



2012

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Recommended Citation

Rogers, Vanessa (2012) "The Future of Hemp in Kentucky," *Kentucky Journal of Equine, Agriculture, & Natural Resources Law*: Vol. 4 : Iss. 2 , Article 9.

Available at: <https://uknowledge.uky.edu/kjeanrl/vol4/iss2/9>

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THE FUTURE OF HEMP IN KENTUCKY

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I. INTRODUCTION

Hemp has been in production for uses ranging from food production to textiles to structural materials for many years.¹ As the United States' economy remains in economic turmoil, states are looking for alternative ways to generate revenue. Some Kentucky citizens argue that legalization of hemp production could be a way for the state to jumpstart its revenue stream. The debate over legalizing the cultivation of hemp has been questioned for many years.² However, Kentucky legislation on the issue has failed to make it into the statute books. In light of the long history and success of hemp cultivation in Kentucky, many are puzzled as to why Kentucky legislators will not legalize its production. As this note explains, the answer stems from legislative history, law enforcement perception, and public concern.

Hemp is technically termed *Cannabis sativa L.*³ The plant is recognized as a subspecies of *Cannabis*.⁴ Some of the subspecies include hemp plants grown to produce narcotics and others grown for fiber production or seeds that have industrial purposes.⁵ Hemp can be used for narcotic effects due to the tetrahydrocannabinols (THC) contained in cannabis.⁶ Although there are levels of THC in hemp, marijuana has a higher THC content than industrial hemp.⁷ The level of THC and fiber of hemp depend on climate, cultivation techniques, and the variety of seeds used. Hemp grown in temperate regions with moist soils has more fiber.⁸ By contrast, hemp grown in hot and dry climates tends to produce more resin, which is the most potent source of the plant's narcotic properties.⁹

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¹ See Robin Lash, *Industrial Hemp: The Crop of the Seventh Generation*, 27 AM. INDIAN L. REV. 313, 315 (2003).

² See generally Susan D. Dwyer, *The Hemp Controversy: Can Industrial Hemp Save Kentucky*, 86 KY. L.J. 1143(1998) (containing a considerable summary of the hemp debate on both the state and federal level).

³ JAMES M. DEMPSEY, *FIBER CROPS* 54 (1975).

⁴ LESTER GRINSPOON, *MARIHUANA RECONSIDERED* 35 (1971).

⁵ DEMPSEY, *supra* note 3 at 47 (1975); R.H. KIRBY, *VEGETABLE FIBRES* 46 (1963).

⁶ GRINSPOON, *supra* note 4, at 35.

⁷ David P. West, *Fiber Wars: The Extinction of Kentucky Hemp*, in *HEMP TODAY* 5, 45 (Ed Rosenthal ed., 1994).

⁸ *Id.*

⁹ GRINSPOON, *supra* note 4, at 34-35.

Hemp production is not a new phenomenon. George Washington and Thomas Jefferson were thought to have grown hemp.¹⁰ The sails on Christopher Columbus's ship were made from hemp.¹¹ Canvases of painters such as Van Gogh were made from hemp.¹² The first drafts of the Declaration of Independence were also drafted on hemp paper.¹³ Hemp has been usefully produced for many years and continues to have a variety of useful purposes.¹⁴ Clothing and textiles made from hemp have a higher quality than those made from cotton. Canvas, rugs, and upholstery made from hemp also have a higher quality because hemp fibers resemble state-of-the-art canvas.¹⁵ Hemp can be mixed with other products to produce high-value goods at lower prices. German researchers have used hemp and polypropylene composites to produce automobile interior paneling and headliners, enabling them to offer it at lower costs.¹⁶ In England, France, and the Netherlands, firms are able to produce horse bedding made from hemp hurds, the inner material of straw, at a competitive level with higher-cost bedding made from wood shavings and straw.¹⁷

Hemp grain oil has a range of commercial uses, as well. Shampoo, skin care products, energy sources, painting products, and printing products may be made with hemp oils.¹⁸ Hemp skin care products have the ability to penetrate three layers of skin, thereby increasing their effectiveness.¹⁹ In addition, oil from hemp seeds has an environmentally friendly use because it can be used as a substitute for petroleum and other fossil fuels as an energy source.²⁰ Paints made from hemp oils penetrate wood better than other paints.²¹ Hemp oil may also be used in cleaners for printing equipment.²² In addition, hemp oil can be eaten with food such as potatoes or used to dress a salad.²³ Its advantages over current oil are superior shelf life, more nutrients (such as essential fatty acids), and a high protein efficiency ratio enabling easier digestion.²⁴

¹⁰ Christopher S. Wren, *U.S. Farmers Covet a Forbidden Crop*, N.Y. TIMES, Apr. 1, 1999, at A22.

¹¹ Wendy Koch, *Hemp Homes are Cutting Edge of Green Building*, USA TODAY, Sept. 12, 2010, <http://content.usatoday.com/communities/greenhouse/post/2010/09/hemp-houses-built-ashville/1#.Tz8T3oeGqf5>.

¹² Knight Ridder Tribune News, *Hemp in History*, HOUS. CHRON., Apr. 21, 1996, at B9.

¹³ *Id.*

¹⁴ STEVEN N. ALLEN, MARK C. BERGER & ERIC C. THOMPSON, ECONOMIC IMPACT OF INDUSTRIAL HEMP IN KENTUCKY 4 (1998), available at <http://www.votehemp.com/PDF/hempstudy.pdf>.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.* at 7.

¹⁹ *Id.*

²⁰ See JACK HERER, *HEMP AND THE MARIJUANA CONSPIRACY: THE EMPEROR WEARS NO CLOTHES* 12 (7th ed. 1991).

²¹ ALLEN, BERGER & THOMPSON, *supra* note 14, at 7.

²² *Id.*

²³ *Id.* (citing conversation with Don Wirtshafter, founder of the Ohio Hempery (June 1997)).

²⁴ *Id.* at 7-8.

Despite the many benefits of hemp and its potential to generate income, Kentucky lawmakers have refused to legalize its cultivation. This note focuses on the state of Kentucky, because it was once America's largest hemp producer. It will analyze the theories of why Kentucky has refuted the legalization of hemp on numerous occasions by first addressing the history of hemp in America, next focusing on the history of hemp in Kentucky, then focusing on the legal status of hemp in America and Kentucky. Finally, the note will analyze the arguments for and against the legalization of hemp and explore the future of hemp production in Kentucky.

II. THE HISTORY OF HEMP IN AMERICA

Globally, hemp has been around for thousands of years.²⁵ It is believed to have been the world's most cultivated crop and primary industry for 3,000 years.²⁶ In the 1600s, hemp was an extraordinarily valuable resource. Areas including Jamestown, Virginia; and the colonies of Massachusetts, and Connecticut made the refusal to grow hemp illegal.²⁷ Henry VIII of England required English farmers to grow hemp in order to supply the British navy with sails and rope.²⁸ By the 1700s and the founding of the United States, some states began to grant subsidizes and bounties to encourage hemp production²⁹ and Confederate states used hemp to manufacture mobile breastwork during the Civil War.³⁰ In the 1800s many states flourished because of the production of hemp, especially Kentucky, Illinois, Nebraska, Michigan, Minnesota, Iowa, Arkansas, California, and Wisconsin.³¹

However, hemp production began to decline in the 1920s, driven by a number of factors.³² The demand for hemp primarily decreased when cheaper jute and metal hoops could be used to wrap cotton bales.³³ Less costly synthetic fibers replaced the market share for natural fiber hemp.³⁴ Additionally, outdated harvesting and processing methods contributed to the decline. Hemp machinery was not continually modified or improved at the same pace as cotton machines. Thus, most hemp was

²⁵ See HERER, *supra* note 20, at 2.

²⁶ *Id.*

²⁷ John Dvorak, *America's Harried Hemp History*, HEMPHASIS (2004), available at <http://www.hemphasis.net/History/harriedhemp.htm>.

²⁸ *Chronology of Hemp*, HEMPHASIS, <http://www.hemphasis.net/History/history.htm> (last visited Mar. 31, 2012).

²⁹ Dvorak, *supra* note 27.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ ALLEN, BERGER & THOMPSON, *supra* note 14, at 1.

produced by hand, resulting in a decrease of America's production of hemp.³⁵

Although hemp production was in decline, in 1941 Henry Ford revealed a hemp automobile, made entirely from hemp and fueled by hemp products.³⁶ One year later, in 1942, the United States entered World War Two (WWII). The war rejuvenated hemp production.³⁷ When Japan invaded the Philippines, the United States supply of natural fibers was cut off and the United States was forced to produce its own natural fibers to manufacture supplies for the war. The "Hemp for Victory" campaign, launched by the United States government to encourage hemp cultivation to support war efforts³⁸ set out to encourage farmers to plant as much hemp as possible to produce fibers for the war.³⁹ As a result, over 400,000 acres of hemp were cultivated and forty-two hemp mills built.⁴⁰ However, after the war, hemp production again declined. Further complicating matters, the Federal Bureau of Narcotics was apprehensive of the hemp industry in general, and in 1945, it announced that any hemp transferred to a mill with a single leaf on it would be classified as marijuana and taxed accordingly.⁴¹

The last United States hemp cultivation farm closed in 1958.⁴² Aggressive measures from federal agents factored into this second decline of hemp growth.⁴³ In addition, factors such as competition from synthetic products and suppression from the government again contributed to the termination of hemp production.⁴⁴ Thus, one of the world's largest industries essentially ceased to exist.

III. HISTORY OF HEMP IN KENTUCKY

Kentucky has had a long and successful history producing hemp. The first cultivation of hemp in the state took place in 1775 near Danville.⁴⁵ After advertising hemp fiber in local newspapers, the hemp industry flourished in Kentucky. For a span of 100 years, Kentucky was the industry center for hemp in the United States.⁴⁶

³⁵ Dvorak, *supra*, note 27.

³⁶ *Soybean Car*, THE HENRY FORD, <http://www.thehenryford.org/research/soybeancar.aspx> (last visited Mar. 31, 2012).

³⁷ See generally, Transcript of HEMP FOR VICTORY (U.S.D.A. 1942), available at <http://www.globalhemp.com/1942/01/hemp-for-victory.html>.

³⁸ West, *supra* note 7.

³⁹ Dwyer, *supra* note 2, at 1163.

⁴⁰ Lash, *supra* note 1, at 322.

⁴¹ Dwyer, *supra* note 1, at 1162-63 (citing RICHARD L. MILLER, HEMP AS A CROP FOR MISSOURI FARMER: MARKETS, ECONOMICS, CULTIVATION, LAW AT 38-41 (1991)).

⁴² West, *supra* note 7, at 45.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Dvorak, *supra* note 27.

⁴⁶ *Id.*

Kentucky's natural resources, particularly the soil, are well suited for hemp production. Although hemp can grow in most types of soil, the moist and well-drained soil of Kentucky enhanced the production of hemp.⁴⁷ Hemp flourishes in a clay loam loose in texture, alkaline, rich in decaying vegetation or alluvial deposit and an environment not subject to harsh droughts during the growing season.⁴⁸ The "bluegrass" region which includes Bourbon, Boyle, Clark, Fayette, Garrard, Jessamine, Scott, Shelby, and Woodford Counties housed most of Kentucky's hemp production.⁴⁹ Kentucky contained almost 60 ropewalks, a covered pathway, where long strands of material were laid before being twisted into rope,⁵⁰ in 1811 and one-third of the bagging, bale rope, and cordage factories in America by the late 1850s.⁵¹ In 1915, Kentucky had 6,500 acres of hemp.⁵² However, Kentucky's hemp production halted when the Federal Bureau of Narcotics announced the crop would be classified as illegal marijuana.⁵³

IV. THE LEGAL STATUS OF HEMP IN AMERICA

The legal status of hemp in America can be attributed to several factors including public concern, the Federal Bureau of Narcotics, the Marihuana Act, the Nations Single Convention on Narcotic Drugs, and the Comprehensive Drug Abuse Prevention and Control Act of 1970. Early on, hemp was grown primarily for industrial uses and occasionally for medicinal purposes.⁵⁴ However, in the early twentieth century, the public became increasingly concerned with marijuana use.⁵⁵

A. The Campaign Against Marijuana

Concern over narcotic use of hemp led to constraints on hemp production. Though the use of marijuana was unknown to most Americans, the public, with the support of the Federal Bureau of Narcotics, started a media campaign to advocate for a uniform drug law.⁵⁶ The media stigmatized African-Americans and Hispanics as being "frenzied beasts

⁴⁷ Dwyer, *supra* note 2, at 1147-48.

⁴⁸ *Id.* at 1148-49.

⁴⁹ Dvorak, *supra* note 27.

⁵⁰ *Ropewalk Definition*, WEBSTERS-ONLINE- DICTIONARY.COM, <http://www.websters-online-dictionary.org/definitions/ropewalk> (last visited May 7, 2012).

⁵¹ Dvorak, *supra* note 27.

⁵² *Id.*

⁵³ *Hemp*, DRUG WAR FACT, <http://www.drugwarfacts.org/cms/Hemp> (last visited May 7, 2012).

⁵⁴ RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 3 (1974).

⁵⁵ See generally Dwyer, *supra* note 2, at 1158-60 (discussing a history of the campaign targeting marijuana usage as a tactic to change public sentiment regarding the narcotic).

⁵⁶ *Id.*

under the influence of marijuana that played anti-white voodoo satanic music.”⁵⁷ Americans responded to this and Congress passed the Marihuana Tax Act of 1937.⁵⁸ As a result, the Federal Bureau of Narcotics was created.⁵⁹ The Act required all marijuana importers, manufacturers, sellers, and distributors to register with the Secretary of the Treasury and pay an occupational tax.⁶⁰ The tax doubled the cost of raw cannabis by adding a \$1 transfer tax to the \$1 selling price per ounce. In addition, unregistered dealers were charged a \$100 per ounce fine.⁶¹

While the Marihuana Tax Act was designed to generate income and to penalize certain uses of marijuana, its consequences reached farther than what Congress initially envisioned.⁶² For example, the Act had a negative consequence for the production of medical hemp.⁶³ Some advocates of hemp claimed that the Act was a conspiracy to undermine hemp production, proclaiming that the cotton industry exercised their leverage to the United States Department of (USDA) by expressing their support of the passage of the Act.⁶⁴ Early on, the USDA supported the hemp industry, but with pressure from the cotton industry, the hemp breeding program was stopped and the related monies diverted to the cotton industry.⁶⁵ The media portrayed the hemp industry as a “dope conspiracy” supported by liberal New Deal government.⁶⁶

While hemp advocates claimed the plant would drive the next billion-dollar industry, the Treasury Department and Federal Bureau of Narcotics assured Congress that the Marihuana Tax Act would not affect hemp farmers. The Act would protect the farmers through its definition of marijuana, which did not include hemp.⁶⁷ The Act defined hemp as:

All parts of the plant *Cannabis sativa L.*, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; *but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound,*

⁵⁷ Christen D. Shepherd, *Lethal Concentration of Power: How the D.E.A. Acts Improperly to Prohibit the Growth of Industrial Hemp*, 68 U. MO. KAN. CITY L. REV. 239, 248 (1999).

⁵⁸ Dwyer, *supra* note 2, at 1157.

⁵⁹ Lash, *supra* note 3, at 319.

⁶⁰ *Id.*

⁶¹ *Id.* at 319-20.

⁶² *Id.* at 319.

⁶³ *Id.* at 318-19.

⁶⁴ Dwyer, *supra* note 2, at 1159.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1160-61.

*manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.*⁶⁸

Thus, hemp producers would be allowed to continue to cultivate and profit from the “non-narcotic” version of the plant so long as they paid a small fee to the Treasury Department.⁶⁹ The Assistant General Counsel for the Treasury Department stated that the bill did not intend to materially interfere with any industrial, medical or scientific uses.⁷⁰ Despite the adamant assurance by the drafters of the Act, the Act contributed to the collapse of the hemp industry. The Marihuana Act forced hemp farmers to pay more in taxes than they would have before the enactment, which in turn made them less capable of competing with cotton producers.⁷¹ Moreover, the negative public reaction to the hemp industry became a further obstacle.

Hemp was labeled as a “drug plant.”⁷² The public thought the hemp industry stood in the way of combating the problem of marijuana use.⁷³ Eventually in 1945, the Federal Bureau of Narcotics announced that any hemp transferred to a mill with a single leaf on it was marijuana and thus subject to marijuana taxation.⁷⁴ The harsh rule was rooted in the fact that technology did not exist to test the THC levels of plants, so the Federal Bureau of Narcotics could only find illegal marijuana based on the plant’s appearance.⁷⁵ The change in taxation of hemp, along with the public’s obstinate hostility toward the industry, arguably led to the collapse of hemp production in this country.

B. The Legal Status of Hemp in America Today

A few years after the disintegration of the hemp industry, Congress illegalized the production of hemp.⁷⁶ In 1961, Congress ratified the United Nations Single Convention on Narcotic Drugs, which effectively defined marijuana as a Schedule I narcotic, the most heavily controlled category of drugs.⁷⁷ The treaty made an explicit distinction between cannabis grown from resin for marijuana purposes and cannabis grown solely for industrial

⁶⁸ Marihuana Tax Act, ch. 553 §1(b), 50 Stat. 551 (1937) (repealed 1969) (emphasis added).

⁶⁹ Dwyer, *supra* note 2, at 1161.

⁷⁰ Lash, *supra* note 1, at 320.

⁷¹ Dwyer, *supra* note 2, at 1162.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1163.

⁷⁵ Lash, *supra* note 1, at 321.

⁷⁶ Dwyer, *supra* note 2, at 1164.

⁷⁷ See Interpretation of Listing of “Tetrahydrocannabinols” in Schedule I, 66 Fed. Reg. 51,530 (Oct. 9, 2001) (interpretive rule to supplement 21 C.F.R. § 1308.11 (2001)).

purposes.⁷⁸ The United States supported this distinction, as evident in the formal signing of the treaty in 1968.⁷⁹ Further, in 1970, the United States took steps to decimate the plant.⁸⁰ The Comprehensive Drug Abuse Prevention and Control Act of 1970 retained the definition of marijuana used in the Marihuana Tax Act, which did not include industrial hemp; however, the Act dismantled the taxation and registration system of the original Marihuana Tax Act, which, in essence, removed the farmers' protection from marijuana taxes.⁸¹

The 1970 Act does not make cannabis illegal, but it does place strict controls on its production.⁸² The Act established a five schedule system to rate and provide better control measures.⁸³ Drugs having "'a high potential for abuse,' 'not currently accepted medical use in treatment in the United States,' and 'a lack of accepted safety for use of the drug ... under medical supervision'" were included as a Schedule I drug.⁸⁴ The 1970 Act made all cultivation and sale of marijuana illegal, which by extension outlawed the growth of cannabis absent a DEA permit.⁸⁵

States may regulate the production of industrial hemp since the federal registration scheme had been removed. However, if a state establishes its own licensing scheme for hemp producers, it will first be confronted by the federal Drug Enforcement Administration (DEA).⁸⁶ The DEA is responsible for enforcing controlled substances laws and regulations, which include the growing, manufacturing, or distribution of controlled substances.⁸⁷ The DEA has been resistant to attempts to revive industrial hemp cultivation, maintaining a "zero tolerance" approach for any substance containing any amount of THC, which includes hemp.⁸⁸

Hemp farmers may seek a permit from the DEA directly in order to legally cultivate hemp. However, the DEA rarely issues permits and restricts them to almost entirely research purposes. Even at that, the procedures necessary to receive a permit are costly, deterring interested industrial hemp growers from cultivating hemp.⁸⁹

⁷⁸ *Id.*

⁷⁹ Lash, *supra* note 1, at 322.

⁸⁰ *Id.* at 323.

⁸¹ Dwyer, *supra* note 2, at 1164.

⁸² *Hemp*, DRUG WAR FACT, <http://www.drugwarfacts.org/cms/Hemp> (last visited Mar. 31, 2012).

⁸³ Lash, *supra* note 1, at 323.

⁸⁴ *Id.* (citing CHRIS CONRAD, HEMP FOR HEALTH, 155 (1997) Shepherd, *supra* note 58, at 255).

⁸⁵ Dwyer, *supra* note 2, at 1164.

⁸⁶ *Id.* at 1165-66.

⁸⁷ *DEA Mission Statement*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/agency/mission.htm> (last visited Mar. 31, 2012).

⁸⁸ Dwyer, *supra* note 2, at 1165 (citing Marty Bergoffen & Roger Lee Clark, *Hemp as an Alternative to Wood Fiber in Oregon*, 11 J. ENVTL. L. & LITIG. 119, 134 (1996)).

⁸⁹ *Id.* at 1168.

In 2004, the Ninth Circuit Court of Appeals in *Hemp Industrial Association v. DEA* ruled that the DEA could not ban hemp products.⁹⁰ The court ruled that the DEA could not “regulate naturally-occurring THC not contained within or derived from marijuana” noting that it is not possible to get high from products containing only trace amounts of THC.⁹¹ The court rejected a rule that would have made the importation of hemp and hemp products without DEA authorization illegal.⁹² Instead, the court found that allowing the DEA to regulate naturally occurring THC frustrated the expressed intent of Congress.⁹³ The court held that the DEA failed to follow the formal rulemaking procedures required by 21 U.S.C. 811(a) to schedule a new substance, and moreover, that hemp products with a low THC content did not fall within the definition of marijuana under 21 U.S.C. 802(16).⁹⁴

In May 2011, Representative Ron Paul of Texas introduced House Resolution 1831 in the United States House of Representatives.⁹⁵ The bill attempted to amend the Controlled Substance Act to exclude industrial hemp in the definition of marijuana.⁹⁶ Industrial hemp was characterized in House Resolution 1831 as when a person “grows or processes *Cannabis sativa L.* for purposes of making industrial hemp in accordance with State law.”⁹⁷ The resolution was referred to several committees and subcommittees for review, but ultimately died in committee.⁹⁸

Many states have considered taking a liberal approach to industrial hemp. Of the twenty-eight states that have considered some type of legislation liberalizing laws pertaining to industrial hemp, fifteen have enacted legislation.⁹⁹ Hawaii, Kentucky, Maine, Maryland, Montana, North Dakota, Vermont and West Virginia have passed legislation removing barriers to its production or research.¹⁰⁰ North Dakota was the first state to

⁹⁰ *Hemp Indus. Ass'n v. DEA*, 357 F.3d 1012, 1018 (9th Cir. 2004).

⁹¹ *Hemp*, DRUG WAR FACTS, <http://www.drugwarfacts.org/cms/Hemp> (last visited Mar.31, 2012).

⁹² *Hemp Indus. Ass'n*, 357 F.3d at 1018.

⁹³ *Id.*

⁹⁴ *Id.* at 1016-17.

⁹⁵ Industrial Hemp Farming Act of 2011, H.R. 1831, 112th Cong. (2011).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Jeff Sturgeon, *Big Hurdles for Hemp*, THE ROANOKE TIMES (Dec. 4 2011), <http://www.roanoke.com/business/wb/301840>.

⁹⁹ *Legislation*, VOTE HEMP, <http://www.votehemp.com/legislation.html> (last visited Mar. 31, 2012) (providing links to legislation passed in Hawaii, Kentucky, Maine, Maryland, Montana, North Dakota, Vermont and West Virginia). See HAW. REV. STAT. ANN. § 329-1 (LexisNexis 2008); KY. REV. STAT. ANN. § 218A.010(18) (LexisNexis 2008); ME. REV. STAT. tit. 17-A, § 1101(1) (2009); MD. CODE ANN., CRIM. LAW § 5-101(q)(1) (LexisNexis 2008); MONT. CODE ANN. § 50-32-101(17) (2007); N.D. CENT. CODE § 19-03.1-01 (2008); VT. STAT. ANN. tit. 18, § 4201(15) (2008); W. VA. CODE ANN. § 60A-1-101(o) (LexisNexis 2008).

¹⁰⁰ VOTE HEMP, <http://www.votehemp.com/legislation.html> (last visited Mar. 31, 2012)

authorize and create a licensing system for industrial hemp production.¹⁰¹ More recently, in 2010, Oregon removed restriction to industrial hemp production and research, becoming the ninth state to lift restrictions.¹⁰² Kentucky is currently attempting to liberalize hemp production.

V. THE LEGAL STATUS OF HEMP IN KENTUCKY

The legal status of hemp in Kentucky has undergone significant changes. Early on, hemp production was legal in Kentucky, as Kentucky was the center of the hemp production industry.¹⁰³ However, over the years the legal status of hemp has ebbed and flowed in the wake of public opinion and federal legislation.

A. *The History of the Legality of Hemp in Kentucky*

In 1934, Kentucky passed its first law prohibiting marijuana.¹⁰⁴ After the federal act of 1970, Kentucky amended its law to parallel the scheduling system of the federal government.¹⁰⁵ Originally, Kentucky adopted the same definition of marijuana as Congress did in the 1937 and 1970 statutes, which distinguished between marijuana and industrial hemp.¹⁰⁶ In 1992, however, Kentucky removed the distinction. The 1992 definition stated that marijuana included:

*all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin" or any compound, mixture, or preparation which contains any quantity of these substances.*¹⁰⁷

Since 1992, the debate over hemp has received increasing attention and gained momentum. In 1994, Governor Brereton Jones implemented an executive order to establish a task force to study hemp and related fiber

¹⁰¹ *Hemp*, DRUG WAR FACT, <http://www.drugwarfacts.org/cms/Hemp> (last visited May 7, 2012).

¹⁰² *Hemp*, DRUG WAR FACTS, <http://www.drugwarfacts.org/cms/Hemp> (last visited Mar. 31, 2012).

¹⁰³ Dvorak, *supra* note 27.

¹⁰⁴ BONNIE & WHITEBREAD, *supra* note 54, at 115.

¹⁰⁵ Dwyer, *supra* note 2, at 1170.

¹⁰⁶ *Id.*

¹⁰⁷ KY. REV. STAT. ANN. § 218A.010(9) (LexisNexis 1996). The definition of marijuana before the 1992 amendment stated "It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination."

crops as an alternative to tobacco.¹⁰⁸ However, in 1995, the task force revealed its pessimism toward the idea of hemp as an alternative cash crop in Kentucky and issued a report citing enforcement issues and lack of world markets as obstacles to Kentucky's hemp production.¹⁰⁹ Chris Gorman, Kentucky's then Attorney General, proclaimed that it would be illegal to allow any cultivation of hemp, even research cultivation; thus the work of the task force came to an end.¹¹⁰ That same year, the University of Kentucky Survey Research Center published a survey showing that 75 percent of Kentucky citizens supported the legalization of industrial hemp.¹¹¹

In 1996, the definition being used by Kentucky was declared unconstitutional by the Lee District Court following an arrest of actor Woody Harrelson for planting hemp seeds; however that decision was later reversed in *Commonwealth v. Harrelson* by the Kentucky Supreme Court.¹¹² In *Harrelson*, the defendant, an actor and owner of a company that he claimed produced textile products in clothing derived from hemp,¹¹³ was charged with the cultivation of marijuana after he planted four hemp seeds in Kentucky.¹¹⁴ He argued that hemp seeds were not part of the statutory definition of marijuana but if they were, that the statute itself was unconstitutional because it was overbroad and vague.¹¹⁵ The District Court finding that the statute was unconstitutionally overbroad for including the non-hallucinogenic parts of marijuana was refuted by the Kentucky Supreme Court.¹¹⁶ The court held that the legislature intended to eliminate the exemption of hemp from the definition through the 1992 amendment. Further, the court stated that the amendment was a response to the serious growing concern of the public and the legislature of illegal drug activities.¹¹⁷ Moreover, the court held that the legislature was well within its authority to make such an amendment.¹¹⁸

In 1997, members of the Community Farm Alliance were granted a legislative hearing before the General Assembly.¹¹⁹ The two-hour hearing showcased the extensive controversy of the hemp debate. The farmers referred to the plant as "industrial fiber hemp" while law enforcement

¹⁰⁸ Dwyer, *supra* note 2, at 1174-75.

¹⁰⁹ *Id.* at 1175.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1175-76.

¹¹² *Commonwealth v. Harrelson*, 14 S.W.3d 541, 550 (Ky. 2000).

¹¹³ *Id.* at 545.

¹¹⁴ *Id.* at 544. The charge was later amended to a possession of marijuana charge under KY.

REV. STAT. ANN. § 218A.1422 (LexisNexis 1992).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 547.

¹¹⁸ *Harrelson*, 14 S.W.3d at 547.

¹¹⁹ Dwyer, *supra* note 2, at 1176.

referred to it as “marijuana.”¹²⁰ Farmers asked legislatures to approve research to find out whether hemp would be a worthwhile crop while the law enforcement officers proclaimed that even cultivation of hemp for research would be stepping onto “a slippery slope.”¹²¹ A federal DEA official asserted that the proposed legalization of hemp was an attempt to legalize the growing of marijuana.¹²² The committee did not act for either side; however, the chairman did state that the subject would be reconsidered.¹²³ The president of the Kentucky Hemp Growers Association proposed legalization of industrial hemp with the restrictions that the grower have no felony convictions, have no drug related misdemeanor convictions, be licensed, and allow unannounced searches of their fields.¹²⁴

B. Hemp Legislation in Kentucky

Throughout the fluctuation of the legal status of hemp in Kentucky, many bills have been proposed on the matter. In 2000, Kentucky Representatives Joe Barrows and Roger Thomas introduced a resolution in the House.¹²⁵ The resolution requested that the United States DEA revise federal policy to allow state regulated development of industrial hemp production and processing.¹²⁶ Despite a 48-27 vote and effective passage in Kentucky’s House of Representatives, the resolution was not voted on by the Senate; it was simply read.¹²⁷ That same year, House Bill 855 was introduced. The bill proposed to allow commercial production of industrial hemp as an agricultural product in Kentucky, to allow the Department of Agriculture to oversee the licensure, and to create an industrial hemp research and marketing program.¹²⁸

House Bill 855, also sponsored by Barrows and Thomas, attempted to amend section 260 of the Kentucky Revised Statutes (KRS), the section that defines terms for marketing of agricultural products, to “allow the commercial production of industrial hemp as an agricultural product in Kentucky.”¹²⁹ Several amendments were made to the bill, including an amendment proposed by Representative Mark Treesh to retain only provisions allowing a selected university to produce industrial hemp for research purposes; an amendment proposed by Representative Barrows to

¹²⁰ Andy Mead, *Kentucky Lawmakers Hear Hemp Arguments*, HEMP WORLD (July 10, 1997), http://www.hempworld.com/hemp-cyberfarm_com/htmls/countries/usa/kentucky.html.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ H.R.J. Res. 121, Reg. Sess. (Ky. 2000).

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ H.R. 855, Reg. Sess. (Ky. 2000).

¹²⁹ *Id.*

add a new subsection to KRS 260 directing Kentucky to adopt the current Federal rules and regulations regarding industrial hemp and any subsequent changes; and an amendment proposed by Representative Jack Coleman to disqualify hemp growers with prior conviction for marijuana possession or trafficking.¹³⁰ The legislative history showcases Kentucky legislators' concern with the narcotic uses of hemp. With these amendments, the bill, which in essence only allowed for industrial hemp production for research purposes with limitations, passed the House, however the Senate again did not vote on this issue.¹³¹

Although House Bill 855 failed to become law, a bill similar to it passed in 2001.¹³² House Bill 100, sponsored by Representatives Joe Barrows, Roger Thomas, Perry Clark, Mike Denham, Stephen Nunn, Kathy Stein, Ken Upchurch, and Robin Webb, created an industrial hemp research program administered by the Department of Agriculture working with a Kentucky university.¹³³ All universities with agriculture departments could apply for consideration by the Council or Postsecondary Education for the location of the industrial hemp research program.¹³⁴ In addition, the state must adopt federal rules and regulations regarding industrial hemp.¹³⁵ The Kentucky legislature was able to pass a law that allowed its production for research purposes only, despite Kentucky citizens' and legislators' concern of the narcotic uses of hemp, probably because it adopted the federal regulations of controlled substances. Therefore, since the bill required Kentucky to follow federal law regarding hemp,¹³⁶ the concern over narcotic use expectedly decreased. Citizens of Kentucky could rest assured that the federal government and the DEA's "zero tolerance" for hemp would strictly monitor hemp grown for research. In addition, the production was only allowed for research purposes and was required to be strictly approved,¹³⁷ which assuaged citizen concern.

Years later, motions were made to legalize industrial production of hemp for commercial uses. In 2009, Senators Joey Pendleton, Perry Clark, and Kathy Stein introduced Kentucky Senate Bill 131.¹³⁸ Bill 131 attempted to create the opportunity for industrial hemp growers to be licensed by the Department of Agriculture.¹³⁹ Under the plan, growers would be required to submit to a criminal check by local sheriff, be monitored by local sheriff, be

¹³⁰ *See id.*

¹³¹ *Id.*

¹³² H.R. 100, Reg. Sess. (Ky. 2001) (enacted).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ S.R. 131, Reg. Sess. (Ky. 2009).

¹³⁹ *Id.*

subject to random tests of industrial hemp field, and pay a fee.¹⁴⁰ In addition, licensees must provide the Department of Agriculture with names and addresses of growers and buyers of industrial hemp.¹⁴¹ Unfortunately, the bill failed to make it past the Senate Agriculture Committee.¹⁴²

In 2010, Pendleton and Clark introduced an identical bill to Senate Bill 131.¹⁴³ The bill, Senate Bill 14, also died in the Senate Agriculture Committee. Likewise, Senators Pendleton, Clark, and Stein introduced Senate Bill 30 in the Kentucky Legislature in 2011.¹⁴⁴ The bill was identical Senate Bills 14 and 131 and also died in the Senate Agriculture Committee.¹⁴⁵

The Kentucky legislature has likely not legalized the industrial cultivation of industrial hemp for several reasons. The strong public concern about narcotic use makes both the citizens and the legislators of Kentucky resistant. Senator Pendleton, a co-sponsor of the bill, stated that the major difficulty with passing this legislation is the misunderstanding that people have of hemp, which, as he explains it, is rooted in law enforcement.¹⁴⁶ Pendleton stated that some law enforcement officers in Kentucky do not understand that marijuana and hemp are not the same.¹⁴⁷ According to him, law enforcement's misconception about hemp is then spread to the legislature, which in turn makes some legislators resistant to pass the bill.¹⁴⁸ Although some law enforcement consider hemp and marijuana the same, not all areas of Kentucky do. According to Pendleton, west of Elizabethtown, the state supports the legalization of industrial hemp, but in the eastern region of the state law enforcement is strongly against its legalization.¹⁴⁹

In addition to law enforcement's perception that marijuana and hemp are virtually the same, factors such as the DEA and politics also contribute to Kentucky's failure to legalize hemp. A system of checks and balances could contribute to the failure to legalize industrial hemp as Kentucky legislators may not want to overshadow the DEA authority to license hemp producers. Moreover, the DEA's strong opposition to legalize anything with THC may also deter a legislator from supporting such legislation. Moreover, the fact that legislators do not want to involve themselves in politically controversial issues for fear that may hinder their reelection may contribute to the failure to support such legislation.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *See id.*

¹⁴³ *See* S.R. 14, Reg. Sess. (Ky. 2010).

¹⁴⁴ S.R. 30, Reg. Sess. (Ky. 2011).

¹⁴⁵ *See id.*

¹⁴⁶ Telephone Interview with Joey Pendleton, Ky. Sen., Third District (Jan. 6, 2012).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

It is important to note that even if Kentucky passes favorable laws, the federal government can prohibit its cultivation for almost any reason and potential producers must obtain a DEA manufacturer's permit for industrial production of hemp.¹⁵⁰ The application process for a permit includes a FBI background check, a nonrefundable fee, extensive documentation, and a demonstration of effective security protocol.¹⁵¹ The DEA's strict standards make it very difficult to obtain a permit.¹⁵² The agency requires that each one-quarter acre plot of land be surrounded by chain link fence, and in addition, the top wire must be razor wire. Further, growers are required to have twenty-four hour infrared security system to supplement the razor wire enclosures.¹⁵³ Thus Kentucky passing state law legalizing the industrial cultivation of hemp is merely the first step; the federal law and agencies remain large obstacles.

VI. THE DEBATE OVER HEMP IN KENTUCKY

As citizens concern with the narcotic use of hemp increases and the economy of the state declines, the debate over whether hemp in Kentucky should be legalized becomes more controversial. The indecisiveness of the state's citizenry as a whole contributes to the hesitancy of the Kentucky legislature regarding the matter. The Kentucky legislature is torn between two sides that each posits a persuasive argument.

A. Supporters of the Legalization of Industrial Hemp Production

Supporters of the production of hemp believe that farmers should be allowed to cultivate industrial hemp for several reasons. Hemp activists lean on the many potential benefits of hemp cultivation, including profit generation, job creation, and hemp's environmentally-friendly qualities. In addition, supporters of the cultivation of industrial hemp also argue that including hemp in the definition of marijuana frustrates the intent of Congress, an argument that gained notoriety with the *Harrelson* case.

The annual market for hemp exceeds 300 million dollars in retail sales in North America.¹⁵⁴ Because the United States is the only

¹⁵⁰ Lash, *supra* note 1, at 323.

¹⁵¹ Lash, *supra* note 1, at 326.

¹⁵² *Id.*

¹⁵³ *Id.* (citing *DEA Permits Hawaii to Plant Industrial Hemp for the First Time in US History*, PR NEWSWIRE, Dec. 14, 1999, LEXIS, News Library, ARCNEWS File).

¹⁵⁵ Thomas A. Duppong, Note, *Industrial Hemp: How the Classification of Industrial Hemp as Marijuana Under the Controlled Substances Act has Caused the Dream of Growing Industrial Hemp in North Dakota to Go up in Smoke*, 85 N. D. L. REV. 403, 410 (2009).

industrialized nation that does not permit the production of industrial hemp, it is also the leading importer of hemp.¹⁵⁵ More than thirty nations have legalized the industrial cultivation of hemp.¹⁵⁶ Canada grew 6,000 acres of hemp crops in 2003 and 8,500 acres in 2004, yielding nearly four million pounds of seeds.¹⁵⁷ China is the current largest exporter of hemp textiles.¹⁵⁸ And in Germany, Mercedes-Benz and BMW automobile manufacturers use hemp fiber for dashboards and door panels.¹⁵⁹ Supporters argue that just as other countries are maximizing the production of hemp, so should Kentucky.

Estimates show that the demand of hemp will be roughly 100,000 tons each year.¹⁶⁰ It is projected, due to several factors, that Kentucky would be able to generate a substantial portion of the profits from hemp production.¹⁶¹ Kentucky is an ideal location for hemp production.¹⁶² Kentucky is located in an area where industrial hemp processors would potentially receive a higher price for hemp hurds.¹⁶³ In addition, because of Kentucky's longer growing season, the state has an advantage in the certified seed market.¹⁶⁴ Moreover, if Kentucky becomes the first state to legalize the cultivation of hemp, then it will be able to further its advantage in revenues generated from industrial hemp production.¹⁶⁵

The projection that Kentucky would be prosperous in its ventures in the hemp industry is based upon several factors. Consumers have recently become more concerned about environmental effects, so therefore consumers are more likely to have increased interest in purchasing products made with natural fibers like hemp.¹⁶⁶ Thanks to environmental standards and regulatory pressures, businesses have also become more concerned with pursuing environmentally friendly measures.¹⁶⁷ Moreover, Kentucky may be able to use already made tobacco equipment and make simple modifications to produce hemp, thereby increasing their competitive edge.¹⁶⁸ These reasons suggest that it is reasonably projected that Kentucky would be successful in the cultivation of industrial hemp and consequently, that many Kentuckians would support its legalization.

¹⁵⁵ *Id.* at 409.

¹⁵⁶ *Id.*

¹⁵⁷ *Facts*, HEMP INDUSTRIES ASS'N, <http://www.thehia.org/facts.html> (last visited Mar. 31, 2012).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ ALLEN, BERGER & THOMPSON, *supra* note 14, at 46.

¹⁶¹ *Id.* at 47.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ ALLEN, BERGER & THOMPSON, *supra* note 14, at 1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 9.

Supporters argue that not only would the legalization of industrial hemp generate money in the state, but the legalization would also create jobs.¹⁶⁹ Based on the assumption that Kentucky legalizes industrial hemp cultivation first, Kentucky farmers could capture twenty percent of the market for hemp, which could generate 1.1 million dollars in worker earnings or farmer income from fifty-nine full-time equivalent jobs from industrial hemp grain production alone.¹⁷⁰ Assuming that a processing industry for industrial hemp straw develops and Kentucky captures one-half of the national production of certified seeds for planting, sixty-nine full-time equivalent jobs would be created yielding 1.3 million dollars in worker earnings.¹⁷¹ Assuming that Kentucky can capture one industrial hemp straw decorticating facility, 303 full-time equivalent jobs would be created along with the generation of 6.7 million dollars in worker earnings.¹⁷²

Supporters of industrial hemp cultivation argue that hemp can help save the planet.¹⁷³ In particular, the oil from hemp seeds can be used as a substitute for petroleum and other fossil fuels as an energy source.¹⁷⁴ In addition, hemp can replace wood pulp in the paper and composite board industry.¹⁷⁵ Hemp also contains lower levels of lignin, the chemical that leads to pollution, than wood; thus hemp would cause less environmental damage than wood in making paper.¹⁷⁶ Hemp also is easy to renew.¹⁷⁷ Thus, replacing hemp for wood would eliminate the adverse effects created from tree destruction, making hemp an environmentally friendly decision.¹⁷⁸ Additionally, growing industrial hemp is environmentally superior compared to growing other fiber crops because it does not require pesticides.¹⁷⁹ The reduction in pesticides also has a societal benefit in avoiding ground water contamination resulting from such pesticide use.¹⁸⁰

In addition to benefits of industrial hemp cultivation, supporters argue that illegalizing industrial hemp cultivation frustrates the intent of Congress. Congress' intent was clearly shown in the 1937 Marihuana Tax Act when they created an exemption for hemp in the definition of marijuana.¹⁸¹ The Comprehensive Drug Abuse Prevention and Control Act of 1970 adopted an identical definition.¹⁸² The fact that the Comprehensive

¹⁶⁹ *Id.* at 49-51.

¹⁷⁰ *Id.* at 49.

¹⁷¹ *Id.* at 49-50.

¹⁷² ALLEN, BERGER & THOMPSON, *supra* note 14, at 50.

¹⁷³ Dwyer, *supra* note 2, at 1150.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1151.

¹⁷⁸ *Id.*

¹⁷⁹ ALLEN, BERGER & THOMPSON, *supra* note 14, at 53.

¹⁸⁰ *Id.*

¹⁸¹ Lash, *supra* note 1, at 323.

¹⁸² *Id.*

Drug Abuse Prevention and Control Act of 1970 did not expand the definition of marijuana and the 1937 Act specifically excluded hemp, evidencing Congress' intent not to include industrial hemp in the definition and illegalization of marijuana.¹⁸³ Moreover, President Nixon's 1973 Reorganization Plan, which established the DEA, does not expand the DEA power beyond the power held by the Federal Bureau of Narcotics.¹⁸⁴ Nor has there been judicial, executive, or legislative action expanding its definition.¹⁸⁵ Thus, marijuana still means what it was intended to mean back in 1937, which does not include industrial hemp.¹⁸⁶

Supporters of hemp argue that there is a critical difference between hemp and marijuana.¹⁸⁷ Although the term cannabis and hemp referred to the entire genus of *Cannabis sativa* species years ago, most *Cannabis sativa* do not have psychoactive properties.¹⁸⁸ Cannabis varieties producing psychoactive effects are contained in *resinous Cannabis* and marijuana.¹⁸⁹ The psychoactive effect comes from the THC in the resin, which is naturally secreted by the plant.¹⁹⁰ Industrial hemp refers to the high fiber cannabis.¹⁹¹ The levels of THC are low in industrial hemp, while marijuana THC levels are high.¹⁹² Hemp THC levels range from .03 percent to 1 percent while marijuana THC levels range from 3 percent to 20 percent.¹⁹³ Researcher Gilbert Fournier estimates that in order to obtain a minimal level of inebriation, a person would have to smoke between fifty to 100 hemp cigarettes at the same time.¹⁹⁴ He believes that the United States should make a distinction between industrial hemp and marijuana just as other countries have.¹⁹⁵

Many Kentucky citizens support the legalization of industrial hemp cultivation because it would generate profits,¹⁹⁶ create jobs,¹⁹⁷ and would be an environmentally friendly energy source.¹⁹⁸ Notwithstanding these arguments, the Kentucky Legislature refuses to legalize its cultivation.

¹⁸³ *Id.* at 323-24.

¹⁸⁴ Dwyer, *supra* note 2, at 1165.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Lash, *supra* note 1, at 316-17.

¹⁸⁸ *Id.* at 316.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Lash, *supra* note 1, at 317 (citing Shepherd, *supra* note 57, at 245).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 349.

¹⁹⁶ Thomas A. Duppong, Note, *Industrial Hemp: How the Classification of Industrial Hemp as Marijuana Under the Controlled Substances Act has Caused the Dream of Growing Industrial Hemp in North Dakota to Go up in Smoke*, 85 N. D. L. REV. 403, 410 (2009).

¹⁹⁷ ALLEN, BERGER & THOMPSON, *supra* note 14, at 49-51.

¹⁹⁸ Dwyer, *supra* note 2, at 1150.

B. Critics of the Legalization of Industrial Hemp Production

Other Kentucky citizens support the refusal of the Kentucky Legislature to legalize the cultivation of industrial hemp for several reasons, mostly stemming from the concern over its narcotic use.¹⁹⁹ Citizens and legislators fear that hemp will be used for inebriation and that law enforcement will have difficulty in policing marijuana if hemp is legalized.²⁰⁰

The DEA, the state police, and the National Guard spend a considerable amount of time and resources on the policing of marijuana. National Guard helicopters regularly fly routes over the hills of eastern Kentucky searching for marijuana patches.²⁰¹ Critics of the legalization of industrial hemp do not want governmental efforts to combat the war on drugs to go in vain, and legislators fear that legalization of industrial hemp will result in more difficulty and the need for more resources to police marijuana. The DEA has issued media reports stating the similarities of hemp and marijuana.²⁰² Some reports have shown that hemp is indistinguishable from marijuana without a chemical test.²⁰³ The indistinguishable nature of the cannabis plant makes it difficult for law enforcement to effectively enforce the ban on marijuana. Time and resources may be wasted pursuing a legal hemp plant because it was thought to be an illegal marijuana plant. Supporters, however argue hemp and marijuana are visually different.²⁰⁴

Legislators fear that hemp fields might hide illegal marijuana plants.²⁰⁵ Supporters would note that growers would actually refrain from growing marijuana in close proximity to hemp out of fear of cross-pollination, which results in less potent marijuana.²⁰⁶ Despite the alleged visual difference and alleged deterrence of growing marijuana and hemp in close proximity to each other, the Kentucky Supreme Court found that law enforcement would be hindered by industrial hemp legalization.²⁰⁷ In *Commonwealth v. Harrelson* the court found that there was “sufficient testimony from law enforcement that there would be serious difficulties for

¹⁹⁹ Lash, *supra* note 1, at 317.

²⁰⁰ *Id.* at 317-18, 322.

²⁰¹ Dwyer, *supra* note 2, at 1178.

²⁰² Lash, *supra* note 1, at 322.

²⁰³ Lash, *supra* note 1, at 317 (citing *DEA Clarifies Status of Hemp in the Federal Register*,

U.S. DRUG ENFORCEMENT ADMIN. (Oct. 9, 2001), <http://www.usdoj.gov/dea/pubs/pressrel/pr100901.html>).

²⁰⁴ Lash, *supra* note 1, at 317-18.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Harrelson*, 14 S.W.3d at 547.

law enforcement in controlling marijuana trafficking if hemp were legalized.²⁰⁸

The public fears that hemp will also be used as a recreational drug.²⁰⁹ As discussed above, hemp contains levels of THC.²¹⁰ Opponents of the legalization of hemp note that THC levels can be merely 2% below marijuana THC levels;²¹¹ however, supporters note the significance in such a small difference in that a obtainment of a minimal level of inebriation requires one to smoke fifty to one hundred hemp cigarettes.²¹² The legalization of hemp creates an additional concern. Critics of the legalization of hemp are concerned that hemp fields will be looted for recreational drug use.²¹³ This concern was also a concern of the DEA as evident in its strict standard that in order to obtain a permit to cultivate hemp, there must be 24-hour security of the field and wire top fencing.²¹⁴

According to law enforcement, countries in which hemp was legalized are having difficulties in the prosecution of marijuana cases. Violators of marijuana laws defend on the grounds that they thought they were growing hemp. It is believed that decriminalization of hemp would make it easy for violators and difficult for law enforcement.²¹⁵ Due to the hostility against marijuana and the zero-tolerance of THC theory of the DEA, Kentucky has concluded that industrial hemp would lead to the decimation of law enforcement.²¹⁶ Law enforcement, citizens, and legislators are concerned with the narcotic use of the drug and the impact that legalizing hemp would have on the war against drugs such as marijuana. Thus valid legislation like Senate Bill 30 fails to become law year after year.

VII. CONCLUSION

Based on the strong resistance of law enforcement in some areas of Kentucky and the hesitancy of Kentucky legislators, it may appear that future attempts to legalize industrial hemp in Kentucky will also fail. However, several factors suggest that industrial hemp could become legalized in the future if certain dynamics are met. With the economy in shambles, the state is looking for ways to generate income. The ability of industrial hemp to generate money favors its legalization. In addition, the new commissioner of agriculture, James Comer, Jr., is in support of its

²⁰⁸ *Id.*

²⁰⁹ Lash, *supra* note 1, at 317.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Lash, *supra* note 1, at 317 (citing Shepherd, *supra* note 57, at 245).

²¹³ Dwyer, *supra* note 2, at 1179.

²¹⁴ Lash, *supra* note 1, at 326.

²¹⁵ Harrelson, 14 S.W.3d at 544.

²¹⁶ Lash, *supra* note 1, at 317-18.

legalization.²¹⁷ Senator Pendleton and the new commissioner are scheduled to have a press conference in the near future to educate the public on industrial hemp.²¹⁸ Moreover, Pendleton and the governor, Steve Beshear, are also arranging to meet to discuss politics and political bargaining.²¹⁹ In addition, discussion of Kentucky's proposed hemp legislation has been voiced to the United States Congress.²²⁰

Despite these factors favoring the passage of hemp legalization legislation, the bill will remain at a stalemate if law enforcement perception does not change. Law enforcement must be in favor of the legalization because they have so much influence. Law enforcement voices their concern to the legislature when the legalization of hemp is considered. Legislators believe that by educating law enforcement, the perception of hemp will change and resistance toward legalization will decrease.²²¹ It may be true that with education of a subject, ones perception may be swayed, however, the process to do so will likely be slow. It will take time for so many years of anti-hemp to be capsized. Without the support of law enforcement, industrial hemp cultivation will remain illegal in a state that was once such a major producer.

Senator Pendleton, however, proposes that Kentucky allow local governments to choose whether they will allow citizens to cultivate industrial hemp; thus solving the problem of difference of opinions in different regions.²²² A law allowing regions to decide the legal status of the cultivation of hemp will be difficult to pass because the regions against industrial hemp will likely not support such legislation. In addition, it will be hard to keep hemp out of regions that say it is illegal to grow. Therefore, law enforcement perception remains a critical factor in the legalization as it has many effects.

In conclusion, despite the many benefits of hemp and the long history of its cultivation, Kentucky has refused to legalize the cultivation of industrial hemp. Many factors have contributed to its demise, including legislative history, law enforcement perception, and public concern. The most important of these is the perception of hemp by law enforcement. Without a support or at least acceptance of hemp, the legalization of industrial hemp in Kentucky will forever remain illegal, despite its past success.

²¹⁷ Telephone Interview with Joey Pendleton, Ky. Sen., Third District (Jan. 6, 2012).

²¹⁸ *Id.*

²¹⁹ *Id.* Pendleton plans on asking for the Governor's support in exchange for his continued support of the governors gambling legislation.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

