

A Great Schism: Social Norms and Marijuana Prohibition

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INTRODUCTION: A DICHOTOMY

In the Democratic presidential debate on November 6, 2003, the eight candidates were asked whether they had ever used marijuana.¹ Three, including the party's eventual nominees for president and vice president, answered yes; a fourth said that he had not but thought it should be decriminalized; and a fifth stated that she had no comment.² Less than twenty-four hours later, believing that students possessed marijuana, police exploded into a South Carolina high school hallway with guns drawn. They ordered all 107 people to the ground, handcuffed approximately a dozen students, and brought in drug-sniffing dogs, searching any bags to which the dogs reacted.³ One fourteen-year-old witness described how police treated his classmates: “They would go put a gun up to them, push them against the wall, take their book bags and search them.”⁴ In the end, the officers found nothing and arrested no one.⁵

The presidential candidates almost certainly could not have openly admitted to violating any other law while maintaining the viability of their candidacies. Yet others suspected of breaking that same law experience the kind of treatment suffered by the students in South Carolina. The juxtaposition of these two events illustrates the vast chasm between social norms and the laws prohibiting marijuana.

The objective of this Essay is to use the theoretical framework of Law and Economics to demonstrate that there is a large disconnect between social norms and marijuana prohibition, that the prohibition is not achieving its goal of preventing marijuana use, and that the prohibition may instead actually be creating serious costs by damaging the institution of law itself. Thus, policymakers should consider changing the law to more closely resemble the

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¹ *Dems Face off in Rock the Vote*, CNN.COM, Nov. 6, 2003, <http://www.neilrogers.com/news/articles/2003110521.html> (on file with the Harvard Law School Library).

² *Id.*

³ David Hancock, *Drug Raid at S.C. High School*, CBS NEWS, Nov. 7, 2003, <http://www.cbsnews.com/stories/2003/11/07/national/main582492.shtml> (on file with the Harvard Law School Library); see also *Police, School District Defend Drug Raid*, CNN.COM, Nov. 10, 2003, <http://www.cnn.com/2003/US/South/11/07/school.raid/> (on file with the Harvard Law School Library). Part of this raid can be viewed at *Goose Creek Raid*, <http://youtube.com/watch?v=N6r9neE89Fg> (last visited Jan. 17, 2010).

⁴ *Police, School District Defend Drug Raid*, *supra* note 3.

⁵ *Id.*

social norms surrounding marijuana use. The Essay will show why marijuana laws should adapt to the norms rather than continue to try and make the norms conform to the law.

The discipline of Law and Economics applies the science of economic theories to the study of law and its institutions.⁶ Its primary focus is on choosing rational options given that resources are limited.⁷ For example, as will be discussed in Part III, one solution to dealing with the twenty-five million annual marijuana users is to put them in jail, but this would require such an immense amount of resources that it is not a rational option.

Social norm analysis in Law and Economics examines how societal customs influence individual behavior and interact with the law. Such examinations can help determine the degree to which a law will be followed. According to Cass Sunstein, comprehension of social norms can assist in understanding policies and how they may be altered to achieve more productive results.⁸ Social norms can also help explain why a policy is not working because “[e]mpirical research on legitimacy reveals that norm-based factors are sometimes stronger determinants of behavior than formal sanctions.”⁹ Indeed, social norm analysis has proven so useful that it has become a rapidly expanding aspect of Law and Economics.¹⁰

A comparison of social norms and marijuana prohibition is particularly relevant now as local, state, and national governments consider whether and how to change their marijuana laws. Thirteen states have already passed medical marijuana legislation, and others may soon follow suit.¹¹ The City of Denver has voted to legalize possession of up to one ounce of marijuana.¹² In March 2008, the New Hampshire House of Representatives voted to decriminalize possession of up to one-quarter ounce of marijuana.¹³ Testimony before the New Hampshire House showed that social norms vis-à-vis marijuana prohibition were an important consideration in deciding whether to approve the bill.¹⁴ At the federal level, the House of Representatives is deliberating on House Resolution 2943, the Personal Use of Marijuana by Responsible Adults Act of 2009, which seeks “[t]o eliminate most Federal

⁶ See NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM AND BEYOND* 1 (2d ed. 2006).

⁷ See generally *id.*

⁸ *Id.* at 329.

⁹ Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1139 (2005).

¹⁰ See MERCURO & MEDEMA, *supra* note 6, at 306.

¹¹ See Danny Hakim & Michael M. Grynbaum, *Legislators Grapple Over How to Legalize Medical Marijuana Use*, N.Y. TIMES, June 14, 2007, at B1. Michigan became the thirteenth state to allow medical marijuana on November 4, 2008.

¹² Patrick O’Driscoll, *Denver Votes to Legalize Marijuana Possession*, USA TODAY, Nov. 3, 2005, at 3A.

¹³ Keven Landrigan, *N.H. House OKs Marijuana Bill*, NASHUA TELEGRAPH, Mar. 19, 2008.

¹⁴ See Law Enforcement Against Prohibition, Richard Van Wickler Testimony in New Hampshire, http://www.leap.cc/cms/index.php?name=web_Links&l_op=visit&lid=133 (on file with the Harvard Law School Library).

penalties for possession of marijuana for personal use, and for other purposes.”¹⁵

In contemplating whether to better align marijuana laws with marijuana norms, it is useful to conduct positive analysis, which asks why we have certain laws or legal rules.¹⁶ Therefore, Part I of this Essay will discuss the historical basis for marijuana prohibition. Then, Part II will present social norm data on marijuana usage to show that the law is not achieving its intended benefit of preventing marijuana usage. A portion of Part II will discuss how the divide between marijuana use norms and marijuana prohibition has a deleterious effect on the institution of law itself, while Part III will explore this idea further, demonstrating why it would be better to adapt the law to the norms. Lastly, Part IV will answer two potential objections to changing marijuana laws. First, if it is so obvious that marijuana laws should be altered, then why have they not changed already? Second, wouldn't a move away from marijuana prohibition send the wrong message to children?

I. HISTORICAL BASIS FOR MARIJUANA PROHIBITION

Schools of thought in Law and Economics effectively try to answer three questions:

- (1) What is the law?
- (2) Where does the law come from and how does it acquire its legitimacy?
- (3) What should the law be?¹⁷

The subject of this Part is the origins of marijuana laws, while the next section will show that these laws have failed to acquire adequate legitimacy.

Proponents of sociological jurisprudence such as Oliver Wendell Holmes, Jr., Roscoe Pound, and Benjamin Cardozo, believe that to accurately comprehend law, it must be viewed through the lens of social conditions, and therefore, findings of the “social sciences should be integrated into the law.”¹⁸ This perspective attempts to reveal whether a law reflects the prejudices and controlling interests of society.¹⁹ Similarly, legal realists think that law almost invariably reflects the predispositions of policymakers.²⁰

A historical analysis of the criminalization of marijuana is important because in deciding whether to repeal prohibition it is necessary to know the

¹⁵ For sponsorship information and the bill's status, see Govtrack.us, H.R. 2943: Personal Use of Marijuana by Responsible Adults Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=H111-2943> (on file with the Harvard Law School Library).

¹⁶ See Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 96 (2002).

¹⁷ MERCURO & MEDEMA, *supra* note 6, at 5.

¹⁸ *Id.* at 12.

¹⁹ See *id.* at 12–14.

²⁰ *Id.* at 15 n.31.

reasons for initially criminalizing marijuana.²¹ For example, if many people were dying from the use of marijuana or the drug caused people to commit crimes like murder, rape, or theft, policymakers and the public should be aware of this and not change marijuana laws in a way that would exacerbate these problems.

In the early 1970s, President Richard Nixon, the Speaker of the House, and the President Pro Tempore of the Senate selected thirteen people to participate in the National Commission on Marihuana and Drug Abuse.²² The purpose of this Commission was to research and make policy recommendations regarding marijuana and other drugs.²³ University of Virginia School of Law Professor Richard J. Bonnie was the Commission's Associate Director.²⁴ As part of his role, Bonnie, along with law professor Charles H. Whitebread II, analyzed the historical basis for America's marijuana laws.²⁵ Consistent with the beliefs of sociological jurisprudence and legal realism, Bonnie and Whitebread found that "neither philosophy nor science have been shapers of drug policy; instead, the central influence on government action has been the social context—political, economic, and cultural."²⁶

Moreover, Bonnie and Whitebread learned that prejudice lay beneath this social context as "fearmongering and sloppy journalism, sham science, and shameless propaganda, racism and xenophobia—all contributed to the emergence and institutionalization of marijuana prohibition."²⁷ Marijuana was associated with Mexicans, and whites feared that it predisposed them to crime.²⁸ Indeed, racial prejudice against Mexicans and a lack of objective analysis were key factors in the passage of the first federal anti-marijuana legislation in 1937.²⁹ As Judge James P. Gray writes, because there was limited understanding of marijuana "and no scientific studies had been conducted," it was not difficult to criminalize a drug that was used primarily by "politically powerless ethnic minorities and the lower classes," especially when juxtaposed with media propaganda and the trepidation that "use would spread even to whites"³⁰

In fact, the social conditions between 1915 and 1930 were possibly the *sine qua non* of enacting the marijuana prohibition, as "voiceless immi-

²¹ See DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL*, at ix (3d ed., Oxford Univ. Press 1999) (1973).

²² *Id.* at 256.

²³ *Id.*

²⁴ Raymond P. Shafer, *Foreword to the 1999 Edition* of RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES*, at xi (2d ed., The Lindesmith Center 1999) (1974).

²⁵ *Id.*

²⁶ BONNIE & WHITEBREAD, *supra* note 24, at xi.

²⁷ Ethan Nadelmann, *A Note from the Publisher* of BONNIE & WHITEBREAD, *supra* note 24, at xi.

²⁸ See MUSTO, *supra* note 21, at 219–223.

²⁹ JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* 23–25 (2001).

³⁰ *Id.* at 24–25.

grant[s]” were the primary users of the drug, and it arrived from the southern region of North America shortly after the passage of several other prohibitions, including alcohol.³¹ In emphasizing the importance of the social conditions of this era, Bonnie and Whitebread wrote that if marijuana “had suddenly appeared on the American scene in 1970 among the same population and on the same scale it has now achieved, prohibition would not [have even been] considered.”³²

Not only did Bonnie and Whitebread find that a prejudicial social context underlay the origination of marijuana prohibition, but they also discovered that many of the claims about the drug were unfounded or contradicted the social scientific evidence. For example, the assertions that marijuana induced users to commit crimes had little or no objective evidence,³³ and several studies even found that no such correlation existed, including a five-year sociological study conducted by doctors from the New York Academy of Medicine with the support of New York Mayor Fiorello La Guardia.³⁴ This study, known as the La Guardia Report, concluded that marijuana “was ‘not the determining factor in the commission of major crimes’ and that ‘juvenile delinquency [was] not associated with the practice of smoking marijuana.’”³⁵

A disconnect also exists between marijuana policy and some of the government’s own research regarding the detrimental effects on users themselves. There is no evidence marijuana causes any more harm to its users than many other *legal* drugs. In some ways marijuana may even be less harmful.

In the 1980s, the Drug Enforcement Administration (DEA) and the Attorney General were petitioned to reclassify marijuana as a non-Schedule I substance.³⁶ A Schedule I drug is defined as a substance with a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for its use under medical supervision.³⁷ After two years of research on the question of reclassification, the DEA’s Chief Administrative Law Judge, Francis L. Young, recommended that marijuana should be reclassified as a Schedule II drug.³⁸ Judge Young “concluded that marijuana is ‘one of the safest therapeutically active substances known to man.’”³⁹ He further wrote:

³¹ BONNIE & WHITEBREAD, *supra* note 24, at 295.

³² *Id.*

³³ *Id.* at 198–201.

³⁴ *Id.* at 200–201.

³⁵ *Id.* at 201.

³⁶ Cathryn L. Blaine, Note, *Supreme Court “Just Says No” to Medical Marijuana: A Look at United States v. Oakland Cannabis Buyers’ Cooperative*, 39 Hous. L. Rev. 1195, 1213 (2002).

³⁷ 21 U.S.C. § 812 (2009).

³⁸ Blaine, *supra* note 36, at 1213.

³⁹ Alex Kreit, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. Pa. L. Rev. 1787, 1796 (2003).

Nearly all medicines have toxic, potentially lethal effects. But marijuana (cannabis) is not such a substance. There is no record in the extensive medical literature describing a proven, documented cannabis-induced fatality.⁴⁰

Judge Young called this “a remarkable statement” considering humans have used marijuana for five thousand years and millions of Americans use it regularly with no medical oversight.⁴¹ As a comparison, aspirin is responsible for hundreds of fatalities every year.⁴² Judge Young’s analysis led to his decision that “[t]he overwhelming preponderance of evidence in [the] record establish[ed] that marijuana has a currently accepted medical use in treatment in the United States To conclude otherwise, on this record, would be unreasonable, arbitrary and capricious.”⁴³ However, the DEA did conclude otherwise and ruled there was not sufficient scientific and medical evidence to reclassify marijuana.⁴⁴

This position would almost certainly be untenable today. For instance, in January 2008, the second largest physician group in the United States, the American College of Physicians (ACP), released a position paper calling on the federal government to reclassify marijuana “given the scientific evidence regarding marijuana’s safety and efficacy in some clinical conditions.”⁴⁵

This was not the first time the federal government failed to fully consider scientific evidence in determining its marijuana policies.⁴⁶ Contrary to creating laws based on scientifically collected data as Law and Economics aspires, in passing the first anti-marijuana legislation, “[t]he legal reality of the marijuana issue was of significantly more interest to the bureaucracy and to the Congress than the scientific and social realities of marijuana use.”⁴⁷ This has importance in assessing current marijuana legislation because many people may hesitate to consider reforming marijuana laws based on a belief that the prohibition was originally enacted for legitimate reasons.⁴⁸

In order to create laws that achieve a legislature’s objectives, lawmakers should evaluate and establish policies based on social scientific evidence that considers social norms because “[w]here norms govern individual behavior, one cannot correctly assess the effect of formal, state-enforced rules without understanding the informal rules [for example, social norms] also at

⁴⁰ Francis L. Young, IN THE MATTER OF DOCKET NO. 86-22: MARIJUANA RESCHEDULING PETITION, available at <http://www.ukcia.org/pollaw/lawlibrary/young.htm> (parenthetical added).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*; see also Marcia Tiersky, *Medical Marijuana: Putting the Power Where it Belongs*, 93 NW. U. L. REV. 547, 550 (1999).

⁴⁴ Young, *supra* note 40; see also Tiersky, *supra* note 43, at 550–51.

⁴⁵ TIA TAYLOR, AMERICAN COLLEGE OF PHYSICIANS, SUPPORTING RESEARCH INTO THE THERAPEUTIC ROLE OF MARIJUANA (2008), available at http://www.acponline.org/advocacy/where_we_stand/other_issues/medmarijuana.pdf.

⁴⁶ See BONNIE & WHITEBREAD, *supra* note 24, at 148, 187–89, 198–201.

⁴⁷ *Id.* at 126.

⁴⁸ See, e.g., Nadelmann, *supra* note 27, at x.

work.”⁴⁹ If marijuana prohibition was passed without regard to social science data, or in spite of contrary data, then marijuana prohibition may be the wrong policy, or it at least should be reevaluated in accordance with sound social science research. Indeed, social scientific evidence was not used or was ignored as “the federal narcotics bureaucracy made no serious effort before the decision to seek federal legislation to find out what the drug’s effects really were.”⁵⁰ In addition, the chief architect of the 1937 marijuana bill “ignored the contrary findings of every scientific inquiry which had been conducted.”⁵¹ As a result, this bill “was tied neither to scientific study nor to enforcement need.”⁵²

President Nixon’s National Commission on Marihuana and Drug Abuse sought to correct this, as it made policy recommendations based on scientific research. After two years of study, the Commission concluded that marijuana should be decriminalized, meaning “possession for personal use could be a finable offense, like a parking ticket, but should no longer subject the possessor to jail.”⁵³ In reaching this decision, the Commission determined that in passing the first anti-marijuana legislation, “[t]he policy-makers knew very little about the effects or social impact of the drug; many of their hypotheses were speculative and, in large measure, incorrect.”⁵⁴ Regardless, President Nixon did not like the Commission’s findings and “refused to receive the report in public from former Pennsylvania Governor Raymond Shafer, the Commission’s chairman.”⁵⁵

This historical examination of marijuana prohibition shows the initial prohibition was largely a byproduct of social forces present in the 1930s and was not based on scientific research. This is relevant to social norm analysis because it can further discredit marijuana laws. A law that millions of Americans already believe to be invalid will be considered even more so as people learn that it was not based on scientific research, but rather racial prejudice and social conditions peculiar to the 1930s.⁵⁶ This damage to the law’s credibility will be further examined in the next two sections.

⁴⁹ MERCURO & MEDEMA, *supra* note 6, at 309 (citing Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998)).

⁵⁰ BONNIE & WHITEBREAD, *supra* note 24, at 127.

⁵¹ *Id.* at 148.

⁵² *Id.* at 174.

⁵³ MUSTO, *supra* note 21, at 256.

⁵⁴ Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 751 (1998) (citing FIRST REPORT OF NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 132 (1972)).

⁵⁵ MUSTO, *supra* note 21, at 256.

⁵⁶ As evidence that this information has reached a broader audience beyond history books and law review articles, *Fortune* magazine and the History Channel have both recently discussed the genesis of marijuana prohibition. See Roger Parloff, *How Pot Became Legal*, *FORTUNE*, Sept. 28, 2009, at 140; *Hooked: Illegal Drugs and How They Got that Way* (The History Channel television broadcast 2000).

II. THE DIFFERENCE BETWEEN SOCIAL NORMS AND MARIJUANA PROHIBITION

A. *Fostering Disrespect for the Law*

After conducting their research into marijuana laws, Bonnie and Whitebread concluded that “the most compelling reason for modification or elimination of marihuana prohibition lies in its disastrous impact on the law as an institution.”⁵⁷ They reasoned:

No criminal law can be fairly or effectively enforced unless it commands a popular consensus Undoubtedly, marihuana prohibition does not command the minimum amount of public support necessary to sustain and reinforce a criminal prohibition.⁵⁸

Bonnie and Whitebread emphasized that whether prohibition has majority support is not determinative because the usefulness “of a criminal law is not measured in votes but in shared values.”⁵⁹ Therefore, marijuana statutes should be changed because the social norm of widespread marijuana use leads to “disobedience and ridicule” of the law.⁶⁰ They reached this conclusion in part because of the large numbers of people breaking marijuana laws.

B. *Marijuana Use*

The social norm surrounding marijuana use results in violation of the law on a massive scale. The government’s 2007 National Survey on Drug Use and Health found that more than 100 million Americans aged twelve or older had tried marijuana at least once in their lifetime.⁶¹ This represents over forty percent of the U.S. population in that cohort.⁶²

This is not skewed data that is overly reflective of the hippie subculture in the 1960s and 70s. Incredibly, the survey found that 25 million people reported using marijuana in the past year, and 14.4 million in the last month.⁶³ Also, despite an all-time record of 829,626 marijuana arrests in

⁵⁷ BONNIE & WHITEBREAD, *supra* note 24, at 301.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 301–02.

⁶¹ OFFICE OF APPLIED STUDIES, DEP’T OF HEALTH & HUMAN SERVS., 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH 250 (2007), available at <http://oas.samhsa.gov/nsduh/2k7/nsduh/2k7Results.pdf>.

⁶² See *id.* at 247, 250.

⁶³ *Id.* at 252, 254.

2006,⁶⁴ approximately 2.1 million Americans tried marijuana for the first time that year.⁶⁵

Widespread use of marijuana means there are at least three major costs to enforcing the prohibition. As discussed throughout the Essay, the most important of these is damage to the law's credibility. However, there are also extraordinary financial costs. A study by Harvard University Economist Jeffrey A. Miron found that the government spends \$7.7 billion annually to enforce marijuana prohibition, of which state and local governments bear \$5.3 billion.⁶⁶ Furthermore, if it were taxed similarly to alcohol and tobacco, marijuana would provide \$6.2 billion in additional revenue each year, for a total potential annual budget increase of nearly \$14 billion.⁶⁷

Finally, the opportunity to make enormous profits from marijuana sales in America's black market has spawned drug cartels in Colombia and Mexico.⁶⁸ The White House Office of National Drug Control Policy estimates over sixty percent of the cartels' revenue results from selling marijuana in the United States.⁶⁹ A natural consequence of this unregulated black market is the use of violence to solve disputes and gain market share.⁷⁰ This problem has recently terrorized Mexico as more than 13,500 people have been killed in drug-related violence since 2006.⁷¹

Despite this violence, the damage to the law, and the exorbitant financial expense of enforcement, there is strong evidence that society is not acquiring any measurable benefit in terms of reducing marijuana use or in limiting the amount of marijuana available. For example, as shown in the following graphs, since the National Commission on Marihuana and Drug Abuse recommended that marijuana be decriminalized, the number of annual marijuana arrests has nearly tripled, yet the percentage of twelfth graders stating that marijuana is "very easy" or "fairly easy" to get has remained virtually the same.⁷² Also, between 1988 and 2002 the number of eighteen-

⁶⁴ See CRIMINAL SERVS. INFO. DIV., U.S. DEP'T OF JUSTICE, PERSONS ARRESTED, <http://www.fbi.gov/ucr/cius2006/arrests/index.html> (on file with the Harvard Law School Library). Note that the reports list arrests for individual drugs as a percentage of all drug arrests, and thus the total arrests can be determined by taking the relevant individual drug percentage of all arrests.

⁶⁵ OFFICE OF APPLIED STUDIES, DEP'T OF HEALTH & HUMAN SERVS., 2006 NATIONAL SURVEY ON DRUG USE AND HEALTH 50 (2006), available at <http://www.oas.samhsa.gov/nsduh/2k6/nsduh/2k6Results.pdf>.

⁶⁶ See JEFFREY A. MIRON, THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION 2 (2005), available at <http://www.prohibitioncosts.org/MironReport.pdf>.

⁶⁷ See *id.* at 2-3.

⁶⁸ See Steve Fainaru & William Booth, *Cartels Face an Economic Battle*, WASH. POST, Oct. 7, 2009, at A1.

⁶⁹ *Id.*

⁷⁰ See Jeffrey A. Miron, *Legalize Drugs to Stop Violence*, CNN.COM, Mar. 24, 2009, <http://www.cnn.com/2009/POLITICS/03/24/miron.legalization.drugs/index.html> (on file with the Harvard Law School Library).

⁷¹ Chris Hawley, *Gunmen Execute 18 at Mexico Drug Rehab Center*, USA TODAY, Sept. 4, 2009, at 4A.

⁷² These graphs are courtesy of the Marijuana Policy Project's (MPP) website, <http://www.mpp.org/> (on file with the Harvard Law School Library) and the author has verified the data through the FBI's Uniform Crime Reports and the U.S. Department of Health and Human

to twenty-five-year-olds reporting that they have used marijuana at least once in the past month has increased by one percent,⁷³ despite nearly nine million marijuana arrests between 1996 and 2006 alone.⁷⁴ This data will be described further in Part III.

FIGURE 1: U.S. MARIJUANA ARRESTS⁷⁵

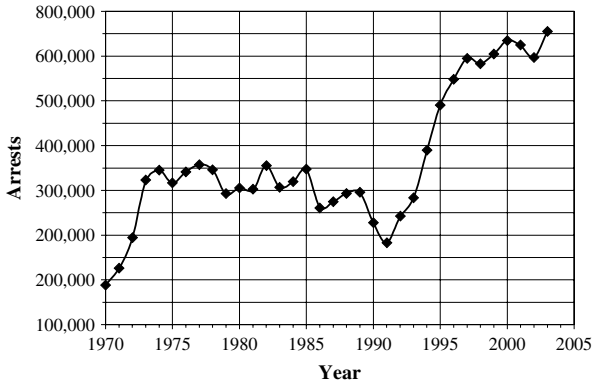
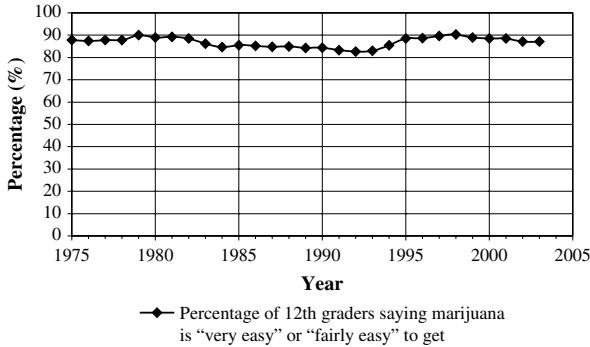


FIGURE 2: U.S. MARIJUANA AVAILABILITY AS REPORTED BY 12TH GRADERS⁷⁶



Services. For the arrest figures, see CRIMINAL SERVS. INFO. DIV., *supra* note 64. For the numbers on marijuana availability, see LLOYD D. JOHNSTON ET AL., NAT'L INST. ON DRUG ABUSE, U.S. DEP'T HEALTH & HUMAN SERVS., 2 MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE 1975-2006, at 224 (2007), available at http://monitoringthefuture.org/pubs/monographs/vol2_2006.pdf.

⁷³ See OFF. OF NAT'L DRUG CONTROL POL'Y, DRUG USE TRENDS 2 (2002), available at <http://www.whitehousedrugpolicy.gov/publications/factsht/druguse/drugusetrends.pdf>.

⁷⁴ See CRIMINAL SERVS. INFO. DIV., *supra* note 64.

⁷⁵ MARIJUANA POLICY PROJECT, MARIJUANA ARRESTS, AVAILABILITY, AND USE: THREE DECADES OF FAILURE, http://www.mpp.org/assets/pdfs/general/SURVEYS_04.PDF (on file with the Harvard Law School Library).

⁷⁶ *Id.*

The preceding statistics demonstrate that marijuana prohibition has failed to acquire legitimacy for a large segment of the population. The following comment by conservative Republican⁷⁷ Dirk Chase Eldredge, the Southern California co-chairman of Reagan's gubernatorial campaign, is illustrative of the lack of belief in marijuana prohibition and drug laws in general:

This kind of wholesale law-breaking in America could only result from a breakdown in respect for drug laws. Although our ingrained respect for law and order causes us to slam on the brakes at a red light, even at four in the morning, with no one in sight, our drug laws lack the moral suasion necessary to command such broad adherence.⁷⁸

Eldredge's statement also alludes to the expressive function of law, which will be discussed below.

III. ADAPTING THE LAW TO THE SOCIAL NORMS

There are numerous reasons why the laws criminalizing marijuana should be adapted to the social norms rather than continuing to try and make the norms conform to marijuana prohibition. First, the expressive function of law has been unsuccessful in shaping the public's view of marijuana use. Second, marijuana prohibition may be contributing to and solidifying marijuana use norms. Third, the first two reasons combine to make effective enforcement of these laws a logistical impossibility, and this has a detrimental effect on law itself.

A. *The Expressive Function of Law and Marijuana Use*

Scholars who advocate that law serves an expressive function base their argument on the theory "that a formal legal condemnation will induce compliance, irrespective of actual enforcement, because law (as an express collective commitment) may engender intrinsic motivations or cause people to conform since they believe that others will do so as well."⁷⁹ In other words, the respected status of the law in the public's consciousness can lead to the creation of social norms simply by passing a particular law.⁸⁰ For example, laws prohibiting smoking in certain areas can foster greater social disapprobation of people who smoke in those areas.⁸¹

⁷⁷ See DIRK CHASE ELDRIDGE, *ENDING THE WAR ON DRUGS: A SOLUTION FOR AMERICA*, at xii (1998).

⁷⁸ *Id.* at 53.

⁷⁹ Depoorter & Vanneste, *supra* note 9, at 1153 n.101; see also Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

⁸⁰ See Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 10-11 (2000).

⁸¹ *Id.*

With respect to marijuana prohibition, the law has been unsuccessful at instilling enough social disapproval to mitigate marijuana use; its expressive function has essentially failed. Although marijuana has been legally prohibited for more than seventy years, in 2007 over 25 million people used marijuana.⁸² Despite more than 12 million marijuana arrests since 1965, over 95 million Americans have used marijuana at least once.⁸³ Finally, despite a record of more than 800,000 marijuana arrests in 2006,⁸⁴ 2.1 million people tried marijuana for the first time, roughly the same number of annual new users since 2002.⁸⁵ This demonstrates that the expressive function of marijuana prohibition has been unable to influence norms sufficiently to reduce marijuana use. Furthermore, according to a Pew Research study, even though marijuana was made illegal approximately fifty years before they were born, forty-one percent of those aged eighteen to twenty-five believe it is “okay” for people to smoke marijuana.⁸⁶

As stated earlier, criminal law experts Bonnie and Whitebread have argued it is not necessary that a popular majority disapprove of a criminal law for it to damage the institution of law, but rather that a large proportion of the population disapprove.⁸⁷ This is because “outright criminal prohibitions, particularly those involving private behavior, derive their legitimacy from congruence with more enduring normative precepts.”⁸⁸ Thus, since “the expressive function of law depends on a number of factors, most importantly the legitimacy of law itself,” perhaps a perceived illegitimacy of marijuana prohibition is why it has been unable to alter social norms.⁸⁹

The public’s response to government officials’ acknowledgment of prior marijuana use indicates that marijuana use has actually become more socially acceptable over the past two decades.⁹⁰ For example, in 1987, President Ronald Reagan’s Supreme Court nominee, Douglas Ginsburg, had to withdraw his candidacy after admitting he had smoked marijuana.⁹¹ In contrast, when President George H.W. Bush nominated Clarence Thomas to the bench in 1991, Thomas’s prior marijuana use was a “non-issue.”⁹² Similarly, there was little concern over President Clinton’s marijuana use per se, although he felt he had to qualify his admission with the irrelevant caveat

⁸² OFFICE OF APPLIED STUDIES, *supra* note 61, at 252.

⁸³ See Carole Shapiro, *Law v. Laughter: The War Against the Evil Weed and Big Screen Reefer Sanity*, 29 OKLA. CITY U. L. REV. 795, 797–98 (2004).

⁸⁴ CRIMINAL SERVS. INFO. DIV., *supra* note 64.

⁸⁵ OFFICE OF APPLIED STUDIES, *supra* note 65, at 50.

⁸⁶ PEW RESEARCH CTR., HOW YOUNG PEOPLE VIEW THEIR LIVES, FUTURES, AND POLITICS: A PORTRAIT OF “GENERATION NEXT” 22 (2007), available at <http://people-press.org/reports/pdf/300.pdf>.

⁸⁷ See BONNIE & WHITEBREAD, *supra* note 24, at 301.

⁸⁸ *Id.*

⁸⁹ Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1760 n.101 (2001).

⁹⁰ See *The Chris Matthews Show* (MSNBC television broadcast Nov. 2, 2006), available at http://www.youtube.com/watch?v=CPBzQI_7ez8&feature=related.

⁹¹ Howard Kurtz, *Rewriting the Rules*, WASH. POST, Feb. 12, 1999, at C1.

⁹² *Id.*

that he had never inhaled.⁹³ In contrast, the Democratic Presidential candidates' responses in 2003 indicate that they felt no need to qualify their prior use, as they "admitted freely that they had used the illegal drug."⁹⁴

This trend of public acceptance continued into the 2008 presidential campaign. Incredibly, in the Democratic primary, a top advisor to then-Senator Hillary Clinton was forced to step down after criticizing then-Senator Barack Obama's past drug use.⁹⁵ Also, consider that for the last sixteen years, the American people have had a president who has tried marijuana.⁹⁶ This streak of having a former marijuana user in the executive office was guaranteed to continue no matter which party won the White House in 2008.⁹⁷

Thus, after seventy years, the expressive effect of marijuana prohibition has failed to establish sufficient social disapproval of marijuana use. Rather, despite record numbers of arrests, evidence suggests that marijuana use has become more socially acceptable. This almost certainly means that the "stickiness" of the norm has become internalized, which makes its prohibition even more difficult for law enforcement.⁹⁸

In addition, widespread violation of a law can cause the norm that the law attempts to reinforce "to lose its potency" and this "loss of potency creates a dissonance between the law's disapproval of the illegal act, and the willingness of individuals to overlook it."⁹⁹ Therefore, "an increased rate of sanctioning may paradoxically undermine the law's expressive value."¹⁰⁰ This concept will be delineated further in the following subsection examining how marijuana prohibition may actually contribute to marijuana use.

B. *Marijuana Prohibition Contributing to Marijuana Use*

Marijuana prohibition may contribute to marijuana use in at least two ways. First, social psychologists have offered "evidence that legal obedi-

⁹³ See *id.*

⁹⁴ Emily Chasan, *Boston Rocks the Vote*, TUFTS DAILY, Nov. 5, 2003, available at <http://www.tuftsdaily.com/2.5541/boston-rocks-the-vote-1.601828>. Also, marijuana use transcends political parties. See Kurtz, *supra* note 91; *Bush Hinted at Use of Marijuana*, BBC NEWS, Feb. 21, 2005, <http://news.bbc.co.uk/2/hi/americas/4282799.stm> (on file with the Harvard Law School Library); *Schwarzenegger: Marijuana's Not a Drug*, CBS NEWS, Oct. 29, 2007, <http://www.cbsnews.com/stories/2007/10/29/national/main3422830.shtml> (on file with the Harvard Law School Library).

⁹⁵ *Clinton Adviser Steps Down After Drug Use Comments*, CNN.COM, Dec. 13, 2007, <http://www.cnn.com/2007/POLITICS/12/13/clinton.obama/index.html> (on file with the Harvard Law School Library).

⁹⁶ See *The Chris Matthews Show*, *supra* note 90; *Bush Hinted at Use of Marijuana*, *supra* note 94.

⁹⁷ See BARACK OBAMA, *DREAMS FROM MY FATHER* 93 (1995); Lisa Lerer, *Palin: She Inhaled*, CBS NEWS, Aug. 29, 2008, <http://www.cbsnews.com/stories/2008/08/29/politics/politico/thecrypt/main4397109.shtml> (on file with the Harvard Law School Library).

⁹⁸ See, e.g., Depoorter & Vanneste, *supra* note 9, at 1157–58.

⁹⁹ Sandeep Gopalan, *Say on Pay and the SEC Disclosure Rules: Expressive Law and CEO Compensation*, 35 PEPP. L. REV. 207, 239 (2008).

¹⁰⁰ *Id.*

ence is ‘morality-based’ and/or ‘legitimacy-based.’”¹⁰¹ In the morality-based view, “people disobey a law if they believe it is illegitimate, regardless of other costs and benefits of breaking that law.”¹⁰² This would explain why each year tens of millions of Americans risk being arrested in order to use marijuana; that is, they do not believe marijuana prohibition is legitimate. Enforcing laws that are viewed as “unjust or illegitimate might strengthen the underlying opposition against those laws.”¹⁰³ Furthermore, “if the law proscribes something that is widely perceived as unfair, the law may encounter more resistance and open opposition.”¹⁰⁴ Thus, as a result of enforcement, more people may use marijuana or have “sympathy” for those arrested for using it.¹⁰⁵

A second way that marijuana prohibition may contribute to marijuana use is that “[p]ublic acts of law enforcement may have an impact on individuals’ perception of the degree and frequency of civil disobedience.”¹⁰⁶ Social psychology has shown that people “are often influenced by their subjective perception of what others are doing.”¹⁰⁷ In addition,

[b]ecause, in many cases, ‘individuals do not have strong prior beliefs on whether any given law is fair or unfair[,] [o]bservation of other people’s reaction to the law (e.g., support, compliance, protest or civil disobedience) conveys some information that may create, reinforce or modify their beliefs on the matter.’ So when a . . . law is met with strong opposition and disobedience from individuals whose internal values are so different from the law that they are willing to incur the costs of protest, individual observers may infer that the law is not aligned with a common sense of justice. This might undermine the law’s authority in the minds of the observing public and ultimately strengthen the social norms by persuading others that the . . . law is unjust.¹⁰⁸

This helps explain why in every year since 2002, an average 2.1 million Americans tried marijuana for the first time.¹⁰⁹

If marijuana prohibition is widely believed to be illegitimate, then the conjunction of the two aforementioned factors means that strong enforcement would probably increase marijuana consumption. Indeed, as shown in

¹⁰¹ Depoorter & Vanneste, *supra* note 9, at 1139.

¹⁰² *Id.* at 1143.

¹⁰³ *Id.* at 1140.

¹⁰⁴ *Id.* at 1167–68.

¹⁰⁵ *See id.* at 1149.

¹⁰⁶ *Id.* at 1147.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1148 (quoting Francesco Parisi & George Von Wangenheim, *Legislation and Countervailing Effects from Social Norms* 9 (George Mason Univ. Sch. of Law, Law and Economics Working Paper Series No. 04-31, 2004); *see, e.g.*, Denny Walsh, *Pair Get Prison in Pot Case*, SACRAMENTO BEE, Mar. 20, 2008, available at <http://www.letfreedomgrow.com/articles/ca080320.htm>; Jeff Woods, *Marijuana Martyr*, NASHVILLE SCENE, Apr. 26, 2007, available at <http://www.nashvillescene.com/2007-04-26/news/marijuana-martyr/>.

¹⁰⁹ OFFICE OF APPLIED STUDIES, *supra* note 65, at 50.

the following graphs, there is a striking correlation in the data between marijuana arrests, the number of marijuana users, and the amount of marijuana use.

FIGURE 3: U.S. MARIJUANA ARRESTS¹¹⁰

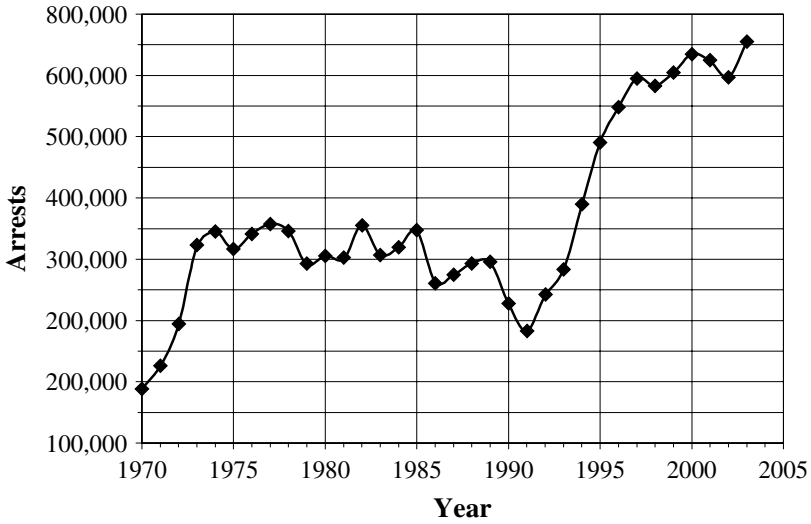
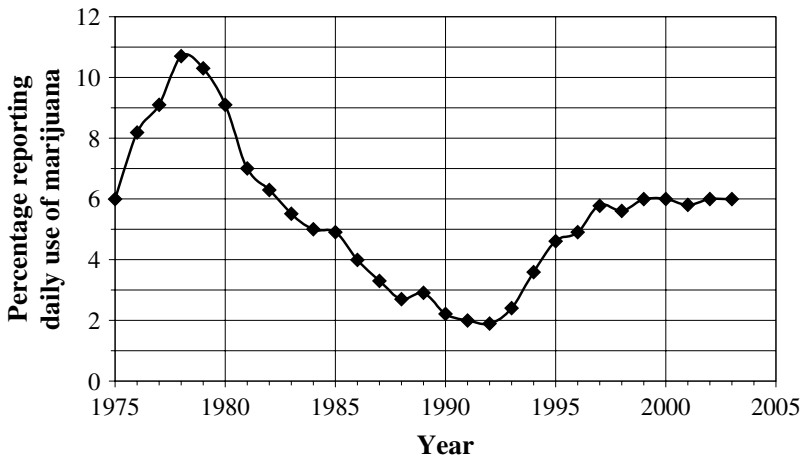


FIGURE 4: U.S. DAILY MARIJUANA USE AMONG 12TH GRADERS¹¹¹



There are several points that suggest a connection between enforcement and marijuana use norms. First, the nadir of arrests in the last thirty years

¹¹⁰ MARIJUANA POLICY PROJECT, *supra* note 75.

¹¹¹ *Id.*

corresponds with the lowest percentages of twelve- to seventeen-year-olds and eighteen- to twenty-five-year-olds who reported using marijuana in the last month.¹¹² Second, when the number of arrests doubled between the early 1990s and 1995, so did the percentage of twelfth graders reporting daily marijuana use.¹¹³ Furthermore, as arrests continued to rise after 1995, so too did the percentage of daily users, eventually tripling from its low of the early 1990s. Thirdly, as the number of arrests increased, so did the number of new marijuana users, possibly because more arrests would create more publicity, thus increasing the non-users' perception of the amount of law violation.¹¹⁴ The final point, shown in the following table, is that as arrests increased, so did the percentage of twelve- to seventeen-year-olds and eighteen- to twenty-five-year-olds reporting marijuana use in the past month.

TABLE 1: PERCENTAGE REPORTING USE IN PAST MONTH¹¹⁵

<i>YEAR</i>	<i>MARIJUANA ARRESTS</i>	<i>AGES 12-17</i>	<i>AGES 18-25</i>
1992	About 350,000	3.4	10.9
1995	588,963	8.2	12.0
2000	734,498	7.2	16.0
2006	829,626	6.7	16.3

This section has suggested that marijuana prohibition may actually contribute to marijuana consumption, and some of the data does show a correlation between increased enforcement and more marijuana use. Of course, correlation does not equal causation.¹¹⁶ However, at the very least it seems clear that enforcement of marijuana prohibition is having very little if any discernable impact on the number of marijuana users or the amount of marijuana available. Therefore, society is making extraordinary enforcement expenditures with limited to no return, while the institution of law itself suffers.

¹¹² OFF. OF NAT'L DRUG CONTROL POL'Y, *supra* note 73, at 2. The exact figures are in the table below.

¹¹³ JOHNSTON ET AL., *supra* note 72, at 50.

¹¹⁴ For a graph of new marijuana users from 1965 to approximately 2002, see OFFICE OF APPLIED STUDIES, U.S. DEP'T OF HEALTH & HUMAN SERVICES, 2003 NATIONAL SURVEY ON DRUG USE & HEALTH (2004), <http://www.oas.samhsa.gov/nhsda/2k3nsduh/2k3Results.htm#fig5.1> (on file with the Harvard Law School Library).

¹¹⁵ The percentages for each year except 2006 are found at OFF. OF NAT'L DRUG CONTROL POL'Y, *supra* note 73, at 2. For the 2006 figures, see OFFICE OF APPLIED STUDIES, *supra* note 65, at 21-22. The arrest figures are based on the FBI Uniform Crime Reports, which can be accessed from the FBI's website. See CRIMINAL SERVS. INFO. DIV., *supra* note 64.

¹¹⁶ It could be reasonably argued that it is difficult to know whether there are more marijuana users because there are more arrests, or more arrests because there are more marijuana users. However, it seems unlikely that increase in use alone can explain why there was such a disproportionate increase in daily users, thus suggesting publicity played a role.

C. *Logistical Impossibility*

Albert Einstein said: “nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced.”¹¹⁷ Marijuana use is so widespread that it has become logistically impossible to enforce in at least two ways. First, even after seventy years of prohibition, the government cannot prevent millions of people from using marijuana or have any measurable impact on the amount of marijuana available. Thus, anyone with a desire to use marijuana is able to do so. Certainly this alone does not mean a law should be changed, but when over twenty-five million people a year risk imprisonment to violate a law, it is strong evidence that law cannot be sufficiently enforced.

Second, even if it were desirable, it is impossible to imprison everyone who is in violation of the marijuana prohibition. With 2.3 million people behind bars, the United States already has the largest prison population in the world and the biggest proportion of its population in prison.¹¹⁸ As former Drug Czar, General Barry R. McCaffrey has said: “we can’t incarcerate our way out of this problem.”¹¹⁹

Thus, there is no way to adequately enforce the current law against the tens of millions of Americans who annually break marijuana laws. Therefore, under the logic of Einstein’s statement, marijuana prohibition is deteriorating the respect for government and law; hence, marijuana laws should be reformed to better coincide with the social norms of marijuana use.

IV. TWO OBJECTIONS

A. *Why Has the Law Not Changed Already?*

Some people may argue that if it is so obvious marijuana laws should be altered then why have they not changed already? But the mere fact that a law has not been changed after many decades says little about the virtue or social value of that law. For example, slavery was legal in America for more than seventy years and Jim Crow laws existed for another hundred years after slavery ended. Also, women were not allowed to vote for the first approximately 130 years in this country. Certainly if something as pernicious as these laws can take over a century to improve, then it is no inhibitor that marijuana laws have not changed for many decades.

The structure of American government makes the process of amending laws slow and difficult. As Alexander Hamilton, chief author of the Federal-

¹¹⁷ GRAY, *supra* note 29, at 77.

¹¹⁸ PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 5 (2008); *see also* *US Prison Population Peaks*, BBC NEWS, Apr. 7, 2003, http://news.bbc.co.uk/2/hi/in_depth/2925973.stm (on file with the Harvard Law School Library).

¹¹⁹ GRAY, *supra* note 29, at 30.

ist Papers, wrote: “Whoever considers the nature of our government with discernment will see It will be far more difficult to *undo* than to *do*.”¹²⁰

Moreover, despite the structural challenges, marijuana laws have gradually been changing. Although it took nearly sixty years since the initial prohibition of marijuana, the state of California legalized medical marijuana in 1996. Since then, twelve other states have followed suit. Furthermore, reputable organizations are forming in order to make the case for reforming marijuana laws,¹²¹ and marijuana is being voted on somewhere in the country during every election cycle.

Although marijuana laws are changing at the local and state levels, it remains illegal at the federal level. This inconsistency has caused further derision of law itself, as people acting legally under their state’s law are arrested for violating federal statutes.¹²² As noted above, H.R. 2943 has been introduced in the House to modify federal marijuana policy. Predicting the outcome of this particular bill is difficult and, like most bills, it may never make it out of committee; however, the gap between federal and state law has become so wide that the law must change. Indeed, a September 2009 cover story in *Fortune* magazine hypothesizes that marijuana may already be effectively legal in several states where doctors have prescribed it to hundreds of thousands of people.¹²³ This has created an irreconcilable situation in which these doctors are prescribing a federally banned Schedule I drug and the hundreds of dispensaries that openly supply patients are engaging in narcotics trafficking.¹²⁴ Such disparity demeans the supremacy of federal law and cannot last. History has shown that it will almost certainly be impossible to make the citizenry conform to current federal marijuana policy, and therefore federal law should adapt to the realities and norms of state law.

B. *Wrong Message to Children*

Almost invariably the reply to altering marijuana laws is that it would send the wrong message to children.¹²⁵ However, there is no reason to think that changing marijuana laws will send the wrong message to children because their views are already largely determined by social norms. As mentioned, studies have shown that norms can be “stronger determinants of behavior than formal sanctions.”¹²⁶

¹²⁰ RON CHERNOW, ALEXANDER HAMILTON 331 (2004).

¹²¹ These include Law Enforcement Against Prohibition (LEAP) whose advisory board includes former police chiefs and judges. See, e.g., Law Enforcement Against Prohibition, About Leap—The Summary, <http://www.leap.cc/cms/index.php?name=Content&pid=4> (on file with the Harvard Law School Library).

¹²² See, e.g., Joel Stein, *The New Politics of Pot*, TIME, Nov. 4, 2002, at 57.

¹²³ See Parloff, *supra* note 56.

¹²⁴ *Id.*

¹²⁵ See, e.g., Senator John Edwards, Democratic Presidential Debate (Oct. 30, 2007), available at <http://www.youtube.com/watch?v=BUNX9o19U-8> (last visited Jan. 17, 2010) (responding to a question about marijuana decriminalization).

¹²⁶ Depoorter & Vanneste, *supra* note 9, at 1139.

For example, the 2007 Monitoring the Future survey found that a larger percentage of tenth graders believed that there was a greater risk of harm in smoking one or more packs of cigarettes per day than in smoking marijuana regularly.¹²⁷ Thus, the legality of a substance is not per se determinative of how young people view the use of that substance. If marijuana laws are changed, there is good reason to believe that honest education will help children understand the potential health risks of using marijuana, just like it has done with cigarettes.

Alcohol prohibition was not ended because everyone suddenly believed alcohol was good for people, but because of the black market problems that accompanied prohibition. Similarly, as described below, the effects of the marijuana black market are worse for children than reforming the laws to a regulatory system.

Despite effectively being illegal for seven decades, the availability of marijuana is ubiquitous. In the Monitoring the Future survey, only thirteen percent fewer tenth graders said that marijuana was “fairly easy” or “very easy” to get as compared to alcohol.¹²⁸ This is amazing considering that alcohol is legally and readily available to the millions of Americans over the age of twenty-one, while no one is allowed to have marijuana for recreational use.

One important difference between alcohol and marijuana is that no one is trying to sell alcohol to minors. As Judge Gray writes, “When was the last time you heard of someone offering a student a free sample of alcohol on a high school campus? It does not happen because there is no illegal profit in it.”¹²⁹

In addition, the opportunity to make these profits can entice young people to sell marijuana.¹³⁰ If the potential to make in an afternoon what otherwise takes a month of hard work has proved too irresistible to myriad law enforcement officers, how can it be expected that young people with much less world experience will not also follow this path?¹³¹ Another effect of youth dealers is that their “natural customers” are “other young people.”¹³²

The reality is that marijuana is a social norm in young people’s lives. Its omnipresence means they are already making the decisions of whether to use it and how they view others who do it. In 2007, nearly forty-two percent of twelfth graders reported having tried marijuana at least once in their lifetime.¹³³ This means that many young people are breaking the law, which may be more detrimental to society than widespread use of the drug itself.

¹²⁷ See LLOYD D. JOHNSTON ET AL., NAT’L INST. ON DRUG ABUSE, U.S. DEP’T HEALTH & HUMAN SERVS., 1 MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2007, at 365 tbl.8-2 (2007), available at http://monitoringthefuture.org/pubs/monographs/vol1_2007.pdf.

¹²⁸ See *id.* at 429 tbl.9-7.

¹²⁹ GRAY, *supra* note 29, at 50.

¹³⁰ See *id.* at 53.

¹³¹ See *id.* at 76.

¹³² *Id.* at 53.

¹³³ See JOHNSTON ET AL., *supra* note 127, at 196 tbl.5-1.

Perhaps since marijuana prohibition has proved impossible to enforce, the primary response to opponents of reform should be: what message do you want to send to children about the rule of law?

CONCLUSION

This Essay has applied a Law and Economics analysis to the disconnect between social norms and marijuana prohibition in order to demonstrate that enforcement of marijuana prohibition is not achieving its intended benefits, while the institution of law itself is being damaged. Consequently, the law should be changed to more closely resemble the social norms. The law should adapt to the norms rather than vice versa because marijuana norms have become internalized and continued prohibition may actually strengthen these norms and lead to greater marijuana use.

Contrary to the origination of marijuana prohibition, any changes in the law should be based on social scientific evidence. This is what President Nixon's National Commission on Marihuana and Drug Abuse did when its two-year study recommended that marijuana possession be decriminalized. The forty-five years of prohibition since then have not reduced the number of marijuana users and have created a logistical impossibility for law enforcement. Thus, it is time for lawmakers to consider a marijuana policy that better accounts for the social norms of marijuana use.