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A History of United States Cannabis Law

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I. INTRODUCTION

Perhaps the best way to understand early-Twenty-First Century state and federal cannabis law in the United States is to examine the relevant history. Justice Oliver Wendell Holmes, Jr.'s statement is apropos: "[A] page of history is worth a volume of logic."[1] This article begins by discussing the early history of cannabis and its uses. Next, this article examines the first state and federal marijuana laws. After a brief comparison of alcohol prohibition to cannabis prohibition, this article addresses cannabis laws from the 1920s to the early 1950s. Then, this article takes up the reorganization of the federal drug regulatory bureaucracy since its inception. Addressing the current era of cannabis laws and regulations, this article recounts how marijuana became a Schedule I drug. The discussion then turns to changing social attitudes towards cannabis as reflected in presidential politics and popular culture. Starting with the late-1990s, this article describes the development of state and federal cannabis laws and policies up to the present day.

By definition, the term "present day" temporally fixes this article to late 2020. This is problematic because cannabis laws constantly change. It is entirely possible that this article will be rendered obsolete in the near future. For example, currently-pending, federal legislation could fundamentally change cannabis law and policy.[2] Indeed, on November 20, 2019, the U.S. House of Representatives Judiciary Committee passed the Marijuana Opportunity Reinvestment and Expungement Act of 2019 (MORE Act).[3] This legislation would, *inter alia*, remove cannabis from the federal Controlled Substances Act and allow the individual States to regulate the cannabis industry within their respective borders.[4] Thus, this article shall avoid attempting to predict the future. In any event, per Justice Holmes, the past is always relevant to the future.

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[1] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

[2] *See*, *e.g.*, Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. (2019); Strengthening the Tenth Amendment Through Entrusting States Act, S. 3032, 116th Cong. (2019); Regulate Marijuana Like Alcohol Act, H.R. 420, 116th Cong. (2019).

[3] *See* Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3848, 116th Cong. (2019).

[4] *See generally id.*

II. EARLY HISTORY OF CANNABIS

Cannabis has historically been known by several names, such as "hemp," "Indian hemp," "marywana," "maraguana," and "marihuana."[5] Official Jamaican government documents use the term "ganja."[6] "Marihuana," with an "H," is the traditional spelling in the United States, particularly in official, government documents.[7] "Marijuana," with a "J," is the popular, contemporary spelling.[8] The preferred term among pro-cannabis advocates is "cannabis" because the term "marihuana" is associated with early-Twentieth Century, anti-cannabis propaganda to brand the drug as a foreign, and therefore dangerous, substance.[9] "Cannabis" is the Latin form of the Greek word "κάνναβις."

Researchers from the University of Vermont have recently concluded that cannabis originated in the Tibetan Plateau twenty-eight million years ago.[10] Hemp cultivation began in Western China in antiquity, and then spread to Central Asia, India, Asia Minor, and Africa.[11] Historically, hemp has had three primary uses: (i) Fiber for rope, twine, cloth, and textiles,(ii) seeds for oil and birdseed, and (iii) resin for medicine, religious rituals, and as an intoxicant.[12] Hemp was used medicinally in Ayurvedic medicine in India as early as the Fourth Century B.C.E.[13] By the Fourteenth Century, hemp cultivation began in Europe.[14]

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[5] *See* RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIJUANA CONVICTION:A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES XIX (1974).

[6] *See*, *e.g.*, Jamaican Dangerous Drugs (Amendment) Act, 2015, §3(a) (defining "ganja").

[7] *See*, *e.g.*, Ohio R.C. §2925.01(D)(1) (using the term "marihuana"); Michigan statutes §§333.26421-26430 ("Michigan Medical Marihuana Act"); 21 U.S.C. §812, Schedule I(c)(10) (using the term "marihuana").

[8] *See*, *e.g.*, Ohio R.C. Chapter 3796 ("Ohio Medical Marijuana Control Program"). *See also Federal Register*, Vol. 84, No. 211, p. 58523, fn. 2 ("Although the statutory spelling is "marihuana" in the Controlled Substances Act, this rule [(*i.e.*, 7 C.F.R. Part 990)] uses the more commonly used spelling of marijuana.").

[9] *But see* Robert A. Mikos & Cindy D. Kam, *Has the "M" word been framed? Marijuana, cannabis, and public opinion*, Plos One (Oct. 31, 2019) (https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0224289) (last visited Sept. 25, 2020) ("Throughout each of our tests, ***we find no evidence*** to suggest that the public distinguishes between the terms "marijuana" and "cannabis." We conclude with implications of our findings for debates over marijuana/cannabis policy and for framing in policy discourse more generally.") (emphasis in original).

[10] *See Origins of cannabis traced back 28 million years to the Tibetan Plateau* https://www.earth.com/news/origins- cannabis-tibetan-plateau/ (last visited Sept. 25, 2020).

[11] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 1-2.

[12] *See id.* at 1.

[13] *See* Ethan Russo, M.D., *Historical Review of Cannabis for Pain Relief and Addiction Treatment*, p. 4 (2018).

[14] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 2.

Carl Linnaeus first classified the genus *Cannabis* in 1753.[15] Within the *Cannabis* genus are the species *C. sativa* and *C. indica*. Some taxonomists recognize a third species: *C. ruderalis.* However, others classify *C. ruderalis* as a sub-species of *C. sativa*.[16] Hemp is a variant of *C. sativa*. Sub-varieties of cannabis are traditionally known as "strains." However, the term "cultivar" is enjoying increasing currency in the cannabis industry.

The Spanish introduced hemp to the Western Hemisphere in modern-day Chile in 1545.[17] In the modern-day United States, hemp cultivation began in (i) 1611 in Jamestown, Virginia, (ii) 1632 in Massachusetts, (iii) 1775 in Kentucky, and (iv) 1835 in Missouri.[18] By the 1850s, hemp was grown in California, Illinois, Indiana, and Iowa, and Nebraska.[19] Hemp processing occurred throughout the Great Lakes region.[20]In the mid-1800s, cotton replaced hemp as a textile source. This caused hemp production to decline. However, hemp continued to grow wildly throughout the United States.[21]

In 1839, Irish physician William B. O'Shaughnessy, M.D., published a paper entitled *On the Preparations of the Indian Hemp, or Gunjah (Cannabis Indica)*.[22] Dr. O'Shaughnessy's paper discussed, *inter alia*, the use of cannabis to successfully treat rheumatic disorders.[23] In 1848, Scottish physician Robert A. Christison authored *A dispensatory of commentary on the pharmacopoeias of Great Britain and the United States*, which stated, in part:

> Indian hemp has been used as antispasmodic in hydrophobia, tetanus, malignant cholera, and infantile convulsions, with marked relief in repeated instances. Some cases of tetanus appear to have been cured in the East-Indies by it;—It has been employed with success as an anodyne in chronic rheumatism,

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[15] *See id.* at 1.

[16] *See* 84 Fed. Reg. 58,531 (Oct. 31, 2019) (to be codified at 7 C.F.R. pt 990) ("Cannabis is a genus of flowering plants in the family Cannabaceae of which *Cannabis sativa* is a species, and *Cannabis indica* and *Cannabis ruderalis* are subspecies thereof.").

[17] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 2-3.

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.* at 58,540 ("The production of hemp has a long history in the United States Prior to the mid-20th Century, hemp had been cultivated in the U.S. for hundreds of years to make flags, sails, rope, and paper. The first regulation of hemp occurred in 1937 with the Marihuana Tax Act, which required all producers of the species *Cannabis sativa* to register with and apply for a license from the Federal Government. The "Hemp for Victory" Campaign during World War II promoted the production of hemp for rope to be used by U.S. military forces, but at the end of the war, the requirements in the Marihuana Tax Act resumed. In 1970, Congress passed the Controlled Substances Act, granting the Attorney General the authority to regulate production of hemp.") (capitalization in original).

[22] *See* RUSSO, *supra* note 13, at 21.

[23] *See id.*

> toothache, and other varieties of neuralgia. I have used it a good deal and with great success, in diseases at large, to obtain sleep.[24]

Military physicians used cannabis as an analgesic in the treatment of combat injuries during the U.S. Civil War (1861-1865).[25] Finally, in 1891, American physician J.B. Mattison published an important paper in the *St. Louis Medical and Surgical Journal*.[26] Dr. Mattison noted the effectiveness of cannabis in treating cocaine and opiate addiction.[27] Moreover, he reported success in treating migraine headaches with cannabis:

> In headache, periodical or long continued, one half to two grains solid extract may be given each hour or two till the attack is arrested, and then continued in a similar dose, morning and night, for weeks or months. It is important not to quit the drug during a respite from pain. Recollect that hemp eases pain without disturbing stomach and secretions so often as opium, and that competent men think it not only calmative, but curative.[28]

Thus, the Nineteenth Century saw the beginnings of serious scientific study of the medicinal benefits of cannabis.

By the late-Nineteenth to early-Twentieth Centuries, cannabis use in the United States was largely confined to medicinal applications. Moreover, there was not a significant degree of recreational cannabis use in the United States during this period. Instead, Americans at this time recreationally used alcohol, tobacco, opium, morphine, and cocaine.[29] In Mexico, on the other hand, smoking cannabis as an intoxicant was common from the 1880s onward. For example, Francisco "Pancho" Villa's soldiers were known to smoke cannabis.[30] Recreational cannabis consumption also occurred in the Caribbean. The practice of smoking cannabis as an intoxicant was imported from Mexico to the United States along the Rio Grande River in the early-1900s.[31] Caribbean merchants and sailors also introduced cannabis into cities along the Gulf of

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[24] *Id.* at 24.

[25] *See id.* at 25 (quoting 4 *The Medical and Surgical History of the Civil War* (1992)).

[26] *See id.* at 33.

[27] *See id.* ("In these, often, [cannabis] has proved an efficient substitute for the poppy.").

[28] *Id.* at 34 (quoting *Cannabis indica as an anodyne and hypnotic*, 61 *St. Louis Med. Surg. J.* 265-71 (1891)). In addition to the aforementioned Nineteenth Century medical cannabis researchers, there were Edward A. Birch, John Clendinning, M.D., Thomas D. Crothers, M.D., Michael Donovan, William R. Gowers, Richard Greene, M.D., Hobart Hare, M.D., Silas Weir Mitchell, John Russell Reynolds, and Édouard Séguin. Working primarily in England, France, India, Ireland, and the United States, these individuals pioneered the study of medicinal cannabis. *See id.* at 22-35.

[29] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 9.

[30] *See id.* at 4-5.

[31] *See id. See also id.* at 32-34.

Mexico such as New Orleans, Houston, and Galveston.[32]

III. THE FIRST STATE AND FEDERAL MARIJUANA LAWS

A. Early Federal Legislation

The federal government began legislatively controlling drugs in 1906 when Congress passed the Pure Food and Drug Act. This act was "the first major federal drug legislation to require labeling of all preparations containing more than prescribed amounts of opiates . . ."[33] Three years later, federal legislators passed the "Act to Prohibit Importation and Use of Opium," which "barred the importation of opium at other than specified ports and for other than medicinal use."[34] These federal laws were the first steps in what would ultimately become federal cannabis prohibition.

B. 1914 El Paso, Texas City Ordinance Banning Sale and Possession of Marijuana

Given that recreational cannabis was introduced into the United States primarily along the United States-Mexico border, it is not a mere coincidence that perhaps the first, express cannabis prohibition law arose in a border city on the Rio Grande River: El Paso, Texas. In 1914, El Paso enacted a city ordinance which banned the sale and possession of cannabis.[35] The rationale for this ordinance was the belief that cannabis use caused violent behavior among Mexicans, "Negroes, prostitutes, pimps, and a criminal class of whites."[36] This rationale—the Criminality Theory—was representative of the prevailing view among policymakers of the time. Here, one can clearly see the racism and class bias that would inform cannabis law and policy ever since.

C. Harrison Narcotics Tax Act

In 1914, Congress passed the Opium and Coca Leaves Trade Restrictions Act. This law is better known as the Harrison Narcotics Tax Act, named after its sponsor Representative Francis B. Harrison (D-NY). This law "required registration and payment of an occupational tax by all persons who

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[32] *See id.* at 42.

[33] *Id.* at 15.

[34] *Id.*

[35] *See id.* at 34.

[36] *Report of Investigation in the State of Texas, Particularly along the Mexican Border, of the Traffic in, and Consumption of the Drug Generally known as "Indian Hemp," or* Cannabis Indica*, known in Mexico and States Bordering on the Rio Grande as "Marihuana'; Sometimes also referred to as "Rosa Maria," or "Juanita."* Federal Bureau of Narcotics files (Apr. 13, 1917), p. 13.http://antiquecannabisbook.com/TexasReport1917/TexasReport1917.htm (last visited Sept. 25, 2020).

imported, produced, dealt in, sold, or gave away opium and coca leaves and their derivatives."[37]As American government was understood in 1914, only States could regulate the practice of medicine, and the federal government could not do so unless the activity involved interstate commerce.[38] But, the federal government expressly has the constitutional power to tax.[39] So, the courts upheld the Harrison Act on revenue raising grounds. Eventually, the Harrison Act effectively became a prohibition law.[40] Between 1914 and 1931, the individual States responded to the Harrison Act by passing their own laws criminalizing possession of cocaine, opiates, and drug paraphernalia.[41] These State laws were known as "Little Harrison Acts."

D. Narcotic Drug Import and Export Act and the Federal Narcotics Control Board

Congress passed the Narcotic Drug Import and Export Act in 1922. This law (i) established the Federal Narcotics Control Board,[42] and (ii) made drug possession a federal crime.[43] At this time, policymakers did not use the term "narcotic" according to its scientific definition. Instead, "narcotic" was understood to mean any drug used by individuals of low socio-economic standing:

> The most important feature of this initial prohibitory phase is that marihuana was inevitably viewed as a "narcotic" drug, thereby invoking the broad consensus underlying the nation's recently enunciated antinarcotics policy. This classification emerged primarily from the drug's alien character. Although use of some drugs— alcohol and tobacco—was indigenous to American life, the use of "narcotics" for pleasure was not. Evidently, drugs associated with ethnic minorities and with otherwise "immoral" populations were automatically viewed as "narcotics."[44]

Thus, cannabis was classified as a narcotic. And, because narcotics were outlawed, cannabis was outlawed.

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[37] BONNIE & WHITEBREAD II, *supra* note 5, at 16.

[38] *See id.* at 61.

[39] *See* U.S. CONST., art. I, § 8.

[40] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 19-20.

[41] *See id.* at 38-39, 52.

[42] *See* part VIII, *infra* (discussing the Federal Narcotics Control Board).

[43] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 20.

[44] *Id.* at 51.

IV. ALCOHOL PROHIBITION & MARIJUANA PROHIBITION

Narcotics prohibition and the broader War on Drugs are often compared to alcohol prohibition. The Eighteenth Amendment to the U.S. Constitution (1917) provides: "The manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all the territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." The Volstead Act, enacted in 1919, implemented the Eighteenth Amendment.

Alcohol prohibition was animated by concerns over excessive consumption, political corruption, and the "evils" of saloons as dens of vice and anti-social activity.[45] For example, some men would get drunk after work and then go home and physically abuse their wives and children. Conscientious prohibitionists sought to remedy this horrible situation. Prohibitionists were also motivated by nativism, however. Italian immigrants drank wine. German immigrants drank beer. Irish immigrants drank whiskey. Moreover, saloons served as community centers and places of political organization for these immigrant communities. By criminalizing alcohol, nativist prohibitionists could strike a blow against these immigrants' cultures and fledgling political power.

Narcotic prohibition was animated by concerns over "immorality" and disfavored groups like immigrants and ethnic minorities.[46] Therefore, some historians have argued that alcohol prohibition and narcotic prohibition merely coincided in time and that they were caused by separate and distinct social forces.[47] More recent historiography holds that alcohol prohibition and narcotics prohibition are closely related phenomena. For example, historian Lisa McGirr argues that alcohol prohibition laid the foundation for the War on Drugs and the dramatic increase in federal incarceration of drug offenders.[48] In any event, beginning in the late-Twentieth Century, cannabis legalization advocates pointed to the history and unintended consequences of alcohol prohibition as an argument against cannabis prohibition.[49]

V. 1920S TO 1940S

A. Uniform State Narcotic Drug Act and Anslinger's Army

On June 14, 1930, Congress abolished the Federal Narcotics Control Board and replaced it with the Federal Bureau of Narcotics (FBN). The FBN

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[45] *See id.* at 21-27.

[46] *See id.* at 27.

[47] *See id.* at 26-27.

[48] *See generally* LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE (2016).

[49] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 21-22, 26-27, 28-31.

was within the Treasury Department.[50] Approximately one month later, President Hoover and Treasury Secretary Andrew Mellon appointed Harry J. Anslinger commissioner of the FBN. Anslinger served as FBN commissioner until 1962.[51] Anslinger is a hero or a villain depending on which side of the cannabis issue one supports. Anslinger's views on cannabis are summed up in his 1937 statement: "If the hideous monster Frankenstein came face to face with the monster Marihuana, he would drop dead of fright."[52]

During the 1920s and 1930s, rising crime and anti-Mexican bias lead to calls for cannabis prohibition.[53]Anslinger and the FBN enthusiastically answered that call. However, at this time in American history, federal government power was more circumscribed than it is in the modern era. As the U.S. Constitution was then-understood, the federal government had very limited regulatory power because most such powers were still wielded by the individual States. This was before the New Deal and its expansion of federal authority. So, rather than seek a federal strategy, Anslinger pursued a national regulatory regime through uniform State laws. Under Anslinger's influence, the National Conference of Commissioners on Uniform State Laws adopted the Uniform State Narcotic Drug Act on September 15, 1932. Importantly, this act classified cannabis as a narcotic.[54]

Once the Uniform Act was published, Anslinger and the FBN vigorously lobbied State legislatures to adopt it.[55] However, by March 1935, only ten States had done so.[56] So, the FBN began a propaganda campaign against the "Marihuana Menace." Anslinger marshalled the Hearst newspaper chain, the Women's Christian Temperance Union, the World Narcotic Defense Association, the General Federation of Women's Clubs, the Young Women's Christian Association, the National Parent-Teacher Association, and the National Councils of Catholic Men and Women in this lobbying effort.[57] Collectively, these groups were known as Anslinger's Army. The infamous 1936 film *Reefer Madness* (also known as *Tell Your Children* and *Doped Youth* depending on where and when the film was shown) was part of Anslinger's propaganda effort. Within one year of the start of Anslinger's crusade, twenty-eight States had adopted the Uniform Act.[58] Notably, during this time, the American pharmaceutical industry resisted cannabis prohibition on the grounds

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[50] *See id.* at 65-66.

[51] *See id.* at 66.

[52] *See id.* at 117.

[53] *See id.* at 69-75, 83.

[54] *See id.* at 90.

[55] *See id.* at 94-95.

[56] *See id.* at 95.

[57] *See id.* at 95-111.

[58] *See id.* at 115.

that cannabis had legitimate, medicinal benefits.[59]

It has been suggested that Anslinger's antipathy to cannabis was due to his family's financial interests. Mellon appointed Anslinger to be the first commissioner of the FBN. Anslinger was married to Mellon's niece. Mellon had a financial interest in a whiskey distillery. Therefore, the theory goes, Anslinger attacked cannabis in order to help Mellon's whiskey business. This theory enjoys some popularity among Anslinger's critics. However, there is little direct historical evidence to support it.

B. Sonzinsky and the Marihuana Tax Act

As described above, the Harrison Narcotics Tax Act (1914) was upheld as a revenue raising law pursuant to Congress's tax power. By the late-1930s, however, the law operated more as a drug prohibition statute and less as a revenue raising law.[60]This presented a potential problem for narcotics prohibitionists: May a *de jure* tax operate as a *de facto* prohibition? This issue was resolved in *Sonzinsky v. United States*.[61]

In response to the gun violence associated with alcohol prohibition, Congress passed the National Firearms Act in 1934. This law required gun sellers to pay a $200 tax for every gun that they sold. Sonzinsky was convicted of violating this act and he appealed. Ultimately, the Supreme Court of the United States upheld the law as a "prohibitive tax." That is, a tax primarily designed to prohibit conduct and not to raise revenue.

Now that *Sonzinsky* had endorsed the legality of prohibitive taxes, Congress passed the Marihuana Tax Act of 1937 which placed a tax on the sale of cannabis.[62] Anslinger aggressively lobbied Congress in favor of the Marihuana Tax Act.[63] Just as the pharmaceutical industry opposed the Uniform State Narcotic Drug Act, the American Medical Association objected to the Marihuana Tax Act on the grounds that it would stop research on medical cannabis.[64] Ultimately, the New Deal Congress was predisposed to robust federal action to prohibitively tax cannabis. As a result of the Marihuana Tax Act, research on medicinal cannabis became virtually nonexistent, possession and transfer of cannabis was a federal crime, and most cannabis in the United States grew wildly.[65] The Marihuana Tax Act remained in effect until 1969 when it was declared unconstitutional on Fifth Amendment grounds (self-

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[59] *See id.* at 118.

[60] *See id.* at 124-26.

[61] 300 U.S. 506 (1937).

[62] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 126.

[63] *See id.* at 154.

[64] *See id.* at 164-65.

[65] *See generally id.* at 175-86.

incrimination) in *Leary v. United States*.[66]

C. LaGuardia Report

An important dissent to Anslinger's public policy efforts was *The Marihuana Problem in the City of New York* (1944) (*i.e.*, the LaGuardia Report).[67] Mayor Fiorello LaGuardia commissioned this report and the New York Academy of Medicine prepared it.[68]The LaGuardia Report was a comprehensive study of the cannabis phenomenon. The report contained a sociological study, an examination of the mental attitudes of cannabis users toward society, a report on cannabis use among school children, a clinical study, a study of the "Marihuana Cigarette," discussions of psychotic episodes, organic and systemic functions, psychophysical functions, and intellectual functioning, and a comparison between users and non-users regarding mental and physical deterioration.[69] The LaGuardia Report contained several conclusions. Among these conclusions are:

> 7. The practice of smoking marihuana does not lead to addiction in the medical sense of the word. . . .
>
> 9. The use of marihuana does not lead to morphine or heroin or cocaine addiction and no effort is made to create a market for these narcotics by stimulating the practice of marihuana smoking.
>
> 10. Marihuana is not the determining factor in the commission of major crimes. . . .
>
> 12. Juvenile delinquency is not associated with the practice of smoking marihuana.
>
> 13. The publicity concerning the catastrophic effects of marihuana smoking in New York City is unfounded.[70]

Thus, the LaGuardia Report rejected the Criminality Theory; the underlying theory of cannabis prohibition during the 1930s and 1940s. Moreover, the report presciently rejected the Gateway Drug Theory of cannabis prohibition.

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[66] 395 U.S. 6 (1969).

[67] LaGuardia Report at 1, http://rodneybarnett.net/PDF/Laguardia%20Report%201944.pdf (last visited Sept. 25, 2020).

[68] *See id.* at 1-4.

[69] *See generally id.*

[70] *Id.* at 22.

VI. 1950S: THE GATEWAY DRUG THEORY AND THE BOGGS ACT

In the post-World War II period, cannabis's alleged link to addiction, insanity, and crime (the Criminality Theory) had fallen out of favor. The Criminality Theory had been the traditional rationale for cannabis prohibition.[71] In its place, cannabis prohibitionists began to rely upon (and continue to rely upon) the Gateway Drug Theory. That is, cannabis is allegedly a gateway to other drugs like cocaine, heroin, and morphine.[72]

Based upon the Gateway Drug Theory, Congress passed the Boggs Act in 1951.[73] This law was named for Representative Thomas Hale Boggs, Sr. (D-LA), who sponsored the legislation. The Boggs Act provided uniform penalties for violations of the Narcotic Drug Import and Export Act and the Marihuana Tax Act. These penalties were draconian. For example, a first offense was punishable by two to five years in prison. A second offense was punishable by five to ten years imprisonment and a $2,000 fine. A third offense would result in ten to twenty years in prison and a $2,000 fine. Moreover, for second and subsequent offenses, there was no parole, probation, or suspended sentences.[74]

As with the campaign in support of the Uniform State Narcotic Drug Act of the 1930s, Anslinger and his allies (Anslinger's Army) enthusiastically supported the Boggs Act.[75] Many of the same groups from before joined this lobbying effort, including the Women's Christian Temperance Union, the General Federation of Women's Clubs, and the National Congress of Parents and Teachers.[76] The Boggs Act and its legislative history (including floor statements and committee testimony and exhibits) enshrined the Gateway Drug Theory of cannabis into public policy.[77] By the 1950s, the societal consensus was that cannabis was a gateway drug. Therefore, the reasoning went, harsh criminal penalties were seen as the answer to end cannabis use and trafficking.[78]

From 1951 to 1955, the federal Boggs Act inspired "Little Boggs Acts" among thirty-four States.[79] The Ohio statute (1955) was particularly harsh,

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[71] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 204.

[72] *See id.*

[73] *See id.* at 204.

[74] *See id.* at 210.

[75] *See id.* at 209.

[76] *See id.*

[77] *See id.* at 214-15.

[78] *See id.* at 206-08.

[79] *See id.* at 215, fn. 46. These States are Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See id.* at 218.

imposing a twenty to forty-year sentence for selling narcotics.[80] Under the Louisiana statute (1956), prison sentences ranged from five to ninety-nine years.[81]

As an aside, 1950s America was marked by widespread fear of Communism and the Cold War. Some associated drug trafficking with Communism. For example, in 1951 the Chief of the Los Angeles Police Department claimed that Communists agents were importing cannabis and other drugs in an attempt to corrupt American youth.[82]

VII. 1960s To Early-1970s

By the end of the 1950s, American mainstream society reached a consensus regarding cannabis: (i) cannabis was a "narcotic," and (ii) cannabis use was restricted to people in the lowest socio-economic levels.[83] This consensus began to unravel in the 1960s. In 1963, psychologist Timothy Leary began experimenting with LSD at Harvard. At the same time, the Psychedelic Movement began in San Francisco.[84] These events influenced people throughout the country, particularly young adults. The great social movements of the 1960s created "[a] general loosening of restraints imposed by the legal system on behavior with 'moral' overtones."[85] These movements included the Civil Rights Movement, Free Speech Movement, Anti-Vietnam War Movement, and Environmentalism.[86] Cannabis became a symbol of this counterculture.[87]

By the late-1960s, cannabis use became associated with college students. These college students came from the middle and upper classes and had access to politicians and public opinion-makers.[88] During this time, cannabis use became more widespread beyond the counterculture. Some American universities reported that up to seventy percent of their students used cannabis. Moreover, cannabis use became increasingly common among young professionals, blue-collar workers, and Vietnam War veterans. One watershed event in this changing perception of cannabis users was the 1970 arrest of Robert F. Kennedy Jr., and his cousin Sargent Shriver, III, for marijuana possession.[89] Kennedy is, of course, the son of Senator Robert F. Kennedy and the nephew of both President John F. Kennedy and Senator Edward

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[80] *See id.* at 215.

[81] *See id.*

[82] *See id.* at 209.

[83] *See id.* at 222.

[84] *See id.* at 224.

[85] *Id.*

[86] *See id.*

[87] *See id.* at 227.

[88] *See id.* at 223.

[89] *See id.* at 238.

Kennedy. Shriver is a member of the Kennedy family and the son of the then-U.S. Ambassador to France. Once children of privilege began publicly using cannabis, the old stereotypes of the typical cannabis user were no longer valid. Consequently, cannabis use became less identified with any particular race, class, or age. And, cannabis was no longer associated entirely with radical politics and the hippie lifestyle.[90]

By the early 1970s, the draconian criminal penalties of the federal Boggs Act and the Little Boggs Acts became viewed as unjustly harsh. Police officers began to ignore minor violations, such as possession of small quantities of cannabis and personal use. Judges handed down less severe sentences for marijuana crimes. Courts began diversion programs for first time drug offenders.[91] In 1970, thirty-two States reduced their criminal penalties for cannabis possession.[92]

VIII. REORGANIZATION OF THE FEDERAL DRUG ENFORCEMENT BUREAUCRACY

As described above, federal bureaucratic regulation of cannabis began with the Federal Narcotics Control Board (FNCB) in 1922. The FNCB was within the Treasury Department.

In 1930, the Federal Bureau of Narcotics (FBN) replaced the FNCB. The FBN was also a part of the Treasury Department.

The Bureau of Drug Abuse Control (BDAC) existed from 1966 to 1968 within the Food and Drug Administration.

In 1968, the FBN and BDAC were combined to form the Bureau of Narcotics and Dangerous Drugs (BNDD) within the Justice Department.[93] The BNDD's enforcement policy focused on major drug trafficking and not on possession.[94]

In 1973, the BNDD was combined with other federal offices to form the Drug Enforcement Administration (DEA). These other federal offices included the Office of Drug Abuse Law Enforcement and Special Agents from the Bureau of Customs. Consequently, the DEA had a more pronounced law enforcement character than its predecessors. The DEA remained under the Justice Department.[95]

The salient point here is that federal drug enforcement bureaucracy began in the Treasury Department, briefly included the Food and Drug Administration, and ended up in the Justice Department. This law enforcement orientation toward cannabis policy has been a feature of American public policy

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[90] *See id.* at 237-38.

[91] *See id.* at 239-40.

[92] *See id.* at 279.

[93] *See id.* at 242.

[94] *See id.*

[95] *See* www.dea.gov (last visited Sept. 25, 2020).

since the DEA was established.

IX. How Marijuana Became a Schedule I Drug

For much of the Twentieth Century, American drug policy relied significantly on the Marihuana Tax Act. The Supreme Court of the United States ruled the Marihuana Tax Act unconstitutional in *Leary v. United States*.[96] In 1970, Congress sought to (i) replace the Marihuana Tax Act, and (ii) modernize American drug policy. Congress accomplished this in 1970 when it passed the Comprehensive Drug Abuse Prevention and Control Act and the Controlled Substances Act (CSA).[97]

The CSA created the five-tiered Schedule system. Schedule I substances are defined as follows:

> The findings required for each of the schedules are as follows:
>
> (1) Schedule I.—
>
> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States. [and]
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision."[98]

There was controversy over whether cannabis belonged in Schedule I with conflicting testimony and evidence on both sides. The version of the CSA that ultimately became law empowered the Attorney General to decide whether to schedule new drugs and whether to re- schedule existing drugs, but with binding input from the Secretary of the Health, Education, & Welfare Department.[99] Congress and the U.S. Attorney General provisionally categorized cannabis as a Schedule I drug, but promised to revisit the issue once the science was settled.[100] In order to reach such a scientific consensus, the

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[96] 395 U.S. 6 (1969).

[97] *See* Bonnie & Whitebread II, *supra* note 5, at 244 (The Controlled Substances Act is codified at 21 U.S.C. §801 *et seq.*).

[98] 21 U.S.C. § 812(b)(1)(A)-(C).

[99] *See* Bonnie & Whitebread II, *supra* note 5, at 246. *See also* 21 U.S.C. § 811(a)(1)-(2). Currently, Congress may reclassify cannabis out of Schedule I via legislation. Congress may also legislatively remove cannabis from the CSA schedule system entirely (*i.e.*, deschedule). The U.S. Attorney General may also reclassify cannabis within the CSA schedule system and also deschedule cannabis. *See id.*

[100] *See* Bonnie & Whitebread II, *supra* note 5, at 246-47.

CSA established a Presidential Commission on Marihuana and Drug Abuse.[101]The Committee Report on the House Bill noted: "The Commission will be of aid in determining the appropriate disposition of the [marihuana scheduling] question in the future."[102]

In 1970, then, Congress created the National Commission on Marihuana and Drug Abuse. The Commission became popularly known as the "Shafer Commission" because the chairman was then-Pennsylvania governor Raymond Shafer. The Shafer Commission had thirteen members. The President appointed nine members. Congress appointed the other four.[103] Richard Nixon was the president at this time. In that same year, President Nixon stated: "I am against legalizing marihuana. Even if the Commission does recommend that it be legalized, I will not follow that recommendation."[104] Because of President Nixon's public and well documented opposition to cannabis legalization, critics expected the Shafer Commission to recommend against scheduling cannabis out of Schedule I because the president appointed a supermajority of the commission members.

On May 26, 1971, as the Shafer Commission was preparing its report, President Nixon had a conversation in the Oval Office with White House Chief of Staff H.R. "Bob" Haldeman. The president stated:

> I want a Goddamn strong statement on marijuana. Can I get that out of this sonofabitching . . . Domestic Council[sic]? . . . I mean one on marijuana that just tears the ass out of them. . . .
>
> You know it's a funny thing, every one of the bastards that are out for legalizing marijuana is Jewish. What the Christ is the matter with the Jews, Bob, what is the matter with them? . . .
>
> By God we are going to hit the marijuana thing, and I want to hit it right square in the puss [105]

In approximately the same time period, Haldeman wrote in his diary: "[Nixon] emphasized that you have to face the fact that the whole [drug] problem is really the blacks. The key is to devise a system that recognizes this while not appearing to."[106]

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[101] *See id.* at 247.

[102] *Id.* (quoting U.S. Congress, House, Committee on Interstate and Foreign Commerce, 91st Cong., 2d sess. H. Rept. 91-1444, p. 13).

[103] *See id.* at 255.

[104] *Id.* at 256.

[105] *May 13, 1971 Oval Office Conversation – meeting with Nixon, Haldeman and Ehrlichman*, http://www.csdp.org/research/nixonpot.txt (last visited Sept. 25, 2020).

[106] *Haldeman Diary Says Nixon Railed Against Blacks, Jews in Media : Presidency: Book by late chief of staff is previewed on 'Nightline.' Another ex-aide says remarks show frustration,* (May

Reflecting years later on the Nixon Administration's cannabis policy, Nixon White House Domestic Affairs Advisor John D. Ehrlichman said:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[107]

On March 22, 1972, the Shafer Commission issued its report. Among the report's findings and conclusions, the Shafer Commission rejected both the Criminality Theory and the Gateway Drug Theory and recommended decriminalizing marijuana. A month earlier, the National Institute of Mental Health issued a report that reached the same conclusions.[108]

Two days after the Shafer Commission report was issued, President Nixon said: "I oppose the legalization of marihuana and that includes sale, possession[,] and use. I do not believe you can have effective criminal justice based on a philosophy that something is half-legal and half- illegal."[109] Law enforcement officials also condemned the Shafer Commission's report.[110] In October 1972, President Nixon declared "drug abuse" to be "America's public enemy number one."[111] Finally, on March 10, 1973, President Nixon stated:

> In recent days, there have been proposals to legalize the possession and use of marihuana. I oppose the legalization of the sale, possession[,] or use of marihuana. The line against the use of dangerous drugs is now drawn on this side of marihuana. If we move the line to the other side and accept the use of this drug, how can we draw the line against other illegal drugs? . . . There must continue to be criminal sanctions against the possession, sale[,] or use of marihuana.[112]

1994*)*, http://articles.latimes.com/1994-05-17/news/mn-58835_1_haldeman-diary (last visited Oct. 6, 2020).

[107] Press Release, We Are the Drug Policy Alliance, Top Adviser to Richard Nixon Admitted that 'War on Drugs' was Policy Tool to Go After Anti-War Protestors and 'Black People' (Mar. 22, 2016), https://www.drugpolicy.org/press-release/2016/03/top-adviser-richard-nixon-admitted-war-drugs-was-policy-tool- go-after-anti.

[108] *See* BONNIE & WHITEBREAD II, *supra* note 5, at 262-70.

[109] *Id.* at 273.

[110] *See id.* at 274-75.

[111] *Id.* at 291.

[112] *Id.*

Thus, the Nixon Administration rejected the Shafer Commission report and caused cannabis to remain a Schedule I drug under the CSA. Cannabis has remained a Schedule I drug ever since.

X. CHANGING SOCIAL ATTITUDES TOWARDS MARIJUANA

A. Presidential Politics

President Nixon resigned from office following the Watergate Scandal in 1974. From 1974 to present, subsequent presidential administrations have continued the Nixon Administration's cannabis policies. These administrations are Ford, Carter, Reagan, Bush, Clinton, Bush, Obama, and Trump; Five Republicans and three Democrats. Notable during this period was First Lady Nancy Reagan's "Just Say No" anti-drug campaign which included, of course, cannabis.

Nevertheless, social attitudes have significantly changed over the last five decades. In March 1992, while campaigning for president, Bill Clinton said: "When I was in England, I experimented with marijuana a time or two, and didn't like it. I didn't inhale and I didn't try it again."[113] Three years later, Barack Obama wrote *Dreams From My Father* in advance of his campaign for the Illinois Senate. He republished the book in 2004 after he became a national, public figure. In this memoir, Obama admitted to cannabis and cocaine use.[114] When he ran for president in 2007, the public was largely unconcerned with his drug use history. So, in the span of twelve years, American society went from a presidential candidate who dubiously denied cannabis use to a candidate who openly admitted to it without any negative political consequences.

B. Popular Culture

Evolving social attitudes toward cannabis use are also reflected in popular culture. In 1976, Jamaican Reggae musician Peter Tosh released an album called "Legalize It." Although this song was initially banned in Jamaica, it has become a popular decriminalization anthem. From the mid- 1960s until the 1990s, the band Grateful Dead was strongly associated with marijuana. Their concerts were *de facto* marijuana conventions.[115] In the 1980s and 1990s, a similar phenomenon occurred with the band Phish. Since the 1990s, hip hop artist Snoop Dogg has openly used and advocated in support of cannabis.

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[113] Olivia B. Waxman, *Bill Clinton Said He 'Didn't Inhale' 25 Years Ago—But the History of U.S. Presidents and Drugs Is Much Older* (Mar. 29, 2017), https://time.com/4711887/bill-clinton-didn't-inhale-marijuana-anniversary/ (last visited Nov. 11, 2020).

[114] *See* BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE 93-94 (1995, 2004).

[115] *See* Danny Danko, *25 years of Chem Dog,* (Sept. 7, 2016), http://hightimes.com/grow/25-years-of-chem-dog/ (last visited Nov. 11, 2020).

During the 1970s and 1980s, comedy duo Cheech and Chong had an act which largely involved cannabis-based humor. Tommy Chong remains a prominent cannabis reform advocate. The 1998 cult film *The Big Lebowski* featured a protagonist who frequently smoked cannabis. The television series *That '70s Show* ran from 1998 to 2006 on the Fox Broadcasting Network. This show regularly featured cannabis themed jokes. The popular 2004 film *Harold & Kumar Go To White Castle* is a comedy that tells the story of two young men who smoke cannabis, become hungry, and embark on an odyssey to get fast food. Finally, in 2005, the film *Reefer Madness* was remade as a musical comedy.

These popular culture elements portrayed cannabis use in a positive, often comical, light that reflected a broad social acceptance of cannabis use, and the rejection of the traditional arguments against cannabis use, such as the Criminality and Gateway Drug Theories.

XI. STATE AND FEDERAL MARIJUANA LAWS FROM THE 1990S TO 2010S

A. State Legalization of Medical and Recreational Cannabis

Despite changing social attitudes in favor of cannabis decriminalization, cannabis cultivation, manufacturing, possession, importation, exportation, trafficking, and use remain criminal offenses. The federal statutes are codified at 21 U.S.C. §§841-865 (Part D—Offenses and Penalties). These statutes are the criminal enforcement portion of the Controlled Substances Act. Every State has similar statutes criminalizing cannabis.[116] Nevertheless, States began legalizing cannabis for medicinal use beginning in 1996. Currently, thirty-six jurisdictions have legalized medical cannabis:

1996	California
1998	Alaska, Oregon, Washington
1999	Maine
2000	Colorado, Hawaii, Nevada
2004	Montana, Vermont
2006	Rhode Island
2007	New Mexico
2008	Michigan
2010	Arizona, District of Columbia, New Jersey
2011	Delaware
2012	Connecticut, Massachusetts
2013	Illinois, New Hampshire
2014	Maryland, Minnesota, New York
2016	Arkansas, Florida, Louisiana, North Dakota, Ohio, Pennsylvania
2017	West Virginia
2018	Missouri, Oklahoma, Utah

[116] *See*, *e.g.*, Ohio Rev. Code Ann. § 2925 (West 2020).

2020 Mississippi, South Dakota[117]

If one includes cannabidiol[118] types of medical cannabis[119], then the following seventeen States may be added to the above list:

2014 Alabama, Iowa, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Utah, Wisconsin
2015 Georgia, Oklahoma, Texas, Virginia, Wyoming
2017 Indiana, South Dakota
2018 Kansas[120]

Going further, sixteen jurisdictions have currently legalized non-medical, adult use, recreational cannabis:

2012 Colorado, Washington
2014 Alaska, District of Columbia, Oregon
2016 California, Maine, Massachusetts, Nevada
2018 Michigan, Vermont
2019 Illinois
2020 Arizona, Montana, New Jersey, South Dakota[121]

B. Conant v. Walters

As noted above, California legalized medicinal cannabis in 1996. That same year, the Director of the White House Office of National Drug Control

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[117] *See Legal Medical Marijuana States and DC*, PROCON.ORG https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/ (last visited Nov. 11, 2020).

[118] Cannabidiol ("CBD") is a type of cannabinoid in the cannabis plant that has shown promise in treating several conditions, particularly epilepsy. It lacks the psychoactive effects of Tetrahydrocannabinol ("THC"). It is also known as "Charlotte's Web Oil" or "CBD oil."

[119] Prior to 2014, the DEA deemed all CBD to be marijuana-derived, and therefore, illegal. *See DEA Statement on CBD, Hemp and "Farm Bill"* (August 2015), https://fedupwithfatigue.com/dea-cbd-statement.pdf (last visited Sept. 25, 2020). In 2014, Congress passed a Farm Bill which created a hemp production pilot program. *See* 7 U.S.C. § 5940. In 2018, Congress passed another Farm Bill which expanded the pilot program and legalized hemp cultivation, processing, and the sale of hemp products, including hemp-derived CBD products. *See* 84 Fed. Reg. 58,522-64; Agriculture Improvement Act of 2018, Public Law 115-334 (115th Cong.) (Dec. 20, 2018). After 2018, then, a legal distinction exists between marijuana-derived CBD (illegal) and hemp-derived CBD (legal). Because of this legal distinction and the proliferation of lawful, hemp-derived CBD, the importance of CBD in medical cannabis policy is greatly diminished.

[120] *See States with Legal Cannabidiol (CBD)*, PROCON.ORG (Apr. 14, 2020), https://medicalmarijuana.procon.org/view.resource.php?resourceID=006473 (last visited Sept. 25, 2020).

[121] *See Legal Medical Marijuana States and DC, supra* note 117.

Policy (*i.e.*, Drug Czar), the DEA, the U.S. Department of Justice (DOJ), and the U.S. Department of Health and Human Services (HHS)[122] promulgated a policy in response to California's medical cannabis legalization:

> The federal policy declared that a doctor's "action of recommending or prescribing Schedule I controlled substances is not consistent with the 'public interest' (as that phrase is used in the federal Controlled Substances Act)" and that such action would lead to revocation of the physician's registration to prescribe controlled substances.[123]

Also pursuant to the policy, the DOJ and HHS sent letters "to practitioner associations and [State medical] licensing boards informing those groups of the policy."[124] This letter "cautioned physicians who 'intentionally provide their patients with oral or written statements in order to enable them to obtain controlled substances in violation of federal law . . . risk revocation of their DEA prescription authority.'"[125]

In order to lawfully prescribe medications, a physician must (i) be licensed to practice medicine by the relevant State regulatory authority (*i.e.*, State medical board), and (ii) have a Controlled Substance Registration Certificate from the DEA.[126] Without these two credentials, a physician may not lawfully prescribe medications. It is virtually impossible to practice medicine without the ability to prescribe. Thus, the federal policy threatened to effectively prevent physicians who recommended medical cannabis from practicing medicine. "By speaking candidly to their patients about the potential benefits of medical marijuana, [physicians] risk losing their license to write prescriptions, which would prevent them from functioning as doctors. In other words, they may destroy their careers and lose their livelihoods."[127]

In response, four patient and physician groups sued the Drug Czar, DEA, DOJ, and HHS for injunctive relief in the U.S. District for the Northern District of California. Specifically, and based upon the Free Speech Clause of the First Amendment, the plaintiffs sought to permanently "enjoin enforcement of the government policy insofar as it threatened to punish physicians for communicating with their patients about the medical use of marijuana."[128] The trial court certified a plaintiff class, ruled in favor of the plaintiffs, and permanently enjoined the defendants from:

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[122] *See Conant v. Walters*, 309 F.3d 629, 629 (9th Cir. 2002), *cert. denied*, 540 U.S. 946 (2003).

[123] *Id.* at 632.

[124] *Id.* at 633.

[125] *Id.* (omissions in original) (quoting Medical Leader Letter).

[126] *See* Form DEA-223.

[127] *Conant*, *supra*, at 639-40 (Kozinski, J.) (concurring).

[128] *Id.* at 633.

> (i) revoking any physician class member's DEA registration merely because the doctor makes a recommendation for the use of medical marijuana based on a sincere medical judgment and (ii) from initiating any investigation solely on that ground. The injunction should apply whether or not the doctor anticipates that the patient will, in turn, use his or her recommendation to obtain marijuana in violation of federal law.[129]

The federal government appealed to the U.S. Court of Appeals for the Ninth Circuit. The appellate court affirmed largely on free speech and federalism grounds.[130] The federal government unsuccessfully sought U.S. Supreme Court review.[131] When a federal circuit court decides an issue of first impression, other circuit courts tend to eventually decide the same issue. Often a circuit split emerges. That is, one group of circuits decides the issue one way and another group decides the issue another way. Once a circuit split matures, the U.S. Supreme Court will often agree to review a suitable case to resolve the circuit split. This did not happen with *Conant*. By denying *certiorari* review, the U.S. Supreme Court let *Conant* stand, perhaps with the idea that the circuit courts would address the issue and either form a consensus or create a circuit split. However, no other federal intermediate appellate court has squarely addressed the medical- cannabis-recommendation-as-free speech issue.[132]

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[129] *Id.* at 634.

[130] *See id.* at 634-39.

[131] *See Conant v. Walters*, 540 U.S. 946 (2003).

[132] S*ee Gonzalez v. Raich*, 545 U.S. 1 (2005) (citing *Conant* regarding scientific studies on the potential therapeutic and medicinal benefits of cannabis); *NIFLA v. Harris*, 2016 WL 5956734 (9th Cir. 2016) (declining to extend *Conant* to a free speech and free exercise challenge to a state contraception notice statute because the challenged statute, unlike *Conant*, did not discriminate based on viewpoint); *NCAA v. Christie*, 2016 WL 4191891 (3d Cir. 2016) (citing *Conant* regarding commandeering); *Aransas Project v. Shaw*, 756 F.3d 801 (5th Cir. 2014), 775 F.3d 641 (5th Cir. 2014) (citing *Conant* regarding commandeering); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), 728 F.3d 1041 (9th Cir. 2013) (distinguishing *Conant* regarding the distinction between conduct and speech); *NCAA v. Christie*, 730 F.3d 208 (3d Cir. 2013) (citing *Conant* regarding commandeering); *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012), 684 F.3d 825 (9th Cir. 2012) (amended and superseded on denial of rehearing *en banc*) (citing *Conant* in unsuccessful Americans with Disabilities Act challenge to city ordinances banning medical marijuana dispensaries); *United States v. Osburn*, 175 Fed. Appx. 789 (9th Cir. 2006) (citing *Conant* regarding public notice that cannabis is illegal under federal law); *Willis v. Town of Marshall, NC*, 426 F.3d 251 (4th Cir. 2005) (quoting *Conant* regarding the "right to hear"); *King v. Federal Bureau of Prisons*, 415 F.3d 634 (7th Cir. 2005) (citing *Conant* regarding freedom to speak and the freedom to read); *Allstate Ins. Co. v. Disability Services of the Southwest, Inc.*, 400 F.3d 260 (5th Cir. 2005) (citing *Conant* regarding the importance of physician-patient communication); *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004) (citing *Conant* regarding state police power to regulate the medical profession); and *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (citing *Conant* in discussion of "attenuation" between (i) medical marijuana activities that are legal under state law and (ii) interstate commerce). *See also* Nevada Attorney General Opinion No. 2015-03 (June 18, 2015); and Iowa Attorney General Opinion No. 02-12-1 (Dec. 10, 2002).

The *Conant* case is important to current cannabis policy for three reasons. First, *Conant* addresses the distinction between "prescriptions" and "recommendations."[133] A "prescription" is an order from a physician to a pharmacist directing the pharmacist to dispense a controlled substance to a patient. Without such a prescription, it is illegal for the pharmacist to dispense the medication, and it is also illegal for the patient to possess the medication. As such, a "prescription" is not a free speech activity. Rather, it is a proper subject of State and federal regulation. Second, *Conant* stands for the proposition that a physician's medical cannabis recommendation to a patient is protected free speech under the First Amendment. Although this concept has not been adopted by subsequent caselaw, it appears to be the *de facto* rule regarding physicians who endorse medical cannabis. Finally, because of *Conant*, States that have legalized medicinal cannabis use the term "recommend" instead of "prescribe."[134]

C. Federal Cannabis Criminal Enforcement Policy

i. Ogden Memorandum

In March 2009, as part of the Obama Administration, Eric Holder was installed as U.S. Attorney General. At this time, thirteen states had legalized medical cannabis. On October 19, 2009, Deputy Attorney General David W. Ogden issued the "Ogden Memo" to "provide[ ] clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana."[135] The Ogden Memo advised that it would be an inefficient use of federal law enforcement resources to prosecute patients and caregivers lawfully involved in State- sanctioned medical marijuana activities.[136] However, the Ogden Memo also stated that it would be an efficient use of federal law enforcement resources where marijuana activities—medical or otherwise—implicated the following areas:

> [i] unlawful possession or unlawful use of firearms;
>
> [ii] violence;
>
> [iii] sales to minors;
>
> [iv] financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with

[133] *See Conant*, *supra*, at 635.

[134] *See*, *e.g.*, Ohio Rev. Code Ann. § 4731.30 (West 2020) ("Certificate to recommend medical use of marijuana").

[135] Odgen Memo at 1.

[136] *See id.* at 1-2.

purported compliance with state or local law;

[v] amounts of marijuana inconsistent with purported compliance with state or local law;

[vi] illegal possession or sale of other controlled substances; or

[vii] ties to other criminal enterprises.[137]

ii. First Cole Memorandum

On June 29, 2011, Deputy Attorney General James M. Cole issued the First Cole Memo which reaffirmed the guidance contained in the Ogden Memo and advised that large-scale cannabis growers would remain a federal law enforcement priority even if such growers claimed to be cultivating medical marijuana.[138] At this time, seventeen jurisdictions had legalized medical cannabis.

iii. Second Cole Memorandum

On August 29, 2013, Cole issued the Second Cole Memo.[139] At this time, twenty-one jurisdictions had legalized medical cannabis. Moreover, Colorado and Washington had legalized adult use cannabis while Alaska, Oregon, and the District of Columbia were preparing to do likewise. The Second Cole Memo updated the guidance of the first two memoranda "in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale."[140]

The Second Cole Memo also updated the federal enforcement priorities outlined in the Ogden Memo as follows:

[i] Preventing the distribution of marijuana to minors;

[ii] Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;

[ii] Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;

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[137] *Id.* at 2.

[138] *See* First Cole Memo at 1-2.

[139] *See* Second Cole Memo at 1.

[140] *Id.*

[iii] Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

[iv] Preventing violence and the use of firearms in the cultivation and distribution of marijuana;

[v] Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

[vi] Preventing growing marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and

[vii] Preventing marijuana possession or use on federal property.[141]

The Second Cole Memo went on to advise that, so long as (i) the cannabis-legalizing States maintained "strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana,"[142] and (ii) the cannabis activity did not touch upon any of the eight enforcement priorities, federal law enforcement officials would deem cannabis enforcement an inefficient use of its resources and leave regulation and criminal enforcement to State and local authorities.[143] Holder served as U.S. Attorney General until April 2015. Loretta Lynch succeeded Holder as U.S. Attorney General for the remainder of the Obama Administration. Lynch's administration maintained the guidance outlined in the Ogden and Cole Memos. In fact, Lynch was copied on the Second Cole Memo as the then-U.S. Attorney for the Eastern District of New York and Chair of the Attorney General's Advisory Committee.[144] This suggests that Lynch concurred with the Second Cole Memo.

* * *

Collectively, these three memoranda set-forth a policy that, so long as State medicinal cannabis activities did not involve any of the eight enforcement priorities, federal prosecutors would not bring criminal charges against medical cannabis participants. This amounted to passive permission for people to engage

[141] *Id.* at 2-3.

[142] *Id.* at 2.

[143] *See id.* at 2-3.

[144] *See id.* at 3.

in medical cannabis activities with greatly reduced fear of federal criminal liability. However, these memoranda merely indicated that the DOJ had chosen not to prosecute certain medical cannabis activities, but it reserved the right to do so. Moreover, these memoranda did not provide a legal defense. If a federal prosecutor decided to charge someone with a marijuana crime, these memoranda provided no legal cover. Finally, these memoranda were always subject to modification or rescission by subsequent Attorneys General. So, the memoranda's policies and guidance lacked the permanence, stability, and predictability of a statute. Nevertheless, the Ogden Memo, First Cole Memo, and Second Cole Memo created a legal environment which allowed the fledgling cannabis industry to grow into a multi-billion-dollar sector.

iv. Sessions Memorandum

In February 2017, Jeff Sessions became U.S. Attorney General. Sessions is a staunch opponent of cannabis use. Thus, pro-cannabis reform advocates and the cannabis industry were quite concerned about what cannabis law enforcement policies Sessions would implement. For example, the governors of Alaska, Colorado, Oregon, and Washington co-authored a letter to Sessions urging him to continue the policy guidance outlined in the Second Cole Memo.[145] Sessions rebuffed the governors' concerns.[146]

On January 4, 2018, Sessions formally rescinded the Ogden, First Cole, and Second Cole Memos:

> In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. 21 U.S.C. § 801 *et seq*. It has established significant penalties for these crimes. 21 U.S.C. § 841 *et seq.* These activities also may serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. 18 U.S.C. §§ 1956-57, 1960; 31U.S.C. §5318. These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.
>
> In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions. Attorney General Benjamin Civiletti originally set forth these principles in 1980, and they have been refined over

[145] *See* Apr. 3, 2017 Letter to Sessions.

[146] *See* July 24, 2017 Letter from Sessions.

> time, as reflected in chapter 9-27.000 of the U.S. Attorneys' Manual. These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.
>
> ***Given the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.*** This memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.[147]

v. Sessions Memorandum Aftermath

Initially, the Sessions Memo caused a great deal of concern within the cannabis industry. Many feared a harsh, alcohol prohibition-style federal law enforcement crackdown against cannabis industry participants. These fears have not materialized for four primary reasons.

First, the revocation of the Ogden and Cole Memos made the various U.S. Attorneys much more important to federal cannabis law enforcement policy. From the Ogden Memo to the Sessions Memo (2009-2018), the entire U.S. Department of Justice, which includes all of the U.S. Attorney Offices, was advised against prosecuting the cannabis industry so long as the cannabis activities did not implicate any of the enforcement priorities. The Sessions Memo abolished this guidance and instructed U.S. Attorneys to treat cannabis industry activities the same as any other potential criminal conduct. Thus, it was left to the individual U.S. Attorney Offices to decide whether or not to prosecute cannabis industry participants.

Presently, virtually none of the U.S. Attorney Offices have used the broader, post-Sessions Memo latitude to vigorously prosecute the cannabis industry. For example, on the day the Sessions Memo was published, the U.S. Attorney for the District of Colorado issued a statement:

> Today the Attorney General rescinded the Cole Memo on marijuana prosecutions, and directed that federal marijuana prosecution decisions be governed by the same principles that

[147] Sessions Memo (footnote omitted) (emphasis added).

> have long governed all of our prosecution decisions. The United States Attorney's Office in Colorado has already been guided by these principles in marijuana prosecutions—focusing in particular on identifying and prosecuting those who create the greatest safety threats to our communities around the state. We will, consistent with the Attorney General's latest guidance, continue to take this approach in all of our work with our law enforcement partners throughout Colorado.[148]

The cannabis industry interpreted this statement to mean that, at least in the District of Colorado, the post-Sessions Memo environment would be little different than the Ogden and Cole Memo period. This statement was also important because Colorado has a relatively mature cannabis industry market and, therefore, serves as a leader and exemplar to the other U.S. cannabis industry markets. Moreover, since the Sessions Memo, it appears that the various U.S. Attorney Offices are continuing to follow the Ogden and Cole Memos. Although the Ogden and Cole Memos are no longer the federal cannabis enforcement policy *de jure*, they remain the *de facto* policy. Finally, U.S. Attorneys are, at least indirectly, subject to the political will of the citizens of their respective districts. If, for example, a U.S. Attorney vigorously prosecuted the cannabis industry in a State where cannabis is popular, there would likely be political repercussions. And, if such a U.S. Attorney were to later seek elective office, his history of unpopular cannabis prosecutions would likely be a significant political liability. In sum, the post-Sessions Memo DOJ has not significantly affected the cannabis industry.

Second, Congress has withheld DOJ and FBI funding for investigations and prosecutions of the medical cannabis industry since 2014. This legislation is associated primarily with Representative Dana Rohrabacher (R-CA) who co-sponsored defunding language in various appropriations bills since the early-2000s. A recent reiteration of this defunding legislation was passed as part of the federal appropriations act for the 2019 fiscal year:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma,

[148] Press Release, U.S. Attorney's Office: District of Colorado, U.S. Attorney Bob Troyer Issues Statement Regarding Marijuana Prosecutions in Colorado (Jan. 4, 2018), https://www.justice.gov/usao-co/pr/us-attorney-bob-troyer-issues- statement-regarding-marijuana-prosecutions-colorado.(last visited Nov. 11, 2020).

> Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, the Commonwealth of the Northern Mariana Islands, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.[149]

Thus, even if the DOJ wanted to vigorously investigate and prosecute medical cannabis operators, it lacks the funds to do so.

Third, since the Sessions Memo, States have continued to establish and operate medical and recreational cannabis programs. Specifically, since 2018, Missouri, Oklahoma, and Utah have legalized medical cannabis, and Illinois, Michigan, and Vermont have legalized adult use cannabis. These States continue to permit cannabis industry activity within their borders without apparent concern for federal criminal law enforcement.

Finally, over the last decade the cannabis industry has achieved inertia that defies criminal law enforcement resistance. The cannabis industry has ceased to be an outlaw community of low capital outsiders and has become a multi-billion dollar, mainstream enterprise. Politically powerful individuals and corporations are now involved in the cannabis industry. The cannabis industry directly and indirectly employs thousands of people. In the current environment, a large- scale law enforcement crackdown on the cannabis industry would be intolerably economically disruptive and impolitic.

vi. Attorney General Barr

With the resignation of Attorney General Sessions, President Trump nominated William Barr to be U.S. Attorney General in 2018.[150] The following colloquy occurred during Barr's Senate confirmation hearing:

> Sen. Cory Booker (D-NJ): "Do you believe it was the right decision to rescind [the Cole Memo]?"
>
> Mr. Barr: "My approach to this would be not to upset settled expectations and the reliance interest that have arisen as a result of the Cole Memoranda and investments that have been made . . . . However, I think the current situation is untenable I'm not going to go after companies that have relied

[149] H.R.J. Res. 31 Division C, Title V, § 531, 116th Cong. (2019).

[150] Barr was sworn in as U.S. Attorney General on Feb. 14, 2019.

> on the Cole Memoranda. However, we either should have a federal law that prohibits marijuana everywhere, which I would support myself. Because I think it's a mistake to back off on marijuana. However, if we want states to have their own laws . . . let's get there the right way."[151]

Here, Barr summarized the current federal legal dilemma concerning cannabis. First, by acknowledging the "settled expectations," Barr recognizes the existence of a large and wealthy American cannabis industry that has emerged over the last decade. Second, Barr acknowledges the untenable situation of the current state of U.S. cannabis law: How can there be legal medical and recreational cannabis at the State level when cannabis is illegal federally? Third, Barr admits to his anti-cannabis personal policy preferences. Unlike individuals like Anslinger and Nixon, however, Barr seems unwilling to allow his personal views to drive his administration's public policies. This is progress. Finally, Barr implicitly asks Congress to resolve the dilemma legislatively. In any event, Barr's DOJ has so far maintained the *status quo* with respect to federal cannabis law enforcement.

XII. CONCLUSION

Were cannabis a newly discovered plant, it would be heralded as a miracle drug and the pharmaceutical industry would enthusiastically study it to unlock its therapeutic secrets. This is not the case. Cannabis has a long history. With respect to American public policy, the history of cannabis is shaped by racism, nativism, mendacity, unintended consequences, and a host of other imperfect human motives. Current federal cannabis policy is not a product of logic, reason, facts, evidence, or science. It is a product of history. History is not necessarily a linear march toward progress. Civilizations rise and fall. Enlightenment can give way to barbarism. Therefore, it is possible that American society could eventually return to cannabis prohibition. At present, this outcome seems highly unlikely. Instead, in late 2020, comprehensive federal reform of cannabis laws appears to be a matter of "when," not "if." It remains to be seen what form such federal reforms will take.

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[151] *Nomination of the Honorable William Pehlam Barr to be Attorney General of the U.S. Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (statements of Cory Booker, Senator from N.J. and William Barr, nominee).