

ISSUE BRIEF

No. 4806 | JANUARY 8, 2018

The Proper Way to Reconsider Federal Marijuana Policy

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On January 4, 2018, Attorney General Jeff Sessions decided to revisit the Justice Department's policy regarding the prosecution of marijuana traffickers in states that authorize the medical or recreational use of that drug. He repealed a memorandum issued in 2013 by then-Deputy Attorney General James Cole.¹ The Cole Memorandum said that the Justice Department would use an eight-factor standard to decide when to enforce the federal laws against marijuana trafficking. The new policy will allow individual U.S. attorneys to make enforcement decisions based on their own judgments as to how big a problem marijuana trafficking is in their respective jurisdictions.²

Supporters of marijuana liberalization will condemn Attorney General Sessions' decision.³ They will malign him by saying that his judgment represents the now-discredited *Reefer Madness* theory of why marijuana should be deemed contraband.⁴ They will accuse him of defying the wishes of the voters. Some will go so far as to accuse him of having an empty head and a stone-cold heart and ask that both be sacrificed on the sacred alter of marijuana reform.

To say that such criticism is overstated is like saying that the *Titanic* took on a little water. As times

change, science uncovers new risks for old substances, like asbestos, PCBs, and lead. Remember when everyone smoked tobacco because it was seen as a harmless *divertissement*? That day went the way of round black-and-white TVs. Anyone who held that opinion now would justly and properly be ridiculed. Marijuana is another one of those items whose potential risks and benefits need to be reexamined today. Our decision as to whether marijuana is harmful or helpful should rest on what we know today, not what we knew when cars lacked automatic transmissions. Our current knowledge of the pharmacodynamics of marijuana's constituents is far superior to what it was when Lyndon Johnson or Richard Nixon was President, let alone Franklin Roosevelt.⁵

Marijuana Law Begins to Change

Federal law has made marijuana trafficking a crime for decades.⁶ The only question in any individual case has been whether someone broke federal law and whether, for a variety of reasons, the federal government should spend its scarce law enforcement resources on a matter. Traditionally, the federal government has focused on cases involving, for example, the importation into the United States or the distribution across state lines of large quantities of marijuana. The U.S. Customs Service (now known as the U.S. Customs and Immigration Service) and Drug Enforcement Administration have not spent limited federal funds going after high school or college students experimenting with marijuana. Marijuana distribution and possession were also crimes under state law, and local law enforcement officers handled small-scale cases.⁷

This paper, in its entirety, can be found at
<http://report.heritage.org/ib4806>

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American law, however, began to undergo change in 1996.⁸ California became the first state to revise its domestic law and permit physicians to recommend that marijuana be used for medical purposes. Not too long afterwards, states like Colorado and Washington also revised their laws to allow marijuana to be used for recreational purposes. Rather than flatly prohibit the recreational use of cannabis, those states decided to regulate the growth of marijuana, the production of marijuana products, and the commercial, in-state distribution of both items to adults for recreational purposes.

Put aside for a moment whether those decisions made sense as a matter of policy. America ordinarily treats the willingness to admit that a policy is mistaken or has become obsolete as evidence of an agile mind and wisdom, not as proof of mental calcification. It makes sense to reconsider and revise the nation's historic approach to marijuana if today's science calls into question what we thought that we knew in the 1960s and 1970s. There has been a considerable amount of research conducted since the days when films like *Up in Smoke* and *Easy Rider* heralded marijuana as a less dangerous psychoactive substance than alcohol and glamorized its use as a righteous symbol of a young generation's morally justified rebellion against the Vietnam War and resistance to The Man.⁹ We now know that long-term marijuana use can cause physical disorders (e.g., respiratory disease); social problems (e.g., anomie); and mental health problems (e.g., schizophrenia) that no one told us about in the 1960s.¹⁰ According to Doctor Hoover Adger, a pediatrician on the faculty of the Johns Hopkins Medical School and Hospital, 50-year-old studies may not be useful today because we are not dealing with your granddaddy's dope.

A substance known as THC¹¹ is the primary psychoactive ingredient in marijuana. In the 1960s and 1970s, the THC content was in the neighborhood of 3 percent–4 percent. Today, it can be more like 20 percent in smoked marijuana. Marijuana oils have an even higher THC content, and pills can be manufactured that are 99 percent THC. Only a fool would ignore those facts and assume that marijuana use might be no more dangerous today than it was when Cheech and Chong were making films.

Unfortunately, the debate over marijuana policy often generates more heat than light. Voters ignore what science has learned and what it still does not yet know in a mad rush to enable people to anesthe-

tize themselves against life; to justify allowing private businesses (remember Big Tobacco; now think Big Marijuana) to make money from that desire; and to ignore state governments' clamor for a new, untapped income source.

Last November, California voters went whole hog. They passed an initiative legalizing the recreational use of marijuana under state law. That initiative took effect on January 1, 2018. Because California's nearly 40 million residents are roughly 12 percent of the nation's almost 327 million people,¹² the change in California law is no trivial matter as far as the nation's social policy is concerned.

Important Legal Ramifications

But the changes since 1996 also have important legal ramifications. States cannot authorize parties to engage in conduct that federal law prohibits. That has been the law since 1789 when the Framers included the Supremacy Clause of Article VI in the Constitution.¹³ In the Controlled Substances Act of 1970,¹⁴ Congress prohibited the very same activity that states like California now have permitted. Attorney General Sessions was eminently justified in telling the states that the policies adopted by the Obama Justice Department impermissibly encourage states to violate federal law. California can no more legitimately urge its residents to violate the federal drug laws than the federal tax laws. As long as the Controlled Substances Act is on the books, states cannot tell their citizens to disregard it.

We should not expect federal law enforcement officers to decide what laws to support based on polls. We should demand that Members of Congress make those decisions, however much they may want that cup to pass from their lips. The public can urge Congress to repeal or revise whatever federal laws they do not like. That may lead to unwise decisions, but at least asking Congress to reexamine the Controlled Substances Act is the sensible way to address the matter. Congress can ask the Trump Administration—and ask its predecessors too—what is the best criminal justice and social policy. Congress can also query the Food and Drug Administration about what is the best medical answer to this debate. After all, we do not allow state legislators or voters to decide what pharmaceuticals can be marketed. For 80 years, we have vested the authority to make that decision in the FDA because we do not believe that medical safety and effectiveness should be the subjects of plebiscites.

It seems elementary to say that Congress should make policy decisions like those, but that is also the right answer.

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Endnotes

- 1 Memorandum from Deputy Att’y Gen’l James M. Cole for All United States Attorneys on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.
- 2 Memorandum from Att’y Gen’l Jefferson B. Sessions III for All United States Attorneys on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.
- 3 See BRUCE BARCOTT, *WEED THE PEOPLE: THE FUTURE OF LEGAL MARIJUANA IN AMERICA* (2015); JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* (2d ed. 2016) (both discussing the history of recent efforts to liberalize the federal and state marijuana laws).
- 4 *Reefer Madness* is a 1936 film, distributed by Motion Picture Ventures, claiming that marijuana caused users to commit various types of crimes.
- 5 For a sample of recently published scientific, professional, and popular books and papers discussing those issues (in addition to the literature cited elsewhere in this article), see BRITISH MED. ASS’N, *THERAPEUTIC USES OF CANNABIS* 7, 10–11 Tbl. 1 (1997); NAT’L ACAD. OF SCI., ENG’G, & MED., *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH* (2017); OFF. OF NAT’L DRUG CONTROL POLICY, *MARIJUANA MYTHS AND FACTS: THE TRUTH BEHIND 10 POPULAR MISCONCEPTIONS* (2014); WORLD HEALTH ORG., *THE HEALTH AND SOCIAL EFFECTS OF NONMEDICAL CANNABIS USE* (2016); WILLIAM J. BENNETT & ROBERT A. WHITE, *GOING TO POT: WHY THE RUSH TO LEGALIZE MARIJUANA IS HARMING AMERICA* (2015); LESLIE L. IVERSEN, *THE SCIENCE OF MARIJUANA* (2d ed. 2007); JERROLD S. MEYER & LINDA F. QUENZER, *PSYCHOPHARMACOLOGY: DRUGS, THE BRAIN, AND BEHAVIOR* 401–26 (2d ed. 2018); KEVIN A. SABET, *REEFER SANITY: SEVEN GREAT MYTHS ABOUT MARIJUANA* (2013); Amber L. Bahorik et al., *Adverse Impact of Marijuana Use on Clinical Outcomes Among Psychiatry Patients with Depression and Alcohol Use Disorder*, 259 *PSYCHIATRY RES.* 316 (2017); Alain Braillon, *Low-Risk Cannabis Use Is an Oxymoron*, 107 *AM. J. PUB. HEALTH* e26 (2017); Marta Di Forti et al., *Proportion of Patients in South London with First-Episode Psychosis Attributable to Use of High Potency Cannabis: A Case-Control Study*, *LANCET PSYCHIATRY* 4 (Feb. 18, 2015), [http://doi.org/10.1016/S2215-0366\(14\)00117-5](http://doi.org/10.1016/S2215-0366(14)00117-5); Jonathan P. Caulkins, *The Real Dangers of Marijuana*, 33 *NATIONAL AFF.* 21 (Winter 2016); Jodi Gilman et al., *Cannabis Use Is Qualitatively Associated with Nucleus Accumbens and Amygdala Abnormalities in Young Adult Recreational Users*, 34 *J. NEUROSCIENCE* 559 (2014); Wayne Hall, *What Has Research over the Past Two Decades Revealed About the Adverse Health Effects of Recreational Cannabis Use?*, 110 *ADDICTION* 19 (2015); June H. Kim et al., *State Medical Marijuana Laws and the Prevalence of Opioids Detected Among Fatally Injured Drivers*, 106 *AM. J. PUB. HEALTH* 2032 (2016); Dan I. Lubman et al., *Cannabis and Adolescent Brain Development*, 148 *PHARMACOLOGY & THERAPEUTICS* 1 (2015); Laura Amato et al., *Systematic Review of the Therapeutic Effectiveness and Safety of Cannabis for Patients Suffering from Multiple Sclerosis, Chronic Neuropathic Pain and Cancer Patients Receiving Chemotherapy*, 41 *EPIDEMIOL. PREV.* 279 (2017); Andrew A. Monte et al., *The Implications of Marijuana Legalization in Colorado*, 313 *JAMA* 241 (2015); David L. Nathan et al., *The Physicians’ Case for Marijuana Legalization*, 107 *AM. J. PUB. HEALTH* 1746 (2017); Marie Stefanie Keiser Starzer et al., *Rates and Predictors of Conversion to Schizophrenia or Bipolar Disorder Following Substance-Induced Psychosis*, *AM. J. PSYCHIATRY—AJP IN ADVANCE* (Nov. 28, 2017), <https://ajp.psychiatryonline.org/doi/abs/10.1176/appi.ajp.2017.17020223>; Nora D. Volkow et al., *Adverse Health Effects of Marijuana*, 370 *NEW ENG. J. MED.* 2219 & Tbl. 1 (2014); Penny F. Whiting et al., *Cannabinoids for Medical Use: A Systematic Review and Meta-Analysis*, 313 *J. AM. MED’L ASS’N* 2456 (2015). See generally Magdalena Cerdá et al., *Medical Marijuana Laws in 50 States: Investigating the Relationship Between State Legalization of Medical Marijuana and Marijuana Use, Abuse and Dependence*, 120 *DRUG & ALCOHOL DEPENDENCE* 22, 25 (2012) (“[N]o consensus exists at this time on the effectiveness of marijuana as a treatment for symptoms of pain, nausea, vomiting, and other problems caused by illnesses or treatment.... The lack of medical consensus means that both pro and con proponents of medical marijuana can find research support for their positions, and the medical profession has not delivered a clear message to the public.”).
- 6 See RICHARD J. BONNIE & CHARLES H. WHITBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* (1999).
- 7 See JONATHAN P. CAULKINS ET AL., *RAND CORP., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 1–4* (2015) (summarizing America’s domestic federal and state marijuana policy).
- 8 See Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 *AM. CRIM. L. REV.* 453, 467–68 (2015).
- 9 See *supra* note 5.
- 10 See Paul J. Larkin, Jr., *Marijuana Edibles and “Gummy Bears,”* 65 *BUFF. L. REV.* (forthcoming 2018).
- 11 The technical name is Δ^9 -tetrahydrocannabinol. See BRITISH MED. ASS’N, *supra* note 5, at 7, 10–11 Tbl. 1; NAT’L INST. ON DRUG ABUSE, *MARIJUANA* 6 (Apr. 2017); BRITISH MED. ASS’N, *THERAPEUTIC USES OF CANNABIS* 27–65, 189 (1997).
- 12 See U.S. CENSUS BUREAU, *U.S.A. AND WORLD POPULATION CLOCK*, <https://www.census.gov/popclock/> (last visited Jan. 5, 2016).
- 13 See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
- 14 The Controlled Substances Act was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. Under that act, a “controlled substance” is “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter,” except for distilled spirits, wine, malt beverages, or tobacco, as defined in subtitle E of the Internal Revenue Code of 1986. 21 U.S.C. § 802(6) (2012). The Controlled Substances Act incorporates the definition of a “drug” from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1) (2017). Congress placed marijuana in Schedule I when it enacted the Controlled Substances Act. See *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 937 n.1 (D.C. Cir. 1991). Marijuana (and its salts, isomers, and synthetic equivalents) remains on that list today. 21 C.F.R. § 1308.11(d)(31) (2017). Drugs placed on Schedule I are drugs that are found to have no accepted medical use and to pose a serious danger of harm and addiction. Physicians cannot prescribe Schedule I drugs. Larkin, *supra* note 8, at 460 & nn.26–27.