Public Views Clash with U.S. Policy on Cuba, Immigration, and Drugs*, INTER-AMERICAN DIALOGUE (2008), http://www.thedialogue.org/page.cfm?pageID=403.

71. Gary Fields, *White House Drug Czar Calls for End to "War on Drugs,"* WALL ST. J., May 14, 2009, at A3 (reporting that Obama's new drug czar, Gil Kerlikowske, says the administration "is likely to deal with drugs as a matter of public health rather than criminal justice alone, with treatment's role growing relative to incarceration"); Carrie Johnson & Amy Goldstein, *Choice of Drug Czar Indicates Focus on Treatment, Not Jail*, WASH. POST, Mar. 12, 2009, at A04 (discussing White House announcement about policy favoring treatment rather than jail for drug offenders); Kurt Schmoke, *Obama Not Completely Silent on the Drug War*, HUFFINGTON POST.COM, May 22, 2008, http://www.huffingtonpost.com/kurt-schmoke/obama-

prosecutions of medical-marijuana use in states that permit it.[72] Governor Schwarzenegger has proposed consideration of the legalization and taxation of marijuana,[73] and Rep. Barney Frank has introduced a decriminalization bill for the first time in Congress because, he said, the public is now ready to support it.[74] Elsewhere in the world, marijuana use is increasingly seen as a personal matter, with decriminalization gaining ground in many countries[75] and the Argentine high court finding marijuana prohibition unconstitutional as a violation of personal autonomy.[76]

Given the destructive and inhumane consequences of marijuana laws and policies (which we have catalogued elsewhere),[77] any ameliorative reform effort should be embraced. Worthy reform proposals include the removal of marijuana from federal Schedule I into an appropriate lesser category, which would foster both scientific study

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not-completely-sile_b_103122.html (detailing then-Senator Obama's remarks about drug treatment on the campaign trail). In another sign that the Obama administration is rethinking drug policy, the Justice Department has urged Congress to lower sentences for sale and possession of crack cocaine so that they no longer exceed (by a factor of 100 to 1) those for powdered cocaine. *See* Solomon Moore, *Justice Dept. Seeks Equity in Sentencing for Cocaine*, N.Y. TIMES, Apr. 30, 2009, at A17. President Obama's first budget, however, did not match his rhetoric, proposing an increase in interdiction and law-enforcement funding (and a decrease for drug education) compared with the last Bush levels; and, drug czar Kerlikowske says legalization of marijuana is "not in the president's agenda under any circumstances." Tim Dickinson, *A Drug War Truce?*, ROLLING STONE, June 25, 2009, at 45, 47.

72. David Johnston & Neil A. Lewis, *Ending Raids of Dispensers of Marijuana for Patients*, N.Y. TIMES, Mar. 19, 2009, at A20; McKinley, *supra* note 70 (citing remarks by Attorney General Holder suggesting "federal law enforcement resources would not be used to pursue legitimate medical marijuana users").

73. Cathcart, *supra* note 70 (also reporting that 56% of California voters support legalizing and taxing marijuana for recreational use). Governor David Patterson of New York says that he too would be open to a conversation about the legalization of marijuana. Dickinson, *supra* note 71, at 48.

74. Act to Remove Federal Penalties for the Personal Use of Marijuana by Responsible Adults, H.R. 5843, 110th Cong. (2008). Rep. Frank's bill would decriminalize possession of up to 100 grams (or 3.5 ounces) of marijuana and also remove criminal penalties from users who share marijuana with others so long as they do not sell it. *Id.* § 2. Frank announced his intention to file the bill on Bill Maher's television program, stating that caution had prevented his doing so for decades but that it was now time for politicians to "catch up to the public." Posting of CitizenSugar to TrèsSugar, http://www.tressugar.com/1138194 (Mar. 22, 2008, 10:00 EST).

75. The decriminalization movement has gained significant traction abroad in countries that still criminalize possession. For example, the former presidents of Mexico, Colombia, and Brazil recently summarized their report for The Latin-American Commission on Drugs and Democracy in an Op-Ed in *The Wall Street Journal*. Fernando Henrique Cardoso, César Gaviria & Ernesto Zedillo, Op-Ed, *The War on Drugs Is a Failure*, WALL ST. J., Feb. 23, 2009, at A15. That report concludes that prohibition and criminalization have not yielded expected results and that Latin America is "farther than ever from the announced goal of eradicating drugs." *Id.* As a possible correction for the drug problem, the report proposes "the careful evaluation, from a public-health standpoint, of the possibility of decriminalizing the possession of cannabis for personal use." *Id.*

76. Alexei Barrionuevo, *Latin America Weighs Less Punitive Path to Curb Drug Use*, N.Y. TIMES, Aug. 27, 2009, at A8.

77. Blumenson & Nilsen, *supra* note 6, at 59–62.

of the drug and its medicinal use where appropriate;[78] state and federal laws permitting the medical use of marijuana;[79] decriminalization of use and possession (as currently exists in thirteen states),[80] which would put an end to some of the worst excesses afflicting users; and legalization, which would most fully respect individual liberty while also allowing the government to control and regulate the marijuana market in harm-reducing ways. If there is to be progress, reformers should welcome whatever incremental steps may be possible, notwithstanding the stronger deontological requirements associated with liberty claims. But whatever the political dynamics, we should remember that moral rights are also at stake—the rights to a sphere of liberty in personal matters, to prosecutions based on the principles of just punishment, and most fundamentally, to a state that respects the individuality and autonomy of its people. These civil libertarian concerns, well recognized in other contexts, should also inform legislators and policy makers as marijuana law reform efforts move forward.

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78. According to current knowledge, marijuana satisfies none of the three Schedule I requirements: (1) it has a low potential for harm and abuse, *see supra* note 26; (2) it appears to have therapeutic benefits, as the government itself claimed in its successful patent application, *see infra* note 79; and (3) the American College of Physicians (ACP) suggests it may be used safely under appropriate conditions, AM. COLL. OF PHYSICIANS, POSITION PAPER: SUPPORTING RESEARCH INTO THE THERAPEUTIC ROLE OF MARIJUANA 4 (2008), *available at* http://www.acponline.org/advocacy/ where_we_stand/other_issues/medmarijuana.pdf. In its position paper, the ACP "urges review of marijuana['s] status as a Schedule I controlled substance and reclassification into a more appropriate schedule, given the scientific evidence regarding marijuana's safety and efficacy in some clinical conditions." *Id.* at 15.

79. As of December 2008, the United States government continued to oppose medical marijuana as useless, despite having patented the medicinal benefits of marijuana in an application asserting cannabinoids' usefulness in preventing or treating diseases, including stroke, trauma, autoimmune disorders, Parkinson's Disease, Alzheimer's Disease, and HIV dementia. U.S. Patent No. 6,630,507 (filed Apr. 21, 1999).

80. States that have decriminalized at least some kinds of marijuana-possession offenses are Alaska, *see* ALASKA STAT. §§ 11.71.010, .71.160 (2008); California, *see* CAL. HEALTH & SAFETY CODE § 11357 (West 2007 & Supp. 2009); Colorado, *see* COLO. REV. STAT. ANN. § 18-18-406 (West 2004 & Supp. 2008); Maine, *see* ME. REV. STAT. ANN. tit. 17-A, §§ 1102, 1107-A (2006 & Supp. 2008); Massachusetts, *see* MASS. ANN. LAWS ch. 94C, § 32L (LexisNexis Supp. 2009); Minnesota, *see* MINN. STAT. ANN. §§ 152.02, 152.027 (West 2005 & Supp. 2009); Mississippi, *see* MISS. CODE ANN. §§ 41-29-113, -139 (West 2007 & Supp. 2008); Nebraska, *see* NEB. REV. STAT. ANN. §§ 28-405, -416 (LexisNexis 2003 & Supp. 2008); Nevada, *see* NEV. REV. STAT. ANN. § 453.336 (2005); New York, *see* N.Y. PENAL LAW § 221.05 (McKinney 2008); *see also* N.Y. PUB. HEALTH LAW § 3306 (McKinney 2000 & Supp. 2009); North Carolina, *see* N.C. GEN. STAT. ANN. §§ 90-94, -95 (West 2008); Ohio, *see* OHIO REV. CODE ANN. §§ 3719.41 (LexisNexis 2005 & Supp. 2009); and Oregon, *see* OR. REV. STAT. § 475.864 (2007).