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Why the Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215

Michael Vitiello*

My interest in the debate surrounding legalizing marijuana was piqued on my way to work one day about two years ago. Michael Krasny, the host of KQED's *Forum* radio show, was moderating a debate between an avid proponent and equally avid opponent of marijuana.¹ They were arguing about whether a bill then in the hopper in the California Assembly would raise tax revenue and reduce prison costs.² Apart from the lack of civility, I found the discussion to be unenlightening. The participants' arguments were familiar and overblown. In effect, they spoke past one another without close attention to the complexities of the topic.³ My frustration with the debate led me to look more closely at the issues.

Despite real social costs associated with marijuana use,⁴ I concluded that, on balance, the pro-arguments tip the scale in favor of legalization.⁵ But my endorsement for legalization was hardly a ringing one. As I described myself in an article published in 2009, I am a tepid legalizer.⁶ My ambivalence was in the evidence during the 2010 election. After considerable deliberation, I could not vote for Proposition 19,⁷ the initiative that would have eliminated some marijuana offenses from California's penal code.⁸ Instead, I abstained. This article explains my decision to abstain and discusses the failure of the initiative process and the hard issues surrounding the legalization of marijuana.

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1. *Forum with Michael Krasny: Legalizing Marijuana?* (KQED National Public Radio broadcast, Mar. 2, 2009), <http://www.kqed.org/epArchive/R903020900> (on file with the *McGeorge Law Review*).

2. *Id.*

3. Michael Vitiello, *Legalizing Marijuana: California's Pot of Gold*, 2009 WIS. L. REV. 1349 (2009).

4. Erika V. Cox, *The Social Cost of Legalizing Drugs*, ASSOCIATED CONTENT, June 21, 2006, http://www.associatedcontent.com/article/38813/the_social_cost_of_legalizing_drugs_pg2.html?cat=17 (on file with the *McGeorge Law Review*).

5. Vitiello, *supra* note 3, at 1388–89.

6. *Id.* at 1388.

7. Cal. Proposition 19 (2010).

8. One might be tempted to say that the initiative would have legalized possession and cultivation in California. That would be misleading. Those acts would remain criminal acts under federal law. *Gonzales v. Raich*, 545 U.S. 1, 17–19 (2005).

Below, I address four questions. In Part I, I answer the question: so what's wrong with the initiative process?⁹ There, I discuss lessons that we should have learned from the passage of Proposition 215, which provided legal protection for qualifying patients who have a doctor's recommendation to use marijuana for medical purposes.¹⁰

In Part II, I answer two questions: after the defeat of Proposition 19, is legalization a dead letter?¹¹ And if not, do marijuana advocates have any other route than the initiative process?¹² Part III explores why arguing that legalization may happen in the near future is no longer naive.¹³

Part IV asks: what should legalization look like?¹⁴ There, my general point is straightforward: we have engaged in the debate about legalizing marijuana for about forty years and neither side has landed a knockout punch. Instead of continuing that tired debate, and in light of the possibility of legalization, policy-makers should start asking hard questions about how to implement legalization to avoid perceived risks and to maximize benefits, notably to maximize tax revenue.¹⁵

I. SO WHAT'S WRONG WITH THE INITIATIVE PROCESS?

A stranger to our legal system would have a hard time understanding the laws governing marijuana use in California. That is so not just because of our federal system, but also because Proposition 215 has helped to create chaos.¹⁶ Growers and distributors of marijuana live in limbo. They must negotiate a series of changing state laws and regulations.¹⁷ Further, they face conflicting signals out of Washington on the extent to which the federal government will foreswear prosecuting "legitimate" dispensaries.¹⁸ Despite the belief that Proposition 215 has led to *de facto* legalization of marijuana, until recent legislation made possession of a small amount of marijuana an infraction,¹⁹ police continued to arrest over sixty-thousand Californians each year for misdemeanor marijuana offenses.²⁰ But some users fare better: anyone willing to pay about fifty dollars

9. See discussion *infra* Part I.

10. See *infra* notes 37–75 and accompanying text.

11. See discussion *infra* Part II.

12. Indeed, my original title for this article was "Why the Initiative Process Was the Wrong Way (But the Only Way) to Go: Lessons We Should Have Learned from Proposition 215."

13. See discussion *infra* Part III.

14. See discussion *infra* Part IV.

15. See *infra* notes 223–40 and accompanying text.

16. See *infra* notes 37–75 and accompanying text.

17. See *infra* notes 48–75 and accompanying text.

18. See *infra* notes 76–92 and accompanying text.

19. CAL. HEALTH & SAFETY CODE § 11357(b) (West 2007).

20. *Prop. 19 Arguments in Favor of Proposition*, CALIFORNIA STATE WIDE GENERAL ELECTION TUESDAY NOVEMBER 2, 2010: OFFICIAL VOTER INFORMATION GUIDE, <http://www.voterguide.sos.ca.gov/>

for a consultation with a physician can avoid state prosecution (although such conduct remains a violation of federal law).²¹

California's state of affairs is a result of a combination of factors. These include former Governor Peter Wilson's reflexive "tough-on-crime" stance,²² the intentionally broad and misleading language in Proposition 215,²³ and post-enactment efforts by law enforcement to frustrate the legislation.²⁴ This section reviews that history.

Until about a century ago, doctors widely recognized marijuana's medical uses.²⁵ But from the early part of the last century until the 1970s, its medical benefits received little serious attention.²⁶ That changed in the 1970s when the federal government set up the Compassionate Use Program.²⁷ Responding to patient reports that marijuana provided relief from nausea associated with chemotherapy, the government provided marijuana to a small number of carefully selected patients.²⁸ In the early days of the AIDS crisis, many patients suffering from "wasting syndrome" found that marijuana helped them maintain their appetites.²⁹ By the mid-1980s, with the War on Drugs in full swing and an influx of applications from AIDS patients, the federal government virtually eliminated the Compassionate Use Program.³⁰ That spurred medical marijuana activists in states like California to urge state legislatures to fill the gap.³¹

propositions/19/arguments-rebuttals.htm (last visited May 27, 2011) (on file with the *McGeorge Law Review*).

21. See, e.g., *Get Relief Today: 420 Relief, \$54 New Patients, \$49 Renewals*, SACRAMENTO NEWS & REV., May 26, 2011, at 55. While possession of even a small amount of marijuana remains a violation of federal law, the federal government shows no interest in prosecuting possession offenses. 21 U.S.C. § 844 (West 2010); *Marijuana Growers Face Hard Time Under Federal Law*, POLITICS OF POT, Oct. 31, 2010, <http://politicsofpot.com/rhode-island/marijuana-growers-face-hard-time-under-federal-law/> (on file with the *McGeorge Law Review*).

22. See *infra* notes 34–36 and accompanying text.

23. See *infra* notes 37–44 and accompanying text.

24. See *infra* notes 69–76, 79–80 and accompanying text.

25. Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 748–49 (1998).

26. While the American Medical Association urged study of marijuana's medical use when the federal government effectively outlawed marijuana in the 1930s, the federal government has largely reacted hostilely to the medical use of marijuana. Sheilah Downey, *AMA Urges Clinical Studies of Marijuana*, FOOD CONSUMER, Nov. 12, 2009, http://www.foodconsumer.org/newsite/Non-food/Drug/ama_urges_clinical_studies_of_marijuana_111120090943.html (on file with the *McGeorge Law Review*); see generally Vitiello, *supra* note 25, at 748–58.

27. Vitiello, *supra* note 25, at 756 (noting that Proposition 215's prime supporters were focused on the use of marijuana for "compassionate use" and not general use).

28. *Id.* at 716–17 ("Commercials played on the 'compassionate use' theme, featuring a cancer survivor who used marijuana to ease nausea, a doctor who recommended marijuana to ailing patients, and a widow of a cancer patient who had used marijuana.")

29. John Boudreau, *Marijuana for Pain?*, CHI. TRIB., May 2, 1996, at 7 (reporting that marijuana stimulates appetite and helps to control nausea and pain in AIDS patients with "wasting syndrome," which is characterized by the loss of muscle mass and a gaunt appearance).

30. Vitiello, *supra* note 25, at 756–57 ("During the late 1980s, the application process was streamlined. The FDA approved a form that could be completed in less than an hour, replacing one that took up to 50 hours

Shortly after the federal government shrank its program, California came close to enacting medical marijuana legislation. First in 1994,³² and then again in 1995,³³ the legislature passed laws aimed at getting marijuana to seriously ill patients. For example, AB 1529 would have authorized medical use of marijuana for only four medical conditions: AIDS, glaucoma, cancer and multiple sclerosis.³⁴ Governor Wilson vetoed both bills at a time when a large majority of Californians favored medical use of marijuana.³⁵

Engaged in a difficult re-election battle, Wilson fell back on the familiar get-tough-on-crime strategy.³⁶ But his veto opened the door for Proposition 215.³⁷ And it turned out to be a Trojan horse.

Supporters of Proposition 215 included many believers in the medicinal value of marijuana.³⁸ But among its drafters and vocal supporters were many long-time advocates for legalizing marijuana.³⁹ Many of them saw the medical marijuana movement as a vehicle to achieve their broader goal of full legalization.⁴⁰ Or so many of us thought when we read the broad language in the initiative. Dennis Peron, one of the co-authors of Proposition 215 and a supporter of legalization, was remarkably forthcoming in discussing his intentional use of broad language in the proposition: “Peron added potentially expansive language to Proposition 215 not included in AB 1529. His hope was to assure support from both those interested in medical use of marijuana and from those in favor of the unrestricted legalization of marijuana.”⁴¹

to complete. As a result, in 1989, the FDA was swamped with new applications from AIDS patients seeking to become participants in the Compassionate Use Program. In 1991, partly in response to the rise in applications, the FDA suspended the program pending review.”)

31. *Id.* at 758–64 (discussing California’s response to marijuana use, including reclassifying marijuana and allowing for medical usage).

32. *Id.* at 713.

33. *Id.*

34. See AB 1529, 1995 Leg., 1995–1996 Reg. Sess. (Cal. 1995) (as amended on Sept. 5, 1995, but not enacted).

35. Vitiello, *supra* note 25, at 713 (“In both cases, however, Governor Wilson vetoed the legislation despite significant public support for the law.”).

36. See Greg Lucas, *Medical Marijuana Bill Approved*, S.F. CHRON., Aug. 19, 1994, at A20 (reporting that the Governor was embroiled in a re-election battle with being tough on crime as his main platform).

37. Vitiello, *supra* note 25, at 714 (“As a result of Governor Wilson’s strong stance against the legalization of marijuana in any form, long time marijuana activist Dennis Peron decided to resort to the initiative process.”).

38. *Id.* at 715.

39. Proposition 215’s leading advocate, Dennis Peron, has been a long-time advocate for legalization. See Paul DeRienzo, *Dennis Peron: The Marijuana Mouse that Roared*, HIGH TIMES, Aug. 1998, available at <http://pdr.autono.net/DennisPeron.html> (on file with the *McGeorge Law Review*).

40. Vitiello, *supra* note 25, at 714 (“[Dennis Peron’s] hope was to assure support from both those interested in medical use of marijuana and from those in favor of the unrestricted legalization of marijuana.”).

41. *Id.* (discussing the “expansive language” included in Proposition 215, but not included in previous legislation or initiatives). See also Hanna Rosin, *The Return of Pot: California Gears Up for a Long, Strange Trip*, THE NEW REPUBLIC, Feb. 17, 1997, at 19 (“The movement is about the compassionate extension of relief to sick people . . . but it is also very much, and primarily, about legalization.”).

Not surprisingly, the well-funded campaign emphasized that the initiative would allow the compassionate use of marijuana for those who are “seriously and terminally ill.”⁴² Unlike AB 1529, the proposition was not carefully tailored to limit marijuana to such patients.⁴³ The initiative contained a number of open-ended terms.⁴⁴ The broadest language relates to serious conditions for which a physician may recommend marijuana. After listing such conditions (“cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine”), the initiative concluded that marijuana may be recommended for “any other illness for which marijuana provides relief.”⁴⁵

The underfunded opposition campaign pointed out that the catchall phrase could include “stress, headaches, backaches, upset stomach or other minor ailments,” as well as anxiety and menstrual cramps.⁴⁶ That was not merely the rhetoric of the initiative’s opponents. As one proprietor of a cannabis club said in response to a question whether marijuana would make anyone feel better, “Now you’re getting the point.”⁴⁷

The initiative contained other drafting problems. For example, it did not explain where a qualifying patient could get marijuana;⁴⁸ it failed to unambiguously define several important terms, including who qualified as a “primary caregiver”;⁴⁹ and it did not provide a defense to a number of marijuana offenses, including transporting marijuana.⁵⁰ But this catchall phrase created the possibility for virtually anyone who could pay for a doctor’s visit to come within the law’s protections.

Not surprisingly, courts and the legislature have been left to clean up the problems created by the initiative.⁵¹ California courts have had to resolve many of

42. Vitiello, *supra* note 25, at 716.

43. See AB 1529, 1995 Leg., 1995–1996 Reg. Sess. (Cal. 1995) (as amended on Sept. 5, 1995).

44. *Id.* at 718–29.

45. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007).

46. Vitiello, *supra* note 25, at 726.

47. See Rosin, *supra* note 41, at 19–20 (asking Jeff Jones, proprietor of a cannabis club located in Oakland, California, one of the strictest cannabis clubs in the state, if marijuana would make “anyone feel better,” to which Mr. Jones replied, “Now you’re getting the point.”). While the catchall provision was the most obvious example of “creative” drafting, the proposition included a number of other drafting problems and failed to address other important questions that promised to create litigation. Some of the drafting problems included the failure to define “physician.” Vitiello, *supra* note 25, at 719–22. Further, while defining “primary caregiver,” the proposition did so broadly. *Id.* at 722–24.

48. *Id.* at 744 (“The statute implies that patients and caregivers can grow marijuana for medical use, but where will they get the marijuana seeds?”).

49. *Id.* at 722–24.

50. In 2006, the California Supreme Court held that California voters “did not intend for the CUA [Compassionate Use Act] to provide a defense to any marijuana-related offense not specifically named in the initiative, including transporting marijuana. Nonetheless, the [Trippet] court acknowledged that ‘practical realities dictate that there be *some* leeway in applying section 11360 in cases where a Proposition 215 defense is asserted to companion charges. The results might otherwise be absurd.’” *People v. Wright*, 146 P.3d 531, 537 (Cal. 2006) (citation omitted) (quoting *People v. Trippet*, 66 Cal. Rptr. 2d 559, 571 (Cal. Ct. App. 1997)).

51. See, e.g., SB 420, 2003 Leg., 2003–2004 Reg. Sess. (Cal. 2003) (enacted) [hereinafter SB 420];

the all-too-obvious issues created by the law. For example, Proposition 215 gave qualifying patients an affirmative defense to the crimes of possessing marijuana and cultivating marijuana.⁵² It failed, however, to provide a defense for transporting marijuana.⁵³ Lower appellate courts divided on the issue,⁵⁴ and before the California Supreme Court could decide the question, the legislature created an affirmative defense to the crime of transporting marijuana for individuals otherwise covered by Proposition 215.⁵⁵

Courts have had to decide various other legal issues created by the proposition. For example, they have had to define the meaning of a physician's "recommendation" or "approval" of marijuana for the patient, the illnesses that qualify under the catchall provision in the law,⁵⁶ the meaning of "caregiver," and the status of cannabis clubs or cooperatives.⁵⁷ Additionally, courts had to settle procedural issues, including whether the law creates an affirmative defense or immunity from prosecution and whether a person who presents a card identifying him- or herself as a medical marijuana user may nonetheless be arrested for marijuana offenses.⁵⁸ In addition, courts have struggled with how much marijuana a qualifying patient may possess.⁵⁹

In 2004, the legislature attempted to resolve some ongoing issues. For example, the Medical Marijuana Program Act (MMP) addressed some of the problems that had troubled law enforcement and medical marijuana users and suppliers.⁶⁰ The MMP set out limits on the amount of marijuana a qualifying patient may possess.⁶¹ It granted local governments the power to approve regulations permitting possession of larger amounts of marijuana,⁶² while also directing the Department of State Health Services to establish a voluntary medicinal marijuana registry and to issue identification cards.⁶³ The MMP also attempted to clarify the status of marijuana dispensaries.⁶⁴ It provided that

People v. Trippet, 66 Cal. Rptr. 2d 559 at 570 (1st Dist. Ct. 1997) (holding that Proposition 215 can provide a defense for a primary caregiver who is transporting marijuana for a Compassionate Use Act patient); People v. Mower, 49 P.3d 1067, 1070 (Cal. 2002) (holding that the Compassionate Use Act does not provide a patient complete immunity from prosecution, but provides the patient with a defense).

52. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

53. *Trippet*, 56 Cal. App. 4th at 1550.

54. *See Wright*, 146 P.3d 531, 537 (2006). *But see Mower*, 49 P.3d at 1070.

55. *Wright*, 146 P.3d at 541.

56. *See Conant v. McCaffrey*, 309 F.3d 629, 632–33 (9th Cir. 2002).

57. *See People ex rel. Lungren v. Peron*, 70 Cal. Rptr. 2d 20, 28–32 (1st Dist. Ct. 1997) (holding that a marijuana club is not a caregiver).

58. *See Mower*, 49 P.3d at 1073–74.

59. *Wright*, 146 P.3d at 541; *see also* OFFICE OF THE ATT'Y GEN., GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE (2008) [hereinafter *GUIDELINES*].

60. SB 420, *supra* note 51.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

“[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients . . . who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions.”⁶⁵

The MMP defined key terms, including “attending physician,” “qualified patient,” and “primary caregiver.”⁶⁶ My impression is that the MMP, although not without some ambiguity, has reduced litigation by providing some greater clarity. But it has hardly ended uncertainty.⁶⁷ Further, the state’s supreme court found one provision of the MMP unconstitutional because of the law’s imposition of a quantity limitation on all qualified patients, not just those who voluntarily registered.⁶⁸ That requirement, inconsistent with the initiative, violated the provision of the state constitution allowing the legislature to amend an initiative “only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.”⁶⁹

Other government officials have also helped to clarify the law governing medical marijuana. For example, in 2007, the Board of Equalization clarified the state’s policy on taxing the medical marijuana trade and imposed a requirement that those in the marijuana trade secure a seller’s permit.⁷⁰ In 2008, then-Attorney General Jerry Brown released guidelines on how law enforcement should deal with medical marijuana cooperatives, caregivers, and patients.⁷¹ Published twelve years after the passage of Proposition 215, the memorandum finally provides guidance in a number of areas that marijuana providers, patients, and law enforcement should have had years ago. Most importantly, the memorandum includes guidelines to regulate dispensaries.⁷²

Between 1996 and today, cities have struggled with how to regulate medical marijuana.⁷³ Even since the 2008 guidelines, cities around the state continue to struggle with zoning issues.⁷⁴ Individuals interested in getting into the medical

65. *Id.*

66. *Id.*

67. *See* *People v. Mentch*, 195 P.3d 1061 (Cal. 2008) (presumably the law creates some clarity—for example, while not a ceiling, the law’s eight ounce rule seems to create a presumption that the person possesses it for medical use).

68. *People v. Kelly*, 222 P.3d 186, 196 (Cal. 2010).

69. CAL. CONST. art. II, § 10 (c).

70. *See* *GUIDELINES*, *supra* note 59.

71. *Id.*

72. *Id.*

73. *See, e.g.*, Randy Kalp, *Selling Medical Cannabis in the 21st Century*, THE COAST NEWS, Jan. 2011, available at http://thecoastnews.com/view/full_story/11075533/article-Selling-medical-cannabis-in-the-21st-century?instance=coast_top_story (on file with the *McGeorge Law Review*); *see also* *Medical Marijuana Dispensaries Face Confusion Over Zoning Laws*, PLASTIRAS & TERRIZZI, <http://ptlawfirm.wordpress.com/2009/10/29/medical-marijuana-dispensaries-face-confusion-over-local-zoning-laws/> (on file with the *McGeorge Law Review*).

74. *Id.*

marijuana business have had to act at their own risk because of the lack of clear guidance.⁷⁵ According to news reports, police have targeted some bona fide medical marijuana users.⁷⁶ Some police departments have demonstrated a settled policy to frustrate Proposition 215.⁷⁷ The absence of clear guidelines has also allowed other individuals to use marijuana illegally or to set up an illegal drug enterprise under the guise of serving medical marijuana clientele.⁷⁸

One cannot discuss the problems of implementing Proposition 215 or any other efforts to legalize marijuana without recognizing the elephants in the room: federal drug laws and federal agencies' War on Drugs. Elsewhere, I have described the long standing federal hostility towards marijuana, beginning with its criminalization in the 1930s as prohibition ended, and including the protracted litigation brought by the National Organization for the Reform of Marijuana Laws (NORML) to reclassify marijuana.⁷⁹ Litigation dragged on between 1972 and 1992, with drug enforcement agencies using various procedural maneuvers to prevent a hearing on the issue.⁸⁰ Despite an administrative law judge's recommendation, the DEA administrator ruled against reclassification.⁸¹ After a brief flirtation with decriminalization during the Carter administration, the presidents between Carter and Obama have pursued an aggressive War on Drugs, including marijuana.⁸²

Such aggressiveness did not abate after the passage of Proposition 215. Federal authorities, often with the cooperation of state law enforcement agents, pursued an aggressive strategy of prosecuting cannabis clubs,⁸³ doctors who recommended marijuana,⁸⁴ and marijuana growers, whether they were growing for the black market or the gray medical marijuana market.⁸⁵ The strategy utilized

75. Adam Madison, *A State of Confusion: Uneasy Truce Between Cops and Patients*, DAILY TRIPLICATE, Jan. 6, 2010, available at <http://www.triplicate.com/20100106107881/News/Local-News/A-state-of-confusion> (on file with the *McGeorge Law Review*).

76. CANNABIS LAW GROUP, *Police Unit Assembled to Raid Los Angeles Medical Marijuana Dispensaries*, MARIJUANA LAWYER BLOG, July 8, 2010, <http://www.marijuanalawyerblog.com/2010/07/police-unit-assembled-to-raid-los-angeles-medical-marijuana-dispensaries.html> (on file with the *McGeorge Law Review*).

77. Allen St. Pierre, *Nearly 13 Years After Prop. 215, Law Enforcement Still Resists Medical Marijuana*, NORML BLOG, July 12, 2009, <http://blog.norml.org/2009/07/12/nearly-13-years-after-prop-215-law-enforcement-still-resists-medical-marijuana/> (on file with the *McGeorge Law Review*).

78. Brian Day, *Authorities Suspect Illegal Drug Sales Via Medical Marijuana Dispensaries*, SAN GABRIEL VALLEY TRIB., Oct. 6, 2010, available at <http://www.insidesocal.com/sgvcrime/2010/10/authorities-suspect-illegal-dr.html> (on file with the *McGeorge Law Review*).

79. See Vitiello, *supra* note 25, at 752–58; Vitiello, *supra* note 3, at 1358–59.

80. Vitiello, *supra* note 25, at 752–58.

81. *Id.* at 755.

82. *Id.*

83. See Marsha N. Cohen, *Breaking the Federal/State Impasse Over Medical Marijuana: A Proposal*, 11 HASTINGS WOMEN'S L.J. 59, 67 (2000).

84. Andrew J. LeVay, Note, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 721–22 (2000).

85. See NORML's *Suggestions for Starting a Medical Marijuana Dispensary*, RLONGWIRTH'S BLOG,

criminal and civil sanctions, including raids on cannabis clubs and pursuit of forfeiture of their assets.⁸⁶ “Despite [his] strong states-rights rhetoric,” President George W. Bush’s administration pursued an aggressive strategy against those involved in the medical marijuana business.⁸⁷ The Bush Administration litigated two Supreme Court cases that effectively left in place federal power to regulate marijuana at all levels, despite state efforts to allow the medical use of marijuana.⁸⁸ In one case, the Supreme Court rejected a distributor’s claim that selling marijuana was a medical necessity.⁸⁹ In the other, the Court found that the Commerce Clause was broad enough to allow Congress to criminalize even the cultivation of a small amount of marijuana.⁹⁰

Consistent with candidate Obama’s position during his campaign, Attorney General Eric Holder announced guidelines suggesting that the federal government would end raids on legitimate cannabis clubs.⁹¹ The Obama Administration’s position has led, in large part, to the recent expansion of marijuana dispensaries.⁹²

Since the passage of Proposition 215, local efforts to expand medical marijuana have depended upon the willingness of federal law enforcement agencies to tolerate local laws that violate federal law. According to news reports, despite the more tolerant approach of the Justice Department, the IRS has begun auditing one of the leading marijuana dispensaries.⁹³ A representative of the Harborside Health Center, the self-proclaimed “world’s largest dispensary,” reported that the IRS audited its books for compliance with the tax code’s rules disallowing deductions for illegal activities.⁹⁴ While the center would not comment on its position,⁹⁵ consistent with Reagan-era legislation, drug dealers

Feb. 26, 2011, <http://rlongwith.wordpress.com/2011/02/26/normls-suggestions-for-starting-a-medical-marijuana-dispensary/> (on file with the *McGeorge Law Review*).

86. See, e.g., *Feds Move to Seize LA Cannabis Resource Center, Hunger Strike Underway*, STOP THE DRUGWAR.ORG, June 7, 2002, <http://stopthedrugwar.org/chronicle-old/240/lacrc.shtml> (on file with the *McGeorge Law Review*).

87. Vitiello, *supra* note 3, at 1359.

88. *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001); *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005).

89. *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001); see also Vitiello, *supra* note 25, at 737–38.

90. *Gonzales*, 545 U.S. at 32–33.

91. Alex Johnson, *DEA to Halt Medical Marijuana Raids, Holder Confirms States to Have Final Say on Use of Drug for Pain Control*, MSNBC.COM, Feb. 27, 2009, http://www.msnbc.msn.com/id/29433708/ns/health-health_care/ (on file with the *McGeorge Law Review*).

92. *Id.* (“[T]he shift would add momentum to campaigns in states that are considering their own medical marijuana laws.”).

93. Peter Hecht, *Millions at Stake in IRS Audit of Oakland Medical Marijuana Dispensary*, SACRAMENTO BEE, Feb. 18, 2011, available at <http://www.sacbee.com/2011/02/18/3412702/millions-at-stake-in-irs-audit.html> (on file with the *McGeorge Law Review*).

94. *Id.*

95. *Id.*

cannot deduct ordinary business expenses, such as salaries and the cost of producing the drugs.⁹⁶

Aggressive enforcement of the tax code would create an ironic situation: the dispensaries most likely to comply with tax laws would be driven out of business. That would leave the marijuana trade to dealers least likely to comply with the law, whether the tax law or criminal law.

Back to my original question: so what is wrong with the initiative process? One might ask, “given that you are a tepid legalizer, what is wrong with this state of affairs?” At least for anyone with as little as fifty dollars for a doctor’s visit,⁹⁷ Californians can possess and use marijuana with virtual immunity from state prosecution. Among other concerns, I see three major problems in the wake of Proposition 215.

My first concern is that the law lacks legitimacy. Insofar as we have *de facto* legalization of marijuana, it came about without an honest debate.⁹⁸ Instead, it resulted from manipulation of the initiative process.

My second concern is that the initiative process has limited the legislature’s ability to reform the law in light of experience with its enforcement. Proposition 215 has created many problems for city planners and law enforcement agencies. But the legislature cannot reform the initiative if the legislation is inconsistent with the initiative.⁹⁹

My third concern is that Proposition 215 has created chaos for fifteen years. That uncertainty has significant human costs, with some individuals acting in good faith and ending up running afoul of the law.¹⁰⁰ Uncertainty is also economically inefficient. For example, inconsistent signals from city governments are economically wasteful when business owners open dispensaries, only to learn later that zoning laws have been changed.¹⁰¹

II. IS LEGALIZATION A DEAD LETTER?

Given the defeat of Proposition 19 in 2010, are we wasting time discussing legalizing marijuana? That is certainly a fair question. In this section, I explore why I think that the pressure to legalize marijuana will continue and why, for the

96. I.R.C. § 280E (2011). See also Erica Meltzer, *Tax Time Presents Catch-22 for Medical Pot Businesses*, COLORADODAILY.COM, Apr. 14, 2011, http://www.coloradodaily.com/cu-boulder/ci_17851500#axzz1LmWqsSKb (on file with the *McGeorge Law Review*) (noting that the current tax code prevents deductions for business expenses for those engaged in “trafficking in controlled substances”).

97. See, e.g., *Get Relief Today*, *supra* note 21, at 55.

98. Vitiello, *supra* note 25, at 747–48.

99. *People v. Kelly*, 222 P.3d 186, 196 (Cal. 2010).

100. See CANNABIS LAW GROUP, *supra* note 76.

101. Witness, for example, communities like Los Angeles where businesses have opened up during periods of lax enforcement of zoning laws, only to be closed down as a result of changing attitudes.

first time since the Carter presidency,¹⁰² discussing the legalization of marijuana is not naïve.

Marijuana is unlike other illegal substances;¹⁰³ many polls find that significant percentages of the population favor legalization of marijuana.¹⁰⁴ When asked about legalizing marijuana for medical use, significant majorities approve such measures.¹⁰⁵ No other illegal substance garners measurable support when members of the public are asked whether they favor legalization of those drugs.¹⁰⁶ The World Health Organization reports that over forty percent of Americans have tried marijuana, far exceeding the percentage of Americans who have used other illegal drugs.¹⁰⁷

A large number of Americans, including prominent politicians and judges, have used marijuana.¹⁰⁸ Many celebrities, including Willie Nelson, Woody

102. Interview by PBS FRONTLINE with Peter Bourne, Special Assistant to President Carter for Health Issues (2000), available at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/bourne.html> (on file with the *McGeorge Law Review*).

103. See generally Itai Danovitch, *Sorting through the Science on Marijuana: Facts, Fallacies, and Implications for Legalization*, 43 MCGEORGE L. REV 91 (2012) (discussing medical effects of marijuana and the implications of legalization for public health).

104. See MARIJUANA POLICY PROJECT, <http://www.mpp.org/> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*); see also Kevin Hechtkopf, *Poll: 44 Percent Support Marijuana Legalization*, CBS NEWS, Oct. 20, 2009, http://www.cbsnews.com/8301-503544_162-5403028-503544.html (on file with the *McGeorge Law Review*).

105. See *Poll: 60 Percent of Americans Support Medical Marijuana*, KSN.COM, Apr. 23, 2010, <http://www.ksn.com> (search “medical marijuana,” then follow “poll: 60 percent of Americans support medical marijuana”) (on file with the *McGeorge Law Review*); see also *Favorable Marijuana Polls*, NORML, http://norml.org/index.cfm?Group_ID=3392 (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*).

106. John Walker, *New Poll: Majority of American Adults Support Legalization of Marijuana, Oppose Drug War*, FIRE DOG LAKE, July 21, 2010, <http://elections.firedoglake.com/2010/07/21/new-poll-majority-of-american-adults-support-legalizing-marijuana-oppose-drug-war/> (on file with the *McGeorge Law Review*).

107. Carla Marinucci, *Political Legal Pot Suddenly Looking Possible*, S.F. CHRON., Apr. 12, 2009, at A1; see David Cray, *U.S. Appetite for Illegal Drugs is Insatiable*, S.F. CHRON., May 31, 2009, available at http://articles.sfgate.com/2009-05-31/news/17203347_1_cartels-drug-czar-drug-war (on file with the *McGeorge Law Review*) (information regarding drug use in America).

108. This includes former Presidents George W. Bush and Bill Clinton, President Barack Obama, Supreme Court Justice Clarence Thomas, and former Congressman Newt Gingrich. See David D. Kirkpatrick, *In Secretly Taped Conversations, Glimpses of the Future President*, N.Y. TIMES, Feb. 20, 2005, §1, at 11, available at <http://www.nytimes.com/2005/02/20/politics/20talk.html?pagewanted=1&r=1> (on file with the *McGeorge Law Review*) (stating that in secretly taped conversations, “Mr. Bush appears to have acknowledged trying marijuana”); Gwen Ifill, *THE 1992 CAMPAIGN: New York: Clinton Admits Experiment with Marijuana in 1960’s*, N.Y. TIMES, Mar. 30, 1992, at A15, available at <http://www.nytimes.com/1992/03/30/us/the-1992-campaign-new-york-clinton-admits-experiment-with-marijuana-in-1960-s.html> (on file with the *McGeorge Law Review*) (discussing Bill Clinton’s marijuana use); Lois Romano, *Effect of Obama’s Candor Remains to Be Seen*, WASH. POST, Jan. 3, 2007, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/02/AR2007010201359.html> (on file with the *McGeorge Law Review*) (discussing President Obama’s past drug use); *Tokin’ Politics*, NORML, http://norml.org/index.cfm?Group_ID=3461 (last visited May 9, 2009) (on file with the *McGeorge Law Review*) (noting that Justice Thomas admitted using marijuana in college); Keith Bradsher, *Many White House Employees Used Drugs, Gingrich Asserts*, N.Y. TIMES, Dec. 5, 1994, at A17, available at <http://www.nytimes.com/1994/12/05/us/many-white-house-employees-used-drugs-gingrich-asserts.html?n=Top/Reference/Times%20Topics/Subjects/M/Marijuana> (on file with the *McGeorge*

Harrelson, Snoop Dogg, Bill Maher, and Jack Black, favor legalizing marijuana.¹⁰⁹ Wealthy individuals like George Soros and George Zimmer support legalization efforts around the country.¹¹⁰ Further, proponents for legalization include academics around the country, often working at our most prestigious universities.¹¹¹ Even mainstream media have recently begun to advocate for the legalization of marijuana.¹¹²

No other illegal drug has a national lobbying organization similar to NORML, an organization founded over forty years ago to reform marijuana laws.¹¹³ Like many interest groups for more mainstream causes, NORML has litigated, lobbied in Congress and state legislatures, and engaged in public education and advocacy.¹¹⁴ NORML is not alone in its efforts to advocate for legalization of marijuana. A Google search reveals numerous websites devoted to legalizing marijuana.¹¹⁵ Beyond advocacy, some websites educate readers on how to grow marijuana;¹¹⁶ others facilitate locating sources of marijuana.¹¹⁷

Law Review) (noting that Mr. Gingrich admitted using marijuana “years ago”).

109. Shana Ting Lipton, *Celebrity Marijuana Advocates in Los Angeles*, ABOUT.COM, <http://losangeles.about.com/od/artsentertainment/tp/celebritymarijuana.htm> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*) (stating that Jack Black, Woody Harrelson, Snoop Dogg, and Bill Maher support marijuana legalization); Allen St. Pierre, *Marijuana Meetup: Teapot Party Invitation*, NORML BLOG, Dec. 12, 2010, <http://blog.norml.org/2010/12/12/marijuana-meetup-teapot-party-invitation/> (on file with the *McGeorge Law Review*) (stating Willie Nelson’s support for legalization of marijuana).

110. See Carey Goldberg, *Currency King Gives Heavily to Groups Fighting Drug Laws*, PLAIN DEALER (Cleveland, Ohio), Sept. 12, 1996, at 14A; see also Eric Bailey, *6 Wealthy Donors Aid Measure on Marijuana*, L.A. TIMES, Nov. 2, 1996, at A18, available at http://articles.latimes.com/1996-11-02/news/mn-60512_1_medical-marijuana-measure (on file with the *McGeorge Law Review*).

111. See *Endorsements*, YESON19.COM, <http://wayback.archive-it.org/924/20110205033701/http://yeson19.com/endorsements> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*); see also Lester Grinspoon, *Patients for Medical Cannabis*, <http://patients4medicalmarijuana.wordpress.com/medical-use-of-cannabis-video/an-interview-with-lester-grinspoon-md/> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*).

112. See, e.g., *The Washington Legislature Should Legalize Marijuana*, SEATTLE TIMES, Feb. 18, 2011, available at http://seattletimes.nwsourc.com/html/editorials/2014270472_edit20legal.html (on file with the *McGeorge Law Review*).

113. See NORML, <http://norml.org> (last visited at Apr. 3, 2011); see also Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 HAMLIN J. PUB. L. & POL’Y 117, 124–131 (1992).

114. See *NORML Legal Committee*, NORML, http://norml.org/index.cfm?Group_ID=3402 (last visited on Apr. 3, 2011) (on file with the *McGeorge Law Review*); see also Allen St. Pierre, *America’s Best Known and Respected Marijuana Lobby Organization Turns 40-Years Old*, NORML BLOG, Mar. 2, 2010, <http://blog.norml.org/2011/03/02/norml-america-s-best-known-and-respected-marijuana-lobby-organization-turns-40-years-old/> (last visited on Apr. 3, 2011) (on file with the *McGeorge Law Review*) (discussing lobbying efforts by NORML); see also *2004 NORML Conference and Congressional Lobby Day*, NORML http://norml.org/index.cfm?group_id=6014&wtm_format=print (last visited on Apr. 3, 2011) (on file with the *McGeorge Law Review*).

115. See, e.g., MARIJUANA.COM, <http://www.marijuana.com/> (last visited on Apr. 3, 2011) (on file with the *McGeorge Law Review*); HIGH TIMES, <http://hightimes.com/> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*); LEGALIZATIONOFMARIJUANA.COM, <http://legalizationofmarijuana.com/> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*).

116. See, e.g., HOWTOGROWMARIJUANA.COM, <http://howtogrowmarijuana.com/> (last visited on Apr. 3, 2011) (on file with the *McGeorge Law Review*); GROWMARIJUANA.COM, <http://www.grow-marijuana.com/> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*).

117. See, e.g., BUDTRADER.COM, <http://california.budtrader.com/> (last visited Apr. 3, 2011) (on file with

Sorting through the debate surrounding legalization of marijuana may be frustrating because of the heated advocacy. But advocates for legalization have a number of effective arguments. For example, a number of pro-legalization websites give the following frequently cited numbers for American deaths caused annually by drugs: tobacco, 400,000; alcohol, 100,000; all legal drugs, 20,000; all illegal drugs, 15,000; caffeine, 2000; aspirin, 500; marijuana, 0.¹¹⁸ Further, they point to lower rates of marijuana use among teens in the Netherlands than in the United States after the Netherlands reformed its marijuana laws.¹¹⁹

Most recently, advocates point to a study of Portugal's reform efforts.¹²⁰ Portugal now has the most liberal drug policy in Europe.¹²¹ A Cato Institute report indicates that none of the "nightmare scenarios" envisioned by liberalization opponents have occurred.¹²² Further, while rates of use remained constant or slightly decreased, "drug-related pathologies" decreased dramatically.¹²³ According to the report, illegal drug use among teens declined and rates of new HIV cases resulting from shared needles dropped, and the number of individuals seeking drug treatment has doubled.¹²⁴ While Portugal has liberalized its policies for all drugs, marijuana proponents have already begun to cite Portugal's experience as more evidence that opponents of legalization lack factual support for their claims of social harm.¹²⁵

Some legalization advocates focus on the disparate impact of drug laws on minority communities. For example, studies show that about the same number of whites and minorities use illegal substances; by comparison, overwhelming percentages of those prosecuted for drug offenses are minorities.¹²⁶ This data explains why the African American community split on whether to support passage of Proposition 19 in the 2010 election.¹²⁷

the *McGeorge Law Review*).

118. *Annual Deaths Caused by Drugs*, LEGALIZATIONOFMARIJUANA.COM, <http://legalizationofmarijuana.com/> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*).

119. *Myths and Facts About Marijuana*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/marijuana/factsmyths/> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*).

120. Ken Millstone, *A New Era for U.S. Drug Policy?*, CBS NEWS, Nov. 3, 2009, <http://www.cbsnews.com/stories/2009/11/03/national/main5515569.shtml> (on file with the *McGeorge Law Review*).

121. In 2001, it abolished criminal penalties for personal possession of drugs, not just marijuana, and replaced the threat of jail time with the offer of drug treatment. *Id.*

122. GLENN GREENWALD, *DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 1* (Cato Institute, ed. 2009) available at http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf (on file with the *McGeorge Law Review*).

123. The report speculates that using drug treatment rather than prison produces better results. *Id.*

124. *Id.* at 14–16.

125. Maia Szalavitz, *Drugs in Portugal: Did Decriminalization Work*, TIME, Apr. 26, 2009, available at <http://www.time.com/time/health/article/0,8599,1893946,00.html> (on file with the *McGeorge Law Review*).

126. Sean Posey, *The Drug Wars, Minorities, and the Rust Belt*, RUSTWIRE.COM, Jan. 25, 2011, <http://rustwire.com/2011/01/25/the-drug-war-minorities-and-the-rust-belt/> (on file with the *McGeorge Law Review*).

127. *Tell Me More with Michael Martin: Black Community Split Over Legalizing Marijuana* (NPR broadcast July 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=128823133> (on file with the

In addition, the medical marijuana movement has further legitimized marijuana. Proponents of medical marijuana have won the public debate over the past two decades. Currently, Americans favor legalization of marijuana for medical uses by a significant margin.¹²⁸ Indeed, as early as 1996, when Californians authorized the use of medical marijuana, Proposition 215 passed with over fifty-five percent of the vote.¹²⁹ In the run-up to the election, sixty-six percent of those polled approved of the initiative.¹³⁰ Following California's lead, sixteen states and the District of Columbia have legalized marijuana for medical use.¹³¹

Legalization for medical use has created some interesting bedfellows. Montana voted in favor of legalizing marijuana for medical use in 2004.¹³² Since then, Republicans have regained control of its legislature and may repeal the law.¹³³ But those efforts have been complicated by the fact that the marijuana industry has created over a thousand jobs in a depressed economy and led to millions of dollars in economic development.¹³⁴ At least some members of the business community are hesitant to undo the law because sellers have become part of that community, part of an "emerging class of entrepreneurs."¹³⁵

Perhaps as predicted by opponents,¹³⁶ the seemingly legitimate use of marijuana for medical purposes may explain the greater acceptance of legalizing marijuana among younger voters. But then, younger voters were raised on a more tolerant attitude towards marijuana as is evident in the media. While young adults during the 1960s made *Reefer Madness*¹³⁷—a serious attempt to demonize marijuana—into a cult film, younger viewers were raised on more mainstream

McGeorge Law Review).

128. See KSN.COM, *supra* note 105; see also NORML, *supra* note 105.

129. BILL JONES, CAL. SEC'Y OF STATE, STATEMENT OF VOTE 42 (1996), available at <http://www.sos.ca.gov/elections/sov/1996-general/1996-general-sov.pdf>.

130. Tracie Cone, *Reefer Madness: Law-Abiding Regular Folks Descend Into a Netherworld to Get Relief for Themselves or Others with Grave Diseases. Why Morphine and Not Marijuana?*, SAN JOSE MERCURY NEWS, May 14, 1995, at 13 (on file with the *McGeorge Law Review*).

131. *16 Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*).

132. *Marijuana and Medical Marijuana*, N.Y. TIMES, Feb. 11, 2011, available at <http://topics.nytimes.com/top/reference/timestopics/subjects/m/marijuana/index.html> (on file with the *McGeorge Law Review*); PROCON.ORG, *supra* note 131.

133. N.Y. TIMES, *supra* note 132.

134. Kirk Johnson, *In Montana, An Economic Boon Faces Repeal Effort*, N.Y. TIMES, Mar. 5, 2011, available at <http://www.nytimes.com/2011/03/06/us/06marijuana.html?ref=marijuana> (on file with the *McGeorge Law Review*).

135. *Id.*

136. *Marijuana and Medicine: The Need for a Science-Based Approach: Hearing on SB 757 Before the S. Judicial Proceedings Comm.*, 2007 Leg., 2006–2007 Sess. (Md. 2007) (statement of Robert L. DuPont, President, Institute for Behavior and Health, Inc.), available at www.ibhinc.org/pdfs/RLDMedMJTestimony031407.pdf (on file with the *McGeorge Law Review*).

137. REEFER MADNESS (George A. Hirliman Productions 1936).

films like *The Big Lebowski*,¹³⁸ *Pineapple Express*,¹³⁹ *Half Baked*,¹⁴⁰ *Dude, Where's My Car?*,¹⁴¹ *Grandma's Boy*,¹⁴² and *Road Trip*;¹⁴³ films that present a humorous or generally favorable view of marijuana use.

Even with all of these trends at play, legalization of marijuana would probably have remained improbable but for the sharp downturn in the economy. State treasuries have been decimated by a slow post-recession recovery following the housing boom collapse.¹⁴⁴ In such an environment, proponents of legalization have gained traction by holding out the promise of significant tax revenue for cash-hungry states and local governments.¹⁴⁵

And the potential tax revenues from the legalized marijuana trade are enormous. Finding a reliable estimate of the value of California's marijuana crop is difficult for obvious reasons. Estimates range from \$4- to \$14-billion a year.¹⁴⁶ Even subjecting marijuana sales to the current sales tax in effect in many counties (say of eight percent), taxing marijuana would generate between \$320 million and \$1.2 billion annually.¹⁴⁷ Proposals like Assemblyman Tommy Ammiano's have put forward higher rates.¹⁴⁸ For example, his bill would have required marijuana producers to pay a substantial annual fee and sellers to collect

138. THE BIG LEBOWSKI (Working Title Films 1998).

139. PINEAPPLE EXPRESS (Columbia Pictures 2008).

140. HALF BAKED (Universal Pictures 1998).

141. DUDE, WHERE'S MY CAR? (Twentieth Century Fox 2000).

142. GRANDMA'S BOY (Happy Madison Productions 2006).

143. ROAD TRIP (Dreamworks SKG 2000).

144. See Michael Cooper, *Recession Tightens Grip on State Tax Revenues*, N.Y. TIMES, Feb. 22, 2010, available at <http://www.nytimes.com/2010/02/23/us/23states.html> (on file with the *McGeorge Law Review*); see also Joseph Perkins, *California Economy Rises and Falls on Strength of Housing Sector*, NBC SAN DIEGO, Feb. 10, 2011, available at <http://www.nbcsandiego.com/blogs/prop-zero/California-Economy-Rises-or-Falls-on-Strength-of-Housing-Sector-103731544.html> (on file with the *McGeorge Law Review*).

145. Lawrence Goodwin, *Fabric of Our Economy: Legalizing Marijuana, Hemp Could Increase Tax Revenue, Add Jobs*, DAILYGAZETTE.COM, Feb. 20, 2011, available at http://www.dailygazette.com/news/2011/feb/20/0220_goodwin/ (on file with the *McGeorge Law Review*).

146. F. Aaron Smith, *A Neglected Revenue Source for California—Marijuana*, S.F. CHRON., Jan. 13, 2009, available at http://articles.sfgate.com/2009-01-13/opinion/17198470_1_marijuana-crop-california-s-largest-cash-crop-national-forests (on file with the *McGeorge Law Review*) (discussing possibility of California collecting up to \$4 billion in tax revenue); Matt Baume, *Marijuana Crushed Grapes as Cash Crop*, NBC BAY AREA, Feb. 10, 2011, available at <http://www.nbcbayarea.com/blogs/prop-zero/Marijuana-Crushes-Grapes-as-Cash-Crop-105288093.html?dr> (on file with the *McGeorge Law Review*) (discussing marijuana's worth at \$14 billion).

147. Peter Hecht, *California Goes After Pot Shops for Back Taxes*, SACRAMENTO BEE, Mar. 10, 2011, at 1A, available at <http://www.sacbee.com/2011/03/10/3463699/california-goes-after-pot-shops.html> (on file with the *McGeorge Law Review*).

148. Joe Eskenazi, *Get Up, Stand Up: Ammiano Introduces Marijuana Legalization Bill to the Press*, S.F. WEEKLY, Feb. 23, 2009, available at http://blogs.sfweekly.com/thesnitch/2009/02/get_up_stand_up_ammiano_introd.php (on file with the *McGeorge Law Review*). The bill calls for an initial fee of \$5,000 imposed on marijuana growers and then a \$2,500 annual fee in addition to a tax of \$50-per-ounce fee. *Id.* (revealing the tax of \$50 per ounce); AB 390, § 25401, Leg., 2009–2010 Sess. (Cal. 2009) (revealing the \$5,000 initial application fee and \$2,500 annual renewal fee).

a \$50-per-ounce tax.¹⁴⁹ Further, there can be no doubt that, like alcohol, marijuana would be subject to sin taxes, raising far more revenue than do other commercial products.¹⁵⁰

Indeed many legalization proponents suggest that marijuana could produce similar tax benefits for the state as does the wine industry. Currently estimated at \$61.5 billion, the wine industry generates \$14.7 billion (state and federal combined) in tax revenue.¹⁵¹ Further, the wine industry employs 330,000 people who no doubt pay substantial taxes on their incomes.¹⁵²

Despite claims by legalization opponents that black-market marijuana sales will prevent the realization of claimed tax benefits,¹⁵³ some local governments have already received significant tax advantages by regulating and taxing medical marijuana facilities.¹⁵⁴ While some cities have attempted to ban medical marijuana dispensaries or to zone them out of upscale areas,¹⁵⁵ cash-strapped Oakland has welcomed the tax revenue generated by dispensaries¹⁵⁶ and has provided a home for a “university” to train people in all facets of the marijuana trade.¹⁵⁷

149. AB 390, §§ 25401, 34011 Leg., 2009–2010 Sess. (Cal. 2009).

150. Eskenazi, *supra* note 148.

151. *A Signature California Industry Benefits the State and Nation*, Wine Institute, http://www.wineinstitute.org/files/CA_EIR_Flyer_2011_final.pdf (last visited on Aug. 1, 2011) (on file with the *McGeorge Law Review*).

152. *Id.*

153. *Forum with Michael Krasny*, *supra* note 1.

154. Tom McNichol, *Is Marijuana the Answer to California's Budget Woes*, TIME, July 24, 2009, available at <http://www.time.com/time/nation/article/0,8599,1912113,00.html> (on file with the *McGeorge Law Review*).

155. See Ross Farrow, *San Joaquin County Supervisors Ban Rural Marijuana Dispensaries*, LODI NEWS, Mar. 2, 2011, available at http://www.lodinews.com/news/article_59959a09-592b-5674-a969-f4fcdd794cca.html (on file with the *McGeorge Law Review*) (stating that 13 counties and 142 cities in California ban medical marijuana); see also Tony Chavira, *Master Planning!: Zoning Out on Marijuana*, FOURSTORY, <http://fourstory.org/features/story/zoning-out-on-marijuana/> (last visited Apr. 3, 2011) (on file with the *McGeorge Law Review*) (pointing out that cities are debating zoning ordinances for medical marijuana).

156. Ryan Van Lenning, *Oakland Seeks to Double the Number of Medical Marijuana Dispensaries, Increase Permit Fees*, OAKLAND LOCAL, Oct. 11, 2010, <http://oaklandlocal.com/article/oakland-seeks-double-number-medical-marijuana-dispensaries-increase-permit-fees%E2%80%8F> (on file with the *McGeorge Law Review*).

157. Justin Berton, *Marijuana 101: School Teaches Ins, and Outs of Pot*, S.F. CHRON., Apr. 21, 2008, available at http://articles.sfgate.com/2008-04-21/news/17146081_1_pot-clubs-older-brother-ryan/2 (on file with the *McGeorge Law Review*) (listing a wide range of courses, including courses on legal issues, politics and history of marijuana regulation, horticulture, the science and economics of marijuana, and employment opportunities in the marijuana trade). See also OAKSTERDAM UNIVERSITY, <http://www.oaksterdamuniversity.com> (on file with the *McGeorge Law Review*).

As I indicated above, I describe myself as a “tepid legalizer.”¹⁵⁸ I suspect that many Californians share my view of the legalization issue.¹⁵⁹ We might question the use of any significant police, prosecutorial, and judicial resources to prosecute marijuana offenses. We may believe that sentences for marijuana offenses are too high. But for many Californians like me, the state of the economy makes legalization tempting.

I look at the stalemate in the California legislature over Governor Brown’s modest proposal to keep in place existing temporary taxes and wonder how the state can get out of its financial woes.¹⁶⁰ I then look at an untaxed industry that is worth billions of dollars. That the marijuana crop is worth between \$4- and \$14-billion dollars suggests that the war on marijuana has failed.¹⁶¹ Taxing it is awfully tempting. Although the extent of the savings is open to serious question, the state would experience some savings in law enforcement, jail, and judicial costs were it to get out of the business of prosecuting marijuana offenses.¹⁶²

Opponents point to additional costs that would flow from legalization.¹⁶³ No doubt, legalization would create some additional social and economic harm.¹⁶⁴ This section has not tried to assess the competing arguments for and against legalization. But elsewhere, I have written about extravagant claims by proponents and opponents of legalization.¹⁶⁵ My point here is to suggest the factors that have combined to make legalization plausible, more so than at any other point since the early part of the twentieth century when some states,¹⁶⁶ and finally the federal government, made marijuana possession and sales criminal.¹⁶⁷

One other trend may make legalization a political reality: California, like most of the rest of America, has been on a “thirty-year incarceration binge.”¹⁶⁸

158. *Supra* p. 63.

159. McNichol, *supra* note 154.

160. Nanette Miranda, *Tax Increase Vote Tough Sell for Republicans*, KABC-TV, Jan. 13, 2011, <http://abclocal.go.com/kabc/story?section=news/state&id=7897296> (on file with the *McGeorge Law Review*).

161. Gary E. Johnson, *The War on Drugs Has Failed, so Tax and Regulate Marijuana*, CNBC, Apr. 20, 2010, available at http://www.cnbc.com/id/36180871/The_War_On_Drugs_Has_Failed_So_Tax_And_Regulate_Marijuana (on file with the *McGeorge Law Review*).

162. *Forum with Michael Krasny*, *supra* note 1.

163. See OFFICE OF NAT’L DRUG CONTROL POL’Y, MARIJUANA MYTHS & FACTS: THE TRUTH BEHIND 10 POPULAR MISPERCEPTIONS 3 (2004).

164. See THE NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUM. UNIV., SHOVELING UP II: THE IMPACT OF SUBSTANCE ABUSE ON FEDERAL, STATE, AND LOCAL BUDGETS (2009); see also OFFICE OF NAT’L DRUG CONTROL POL’Y, *supra* note 163, at 4–6.

165. Vitiello, *supra* note 3, at 1362.

166. Dale H. Gieringer, *The Origins of California’s 1913 Cannabis Law*, CA NORML, available at <http://www.canorml.org/background/ca1913.html> (last visited June 12, 2011) (on file with the *McGeorge Law Review*).

167. *The Marijuana Tax Act of 1937*, SCHAFFER LIBRARY OF DRUG POLICY, <http://www.druglibrary.net/schaffer/hemp/taxact/mjtaxact.htm> (last visited Apr. 4, 2011) (on file with the *McGeorge Law Review*).

168. Radley Balko, *More Democracy, More Incarceration: The Devastating Mix of Politics and Crime Policy*, REASON MAGAZINE, Oct. 25, 2010, <http://reason.com/archives/2010/10/25/more-democracy-more-incarcerat> (on file with the *McGeorge Law Review*).

With over 2.2 million individuals in our prisons and jails, the United States has the highest incarceration rate in the world.¹⁶⁹ And with few resources devoted to drug treatment, parole supervision, re-entry programs, or rehabilitation within prisons, most states suffer high recidivism rates.¹⁷⁰ Mandatory sentences and sentence enhancements have led to overcrowding and to sentences that are far longer than necessary for protecting of the public.¹⁷¹ Further, incarceration of non-violent offenders may result in their introduction to the world of violent crime, turning them into violent criminals.¹⁷² Longer sentences and recidivist statues like California's Three Strikes law have led to an aging prison population.¹⁷³ And as almost all critics agree, aging felons are both expensive to care for and represent a decreasing social risk when they reenter society.¹⁷⁴

For many years, calls for sentencing reform have come from across a broad political spectrum.¹⁷⁵ Many of us who are interested in rational sentencing reform have been frustrated by the lack of political will to tackle meaningful reform. The logjam has a number of causes: in California, the prison guards' union remains one of the few powerful unions in the state.¹⁷⁶ It has courted politicians across the political spectrum and it has nurtured the now-powerful victims' rights

169. See Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html> (on file with the *McGeorge Law Review*); see also Associated Press, *U.S. Prison Population Sets Record*, WASH. POST, Dec. 1, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113000912.html> (on file with the *McGeorge Law Review*).

170. See Abraham Thompson, *California Grapples With High Recidivism Rate*, EPOCH TIMES, Feb. 2, 2011, <http://www.theepochtimes.com/n2/content/view/50490/> (on file with the *McGeorge Law Review*); see also Bureau of Justice Statistics, *Reentry Trends in the US: Recidivism*, OFFICE OF JUSTICE PROGRAMS, Apr. 3, 2011, <http://bjs.ojp.usdoj.gov/content/reentry/recidivism.cfm> (on file with the *McGeorge Law Review*).

171. See *Mandatory Minimum Sentences*, DRUG POLICY ALLIANCE, <http://web.archive.org/web/20101209083840/http://www.drugpolicy.org/drugwar/mandatorymin/index.cfm> (last visited June 10, 2011) (on file with the *McGeorge Law Review*) ("The U.S. Sentencing Commission and the Department of Justice have both concluded that mandatory sentencing fails to deter crime. Furthermore, mandatory minimums have worsened racial and gender disparities and have contributed greatly toward prison overcrowding More than 80 percent of the increase in the federal prison population from 1985 to 1995 is due to drug convictions."). See also THE BOTANY OF DESIRE (Kimkim Media 2009) (on file with the *McGeorge Law Review*) (noting the number of arrests for marijuana possession is about 750,000 a year; 25,000 to 30,000 people are behind bars at any given time for marijuana offenses) therefore marijuana offenses constitute about a third among all crimes).

172. See generally JACK HENRY ABBOTT, PRISONS CREATE A CRIMINAL PERSONALITY (1991).

173. See generally Chris Schreiber, *Behind Bars: Aging Prison Population Challenges Correctional Health Systems*, NURSEWEEK (July 19, 1999), <http://www.nurseweek.com/features/99-7/prison.html> (on file with the *McGeorge Law Review*) ("Elderly prisoners already account for three times as many new admissions as younger prisoners.").

174. *Id.* (discussing the increasing cost of housing older prisoners).

175. See generally Laura A. Bischoff, *Sentencing Reform Has Bipartisan Push*, DAYTON DAILY NEWS, Jan. 30, 2011, available at <http://www.daytondailynews.com/news/sentencing-reform-has-bipartisan-push-1068119.html> (last visited April 1, 2011) (on file with the *McGeorge Law Review*) (noting the inflation in prison costs in Ohio and that both liberals and conservatives agree that reform is necessary).

176. JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA (2011) (noting the political power the prison guards union has in California).

movement, another important political player in supporting high levels of incarceration.¹⁷⁷

Further, at least since the Willie Horton ad in the 1988 presidential election,¹⁷⁸ politicians have shown little interest in sentencing reform. Despite some notable exceptions, most politicians seem either cynical, waiting for their opponents to back sentencing reform so that they can label their opponents “soft on crime,” or fearful of being labeled so themselves.¹⁷⁹ On occasion, the result has been jarring, with liberal politicians lining up to support short-sighted legislation.¹⁸⁰

As recently as 2009, when I wrote about efforts to legalize marijuana in California, I believed “. . . with two wars and an economy in the tank— [President] Obama is unlikely to take on a divisive issue like legalizing drugs.”¹⁸¹ Even as the Obama Administration softened its stand on medical marijuana, federal agents have continued to pursue “illegitimate” medical marijuana dispensaries, believed to be fronts for drug cartels.¹⁸² Despite any president’s efforts, federal law enforcement agencies maintain the clout to assure significant budgets for anti-drug initiatives.¹⁸³

Theoretically, conservatives and libertarians have many reasons to oppose drug laws. For example, drug use reflects an individual’s life-style choice.¹⁸⁴ Drug laws substitute government decision-making for individual responsibility.¹⁸⁵

177. *Id.* (discussing prison-guard created victim’s rights organizations).

178. *Willie Horton 1988 Attack Ad*, YOUTUBE <http://www.youtube.com/watch?v=Io9KMSSEZOY> (last visited April. 1, 2011) (on file with the *McGeorge Law Review*).

179. *Id.*

180. See generally Mark Martin, *Leno Caught in Conservative Crosshairs/After Another Capitol Defeat for GOP on Sex Offender Bill*, S.F. *Assemblyman’s Alternative Draws Fiery Attacks Nationwide*, S.F. GATE, Jan. 30, 2006, available at http://articles.sfgate.com/2006-01-30/news/17278654_1_initiative-jessica-s-law-offender (on file with the *McGeorge Law Review*) (“It was also suggested in a political newsletter that [Mark Leno] may be brain damaged after inhaling all of that secondhand marijuana smoke wafting through the streets of his hometown.”).

181. Vitiello, *supra* note 3, at 1361 (“Imagine the cry from the radio talk-show hosts about the destruction of Western Civilization (despite some of their own problems with illegal drug use)!”).

182. See generally Andrew Blankstein, *LAPD Investigating Third Shooting at a Medical Marijuana Dispensary*, L.A. TIMES, June 30, 2010, available at <http://latimesblogs.latimes.com/lanow/2010/06/lapd-investigating-robberys shooting-at-san-fernando-valley-medical-marijuana-dispensary.html> (on file with the *McGeorge Law Review*) (discussing robberies at several Los Angeles based medical marijuana dispensaries and ending saying, “authorities shouldn’t rule out a link between the robberies and slayings at the pot clinics and drug cartels”).

183. See generally *The 2005 Federal Anti-Drug Budget: More of the Same, and Some Hidden Costs*, STOP THE DRUG WAR, Mar. 5, 2004, <http://stopthedrugwar.org/chronicle-old/327/budget2005.shtml> (on file with the *McGeorge Law Review*) (“In a time when the federal government faces multi-trillion dollar budget deficits and is warning of belt-tightening all around, the federal anti-drug budget will increase by 4.7% this fiscal year to \$12.468 billion dollars.”).

184. See generally *Impulsivity*, UNIVERSITY COLLEGE LONDON, <http://www.ucl.ac.uk/mental-health/research-themes/impulsivity.php> (last visited June 8, 2011) (on file with the *McGeorge Law Review*) (discussing “impulsivity” as a core clinical problem that can lead to using illicit drugs).

185. Peter de Marneffe, *Do We Have the Right to Use Drugs*, 10 PUB. AFF. Q. 229 (1996) (presenting a

Further, politicians have done little to contain federal funding for the War on Drugs or to force accountability from recipients of public money.¹⁸⁶ In theory, federalists should oppose national drug policies, especially if they collide with state laws.¹⁸⁷ Despite many reasons for libertarians and conservatives to question drug policies in the United States, few prominent conservative politicians have supported sentencing reform or reform of drug laws.¹⁸⁸

That may be changing. In January 2011, Newt Gingrich and Pat Nolan authored an op-ed in *The Washington Post* summarizing a major shift in conservative thinking about crime in the United States.¹⁸⁹ Some prominent conservative leaders have become part of the Right on Crime Campaign, a movement which calls for “sensible and proven reforms to our criminal justice system—policies that will cut prison costs while keeping the public safe.”¹⁹⁰ While few current politicians have signed on to the campaign, signatories include powerful political players, including former Attorney General Ed Meese, former drug czar Asa Hutchinson, and anti-tax leader Grover Norquist.¹⁹¹ According to Gingrich and Nolan (if one takes them at their word), this initiative “opens the way for a common-sense left-right agreement on an issue that has kept the parties apart for decades.”¹⁹²

The Right on Crime Campaign does not explicitly target marijuana laws. Gingrich and Nolan do argue that some states have successfully shifted funds to

case that drug control laws violate individual rights).

186. EDWARD M. SHEPARD III, *THE ECONOMIC COSTS OF D.A.R.E. 3* (2001), available at <http://www.drugpolicy.org/docUploads/DAREfinalRP.pdf> (on file with the *McGeorge Law Review*) (“There is uncertainty about the real costs of D.A.R.E. because there is no centralized accounting of the funds, expenditures, and resources used to support the program. The decision to use D.A.R.E. is made by local school districts, and the needed resources are provided for in local city or town budgets, by local school districts, or by local police departments.”).

187. See generally Ross Raffin, *Legalizing Marijuana the Federalist Way*, STANFORD PROGRESSIVE, May 2009, available at http://progressive.stanford.edu/cgi-bin/article.php?article_id=339 (on file with the *McGeorge Law Review*).

188. Although many conservatives historically have opposed sentencing reform as it relates to drug law, during these tough budgetary times, there seems to be a shift in that traditional thinking. See Phillip Smith, *Conservatives Board Sentencing Reform Bandwagon*, STOPTHEDRUGWAR.ORG, Feb. 2, 2011, http://stopthedrugwar.org/chronicle/2011/feb/02/conservatives_board_sentencing_r (on file with the *McGeorge Law Review*) (“Struggling with chronic budget crises, lawmakers in more and more states are embracing sentencing and other reforms in a bid to hold down corrections costs. But while sentencing reform has long been the domain of ‘bleeding heart’ liberals, now conservatives are driving those efforts in some states.”); see also Newt Gingrich & Pat Nolan, *Prison reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html> (on file with the *McGeorge Law Review*) (“We urge conservative legislators to lead the way in addressing an issue often considered off-limits to reform: prisons. Several states have recently shown that they can save on costs without compromising public safety by intelligently reducing their prison populations.”).

189. *Id.*

190. *Id.*

191. *Id.* (discussing the prominent signatories to the Right on Crime Campaign).

192. *Id.*

drug treatment, resulting in reductions in the prison population.¹⁹³ Many conservative constituents, if not politicians, have targeted drug laws already.¹⁹⁴ While popular support for legalization of all drugs does not exist, a significant minority does favor legalization.¹⁹⁵

Further, while politicians have been slow to take up sentencing reform,¹⁹⁶ the recently elected ideological Republican members of the House of Representatives have shown that they are committed deficit hawks, willing to buck party leadership to pursue their goals.¹⁹⁷ Willing to cut military budgets, this new breed surely would support cutting off some of the funds spent on the War on Drugs, especially in light of efforts like those of Gingrich and other prominent conservative leaders.¹⁹⁸ Further, while this new breed of reformers are ardent in their position on new taxes,¹⁹⁹ taxing marijuana may be an attractive source of

193. *Id.* (“The Lone Star State has already redirected much of the money saved into community treatment for the mentally ill and low-level drug addicts. Not only have these reforms reduced Texas’s prison population—helping to close the state budget gap—but for the first time there is no waiting list for drug treatment in the state. And crime has dropped 10 percent from 2004, the year before the reforms, through 2009, according to the latest figures available, reaching its lowest annual rate since 1973.”).

194. Some prominent conservative commentators like Glen Beck, Rush Limbaugh, and former Congressman Newt Gingrich have argued for drug legalization. See Scott Morgan, *Are Republicans Turning Against the Drug War?* STOPTHEDRUGWAR.ORG, Mar. 11, 2009, http://stopthedrugwar.org/speakeasy/2009/mar/11/are_republicans_turning_against (on file with the *McGeorge Law Review*) (noting that one week after Glenn Beck interviewed a marijuana policy expert he proclaimed his support for legalizing marijuana). Further, Ward Connerly argued for sentencing reform. See generally Naomi Zeveloff, *After Colorado Loss, Ward Connerly May Pull the Plug on Affirmative-Action Bans*, COLORADO INDEPENDENT, Nov. 7, 2008, available at <http://coloradoindependent.com/14617/ward-connerly-may-pull-the-plug> (on file with the *McGeorge Law Review*) (“[R]ather than continue the fight against racial preferences, Connerly said he will focus on reforming the criminal justice system.” Further noting that Mr. Connerly contributed “to Families against Mandatory Minimums, a national organization dedicated to changing sentencing laws. And he is a proponent of alternatives to incarceration, such as ankle monitors for some convicts.”).

195. Ryan Grim, *Majority Of Americans Want Pot Legalized: Zogby Poll*, HUFFINGTON POST, May 6, 2009, available at http://www.huffingtonpost.com/2009/05/06/majority-of-americans-wan_n_198196.html (on file with the *McGeorge Law Review*).

196. For example, Virginia Senator James Webb made sentencing reform a major policy goal, but Congress did little in response. See *Webb Urges Congressional Review of Incarceration*, RICHMOND TIMES-DISPATCH, Mar. 26, 2009, available at http://www2.timesdispatch.com/news/2009/mar/26/webbgater26_20090326-121604-ar-48222/ (on file with the *McGeorge Law Review*) (noting that Senator Webb, “wants a ‘top-to-bottom review’ by Congress of the nation’s criminal-justice system with an eye toward reducing the growing prison population”).

197. Sam Dillon, *New Challenges for Obama’s Education Agenda in the Face of a G.O.P.-Led House*, N.Y. TIMES, Dec. 11, 2010, available at http://www.nytimes.com/2010/12/12/us/politics/12education.html?_r=1&ref=education (on file with the *McGeorge Law Review*) (noting that “Republican deficit hawks” are taking control of the House of Representatives).

198. See generally Gingrich & Nolan, *supra* note 188 (“The Lone Star State has already redirected much of the money saved into community treatment for the mentally ill and low-level drug addicts. Not only have these reforms reduced Texas’s prison population—helping to close the state budget gap—but for the first time there is no waiting list for drug treatment in the state. And crime has dropped 10 percent from 2004, the year before the reforms, through 2009, according to the latest figures available, reaching its lowest annual rate since 1973.”).

199. See generally Jack Chang, *State GOP Opposes Tax Measures Even if Tied to Reforms*, SACRAMENTO BEE, Mar. 20, 2011, available at <http://blogs.sacbee.com/capitolalert/latest/2011/03/state-gop->

revenue, given that it has not been subject to meaningful taxation in the past. These are not ordinary times.²⁰⁰ In a budget-cutting environment, shifting scarce criminal justice and law enforcement dollars away from enforcement of marijuana laws would seem to be a sensible policy. When states enact medical marijuana laws, they are likely to provide less cooperation with federal law enforcement agents who are pursuing marijuana offenders.²⁰¹ Further, as a larger segment of the population supports medical marijuana laws or legalization, policy-makers may recognize that reforming marijuana laws presents little political risk. The possibility of taxing marijuana may seal the deal.²⁰²

This scenario is hardly a foregone conclusion. While a candidate, Jerry Brown opposed Proposition 19.²⁰³ As Governor, he has not proposed cutting prison budgets to address the budget shortfall.²⁰⁴ But his position as a candidate helped him avoid an attack from the right. At least for now, his position on the prison budget may be pure politics: if the tax issue gets on the ballot, Brown will undoubtedly play on the public's fear of crime as a reason to vote for the continuation of the temporary taxes.²⁰⁵ He also knows that the order of a three-judge federal panel to reduce the prison population may accomplish some savings for the state, with little political risk for him.²⁰⁶

opposes-tax-measures.html (on file with the *McGeorge Law Review*).

200. Historians list the need to raise tax revenue during the Depression among the reasons that America voted to repeal Prohibition. See Donald J. Boudreaux, *Alcohol, Prohibition, and the Revenuers*, THE FREEMAN, Jan. 2008, available at <http://www.thefreemanonline.org/columns/thoughts-on-freedom-alcohol-prohibition-and-the-revenuers/> (on file with the *McGeorge Law Review*) ("It's far more likely that Congress proposed the Twenty-First Amendment (to repeal the Eighteenth) in February 1933 not so much because it was a faithful agent of voters who recognized the futility of Prohibition, but because the politicians desperately wanted more revenue.").

201. Other states besides California have legalized marijuana for medicinal use. See PROCON.ORG, *supra* note 131 (including a summary chart describing the state, year passed, how it passed, the fees, possession limit, and whether or not the state accepts other state's registry cards).

202. A major reason for repeal of Prohibition was the need to raise tax revenues in the midst of the Depression. See generally DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2010).

203. John Hoeffel, *Even if Prop. 19 Passes, Federal Drug Laws Will be 'Vigorously' Enforced*, *Official Says*, L.A. TIMES, Oct. 15, 2010, available at <http://latimesblogs.latimes.com/lanow/2010/10/even-if-prop-19-passes-us-atty-gen-eric-holder-says-federal-drug-laws-will-be-vigorously-enforced-against-people-who-grow-dis.html> (on file with the *McGeorge Law Review*).

204. Paresh Dave, *Jerry Brown State Of The State Speech Another Chance To Tell Budget Naysayers: Give Me Alternatives*, USC ANNENBERG, SCHOOL FOR COMM. AND JOURNALISM, Jan. 31, 2011, available at <http://www.neontommy.com/news/2011/01/jerry-brown-tells-budget-naysayers-give-me-alternatives> (on file with the *McGeorge Law Review*) ("The only untouchables appear to be the prisons (because of legal orders) and K-12 education (because of the high regard Californians have for their public schools).").

205. See generally Dan Walters, *Dan Walters: California's Perpetual Prison Mess*, SACRAMENTO BEE, Dec. 3, 2010, available at <http://www.sacbee.com/2010/12/03/3229583/dan-walters-californias-perpetual.html> (on file with the *McGeorge Law Review*).

206. *Brown v. Plata*, 131 S. Ct. 1910 (2011), *aff'g* *Coleman v. Brown*, 912 F. Supp. 1282 (E.D. Cal. 1995), and *Plata v. Brown*, 3:01-cv-01351-TEH (N.D. Cal. 2009).

As I have argued above, legalization of marijuana may no longer be the stuff of fantasy.²⁰⁷ The demographic shift, the availability of marijuana through medical dispensaries, the desperation of state and local governments to find new sources of tax revenue, and a shift of sentiment among conservatives towards criminal sentencing policy could result in legalization of marijuana at some reasonable point in time. That begs another question: what should legalization look like?

III. WHAT SHOULD LEGALIZATION LOOK LIKE?

Legislating through the initiative process produced bad results when California enacted Proposition 215.²⁰⁸ We would have repeated similar mistakes had we enacted Proposition 19. This section describes some of those mistakes; because I believe that legalization should come through the legislature, I discuss some important questions that policy-makers should consider if we end up legalizing marijuana.

California dodged a bullet when voters rejected Proposition 19.²⁰⁹ As I argued above, legalization may happen because marijuana is a vast, untaxed resource.²¹⁰ Many voters who favor legalization, like me, do so because of its potential as a revenue source.²¹¹ Proposition 19 failed to adequately deal with taxation.

While the Legislative Analyst's Office concluded that Proposition 19 implicitly recognized the state's ability to tax marijuana,²¹² that fact was hardly clear from the proposition's language. Instead, it explicitly gave local governments the power to tax marijuana, but did not address the state's authority to tax.²¹³ At a minimum, Proposition 19 would have created uncertainty about the state's ability to tax the marijuana trade. Had the state concluded that the initiative negated that power, one of the primary justifications for legalization would have been lost.

Proposition 19 contained a more profound flaw. Like the drafters of Proposition 215, proponents of Proposition 19 were mainly interested in the legalization of marijuana rather than raising tax revenue.²¹⁴ Reading between the

207. See *supra* Part III.

208. See *supra* notes 36–101 and accompanying text.

209. Cal. Proposition 19 (2010).

210. *Supra* notes 144–67 and accompanying text.

211. See Dan Whitcomb & Steve Gorman, *Pot Shops Could Ease California's Fiscal Jam*, CANNABIS NEWS, <http://www.cannabisnews.org/united-states-cannabis-news/pot-shops-could-ease-californias-fiscal-jam/> (last visited June 6, 2011) (on file with the *McGeorge Law Review*).

212. LEGIS. ANALYST'S OFFICE, *Changes California Law to Legalize Marijuana and Allow It to Be Regulated and Taxed*, July 12, 2010, available at http://www.lao.ca.gov/ballot/2010/19_11_2010.pdf (on file with the *McGeorge Law Review*).

213. Cal. Proposition 19 (2010).

214. See *California Proposition 19, the Marijuana Legalization Initiative*, BALLOTEDIA, [http://ballotpedia.org/wiki/index.php/California_Proposition_19,_the_Marijuana_Legalization_Initiative_\(2010\)](http://ballotpedia.org/wiki/index.php/California_Proposition_19,_the_Marijuana_Legalization_Initiative_(2010)) (last visited

lines, I read Proposition 19 as indifferent to raising taxation. For example, it would have allowed any individual to grow marijuana on a twenty-five square foot plot—marijuana that would have been free from taxation.²¹⁵

Getting a good estimate of how much marijuana would have been produced per plot and throughout the state is difficult. Online sources suggest different estimates of the quantity of marijuana a twenty-five square foot plot would yield.²¹⁶ Estimates also vary depending on whether a person grows marijuana indoors or outdoors (indoor growers have lower yields, but can grow multiple crops in a year).²¹⁷ Further, I could not find an estimate of the number of potential small growers of marijuana. But one website suggests the potential revenue loss that would have resulted from the twenty-five square foot exemption. Remarkably, it estimates that fifty percent of Humboldt County residents have some involvement in the marijuana trade.²¹⁸ Further, it provides a comparison of two indoor gardens, one in which the producer uses only four-thousand-watt light bulbs, the other fifteen similar-wattage bulbs.²¹⁹ The website also indicates that an indoor crop can mature in as little as fifty-seven days.²²⁰ The two hypothetical gardens would yield net revenues of about \$72,000 and \$256,000 a year, and net profits of \$40,000 and \$193,000.²²¹ Another question is how easily one could grow marijuana. But a quick Google search reveals a vast literature on how to cultivate marijuana.²²² Had the initiative passed, its implementation may have disappointed voters who hoped for a source of significant tax revenue.

Another lesson that policy makers should learn from our experience with Propositions 215 and 19 is that the success of reform depends on the position taken by the federal government. While federal prosecutors have little interest in prosecuting individual users, it remains a federal offense; individuals proceed at their own risk by using marijuana.²²³ More importantly, individuals interested in commercial enterprises, like marijuana dispensaries, are dependent on a hands-off position from federal authorities.²²⁴ Absent a change in federal law, a change

June 6, 2011) (on file with the *McGeorge Law Review*).

215. Cal. Proposition 19 art. 5, § 11300(a)(2) (2010).

216. See Russ Belville, *How Much Marijuana Can Grow in 25 Square Foot Garden?*, NORML, Sept. 23, 2010, <http://www.opposingviews.com/i/how-much-marijuana-can-grow-in-25-square-foot-garden> (on file with the *McGeorge Law Review*).

217. *Id.*

218. See *How Much Money Do Pot Growers Make?*, HUMBOLDT COUNTY NEWS (Jan. 2, 2011) http://news.humcount.com/How_Much_Money_Do_Pot_Growers_Make_.html (on file with the *McGeorge Law Review*).

219. Belville, *supra* note 216.

220. *Id.*

221. *Id.*

222. See, e.g., *How to Grow Marijuana*, <http://howtogrowmarijuana.com/> (last visited June 23, 2011) (on file with the *McGeorge Law Review*).

223. 21 U.S.C.A. § 844 (West 1999).

224. See *supra* notes 77–94 and accompanying text.

in administrations could render their investments worthless.²²⁵ Even worse, their success may depend on the position of different agencies within the federal government; for example, if the IRS can enforce provisions preventing dispensaries from deducting business expenses, many dispensaries—the ones most likely to comply with the law—will be driven out of business.²²⁶ And federal forbearance is almost certainly necessary if states desire to maximize tax revenues from the marijuana trade.²²⁷

Given its long history of antipathy towards marijuana,²²⁸ the federal government may be slower than states to legalize marijuana. States' representatives in Congress can push for different kinds of local options. For example, senators or representatives have occasionally called for forbearance from prosecution for medical marijuana users and dispensaries.²²⁹ Beyond that, states could enact legislation reclassifying marijuana to allow doctors to prescribe it or urge local options regarding legalization.²³⁰ Without federal cooperation, maximizing tax benefits and enacting coherent reforms are likely to be unsuccessful.

Assuming that we legalize marijuana use and production and that the legislative process is preferable to the initiative process, what questions should policymakers focus on? If their goal is to raise revenue through taxation, policymakers must address several intertwined questions. For example, who would be allowed to grow marijuana? Proposition 19 would have enabled anyone over the age of twenty-one to grow a limited amount for personal use and did not otherwise limit who could enter the commercial market.²³¹ But the ability to tax marijuana may depend on who is allowed to grow it. Obviously, if the state or federal government had a monopoly, it could maximize revenue. While the federal government has been growing marijuana for its limited Compassionate Use Program,²³² no one has seriously proposed a state or federal monopoly.²³³

225. See Ray Stern, *Medical Marijuana: Prop 203's Passage Means a New Billion-Dollar Industry for Arizona*, PHOENIX NEW TIMES, Nov. 25, 2010, <http://www.phoenixnewtimes.com/2010-11-25/news/medical-marijuana-prop-203-s-passage-means-a-new-billion-dollar-industry-for-arizona/> (on file with the *McGeorge Law Review*).

226. See generally Hecht, *supra* note 91.

227. See *supra* notes 79–92 and accompanying text.

228. Vitiello, *supra* note 25, at 748–58.

229. Scott Nath, *Three Medical Marijuana Protection Bills Introduced in the United States Congress*, PROHIBITION'S END, May 25, 2011, <http://prohibitionsend.com/2011/05/25/three-medical-marijuana-protection-bills-introduced-in-the-u-s-congress/> (on file with the *McGeorge Law Review*).

230. 21 U.S.C.A. § 812(c) (West 1999).

231. Cal. Proposition 19 art. 5 § 11300(a)(2) (2010).

232. *Despite Marijuana Furor, 8 Users Get Drug From the Government*, N.Y. TIMES, Dec. 01, 1996, available at <http://www.nytimes.com/1996/12/01/us/despite-marijuana-furor-8-users-get-drug-from-the-government.html> (on file with the *McGeorge Law Review*).

233. Joel Connelly, *Should State Liquor Stores Sell Cannabis?*, SEATTLE POST INTELLIGENCER, Jan. 26, 2011, <http://www.seattlepi.com/local/connelly/article/Should-state-liquor-stores-sell-cannabis-982385.php> (on file with the *McGeorge Law Review*).

At the other extreme would be a completely open market,²³⁴ which poses some hard questions. Presumably, the price of marijuana would drop significantly as more participants enter the market, and because an illegal market reflects added costs associated with the risks inherent in illegal conduct.²³⁵ Would lower cost increase demand? And if so, by how much?²³⁶ The Rand Corporation's report considered that question without coming to any firm conclusion.²³⁷ In my *Wisconsin Law Review* article, I explored some competing arguments that left uncertain whether demand would increase dramatically.²³⁸ One factor that might influence demand is whether the state allows producers to advertise.²³⁹ Given that the government can limit cigarette advertising,²⁴⁰ the state or federal government could restrict marijuana ads. But if the government's goal is to increase tax revenue, it may be tempted to allow advertising.

Another problem with an open market is that some suppliers may circumvent the applicable taxing scheme. For example, some proponents of legalization have argued that legalizing marijuana may impair Mexican drug cartels.²⁴¹ Open markets would reduce the risk of criminal prosecution; but given that members of drug cartels have been willing to violate the law, one wonders if they will enter the legal market or will try to circumvent paying taxes. That in turn raises an important law enforcement question: if marijuana is legalized, what penalties are available for sellers who do not pay marijuana taxes?²⁴² Proponents of legalization have overstated the savings that we will likely realize by legalizing marijuana.²⁴³ If the criminal justice system ceases to prosecute marijuana offenses, participants in the marijuana trade will have little incentive to pay marijuana taxes. In most legalization scenarios, we face a hard choice between reducing criminal justice cases and raising tax revenue. Raising tax revenue

234. *See id.*

235. *See* Rosalie L. Pacula, *Examining the Impact of Marijuana Legalization on Marijuana Consumption: Insights from the Economics Literature* (RAND, Working Paper No. WR-770-RC, 2010), available at http://www.rand.org/content/dam/rand/pubs/working_papers/2010/RAND_WR770.pdf (on file with the *McGeorge Law Review*).

236. *See id.*

237. *See id.*

238. *Supra* note 3, at 1377–80.

239. *Insights on the Effects of Marijuana Legalization on Prices and Consumption: Hearing Before the Assemb. Public Safety Comm. and Sen. Public Safety Comm.*, 2007 Leg., 2010–2011 Sess. (Cal. 2010) (statement of Beau Kilmer, Co-Director, RAND Drug Policy Research Center), available at http://www.rand.org/content/dam/rand/pubs/testimonies/2010/RAND_CT351.pdf (on file with the *McGeorge Law Review*).

240. *Cf.* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (upholding state regulation of commercial speech where “government interest is substantial” and “the regulation directly advances the government interest”).

241. Joseph D. McNamara, *Yes on Proposition 19 Ballot Argument*, YES ON PROP 19 (2010), <http://yeson19.com/node/109> (last visited on May 21, 2011) (on file with the *McGeorge Law Review*).

242. *See* Cal. Proposition 19 art. 5 § 11302(b) (2010); *cf.* Vitiello, *supra* note 3, at 1374 (discussing the failure of AB 390 to address the penalties for sellers who do not pay taxes).

243. *See* Vitiello, *supra* note 3, at 1374–75.

requires a significant threat of criminal prosecution for the failure to pay marijuana taxes.²⁴⁴

One reason why Americans are more compliant in paying taxes than are citizens in some other countries is that employers deduct taxes from employees' wages, limiting the ability of tax payers to hide their income.²⁴⁵ So if we are serious about raising tax revenue through the distribution of marijuana, what about inviting Big Tobacco or other large corporations into the market? For all of its evils, Big Tobacco complies with a host of regulations, including collection and payment of state and federal taxes.²⁴⁶ Currently, Big Tobacco disavows any interest in entering the marijuana production market, probably because of concern about image.²⁴⁷ But that could change. Inviting Big Tobacco into the market plays into the fears of marijuana producers and conspiracy theorists.²⁴⁸

While allowing large corporations to produce marijuana would increase revenue streams, it could have a significant downside. Currently, California has a shadow economy, where thousands of employees work illegally or in the gray area. By one estimate, half Humboldt County's residents have some involvement in the marijuana trade.²⁴⁹ Legalizing marijuana provides the advantage of bringing those people out of the cold and into the legal work force. Would they do so if Big Tobacco controlled distribution of marijuana? These are the kinds of hard policy questions that need to be resolved as part of the legalization process.

V. CONCLUSION

The debate over marijuana is reminiscent of debates surrounding the culture wars. Armed with enough plausible evidence to support their sides, the partisans are not going to give ground.²⁵⁰ Rather than weighing in on that never-ending story, I have focused on a different point.

244. *Id.* at 1374.

245. Cf. Charlotte Twight, *Evolution of Federal Income Tax Withholding: The Machinery of Institutional Change*, 14 CATO J. 359, 360–62 (1995), available at <http://www.cato.org/pubs/journal/cj14n3/cj14n3-1.pdf> (on file with the *McGeorge Law Review*) (discussing the psychology of the withholding system and tax compliance).

246. See generally *History of Tobacco Regulation*, SCHAFFER LIBRARY OF DRUG POLICY, available at <http://www.druglibrary.org/schaffer/library/studies/nc/nc2b.htm> (last visited May 25, 2011) (on file with the *McGeorge Law Review*).

247. Peter Hecht, *Weed Wars: Big Tobacco Snuffs Out Rumor of California Marijuana Interest*, SACRAMENTO BEE, Sept. 27, 2010, <http://blogs.sacbee.com/weed-wars/2010/09/> (on file with the *McGeorge Law Review*).

248. Ed Vulliamy, *Could Marijuana Save California?*, OBSERVER, May 9, 2010, <http://www.guardian.co.uk/world/2010/may/09/marijuana-legalise-california-drugs-cartels> (on file with the *McGeorge Law Review*).

249. See *How Much Money Do Pot Growers Make?*, *supra* note 217.

250. MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* xiv (Geoffrey R. Stone ed., 2007).

Marijuana is big business, largely untaxed, and remarkably resistant to eradication efforts.²⁵¹ We are shortsighted not to tax a business worth billions of dollars. And viewed objectively, the potential to tax marijuana may give legalization efforts the final push.²⁵² As a result, questions about what we want a post-legalization world to look like are far more interesting than the old pro and con debate. My hope is the policymakers will begin that conversation in earnest sooner rather than later.

As I suggested above, an advantage of the legislative process over the initiative process is that the legislative process can involve greater transparency and can accommodate legitimate objections of opponents.²⁵³ I would urge law enforcement and other traditional prohibitionists to come to the table to voice their legitimate concerns. We ended up with Proposition 215—our version of the Trojan horse—because of then-Governor Wilson’s reflexive tough-on-crime stance and his resulting veto of AB 1529.²⁵⁴

Similarly, hard-line local law enforcement efforts have hindered reasonable regulation of medical marijuana.²⁵⁵ Members of law enforcement do raise legitimate concerns. For example, what about crime in neighborhoods where dispensaries have opened?²⁵⁶ What about drug-impaired drivers?²⁵⁷ Cooperation between law enforcement and medical marijuana providers has reduced or eliminated the parade of horrors raised by marijuana opponents, like rampant crime in neighborhoods with dispensaries.²⁵⁸

My hope is that this symposium can be part of a more sensible debate about how, not whether, to legalize and regulate marijuana.

251. See *supra* note 145 and accompanying text.

252. See *supra* notes 144–67 and accompanying text.

253. See *supra* notes 98–101 and accompanying text.

254. See *supra* notes 35–37 and accompanying text.

255. See *supra* notes 74–75, 82 and accompanying text.

256. John Ingold & Nancy Lofholm, *Medical-Marijuana Dispensaries’ Effect on Crime Unclear*, DENVER POST, Jan. 24, 2011, available at http://www.denverpost.com/news/marijuana/ci_17178820 (on file with the *McGeorge Law Review*).

257. Tom Fudge, *Will Prop. 19 Cause You to Drive While Stoned?*, KPBS, Oct. 27, 2010, <http://www.kpbs.org/news/2010/oct/27/will-prop-19-cause-you-drive-while-stoned/> (on file with the *McGeorge Law Review*).

258. *Impact of Dispensaries and Regulations on Communities*, AMERICANS FOR SAFE ACCESS, available at <http://www.safeaccessnow.org/article.php?id=4339> (last visited June 23, 2011) (on file with the *McGeorge Law Review*).