MARIJUANA, FAIRNESS AND PUBLIC SAFETY

A Report on the **LEGALIZATION** *of* **RECREATIONAL MARIJUANA** *in the* **UNITED STATES**

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Executive Summary

New Yorkers consume a large amount of marijuana, and they necessarily purchase it on an illegal black market. Our state's marijuana statutes conscript thousands of such consumers into the criminal justice system each year, at great cost to the state, and these arrests disproportionately affect communities of color. In the face of such facts, ten other states have already legalized the possession of recreational marijuana, and eight have also legalized its retail sale. Polls in New York have shown an increasing support for such reforms, and elected officials, advocates, health experts, and others have thus begun to consider changes to our state's marijuana laws as well.

Our office's belief is that such discussions are likely to lead in the foreseeable future to reforms that legalize and regulate the cultivation, distribution, sale, and consumption of marijuana in New York: reforms our office will support. The impact, of course, will be far reaching, as an entirely new industry will effectively be created with a single legislative stroke.

The recent legalization efforts in other states are of obvious relevance to the consideration of whether and how legalization should be pursued in New York. In particular, several states have already experienced the pitfalls of pursuing marijuana reform in the absence of sufficient input from prosecutors and law enforcement agencies in their jurisdictions. Without careful consideration of these stakeholder views, the resulting laws and regulations can create confusion about enforcement, and may impede a state's ability to combat black market violence and other risks to public safety.

With this in mind, our office has, over the past several months, gathered data and conducted interviews with dozens of prosecutors, regulators, and law enforcement representatives from states that have legalized the use of recreational marijuana. Our purpose was to understand the challenges that will need to be anticipated by lawmakers in our state. This work has yielded valuable insights into how responsibly to frame any future laws and regulations to avoid negative impacts on public safety. Our findings are discussed in this report, and our recommendations are summarized below. Having completed this effort, we stand ready to advise and assist any participant in the important ongoing discussions about legislative reform of our state's marijuana laws.

In the meantime, we have continued to study the impact our existing marijuana laws are having on the residents of New York City. Most notably, despite recent efforts by law enforcement, it remains the case that black and Hispanic individuals in low-income neighborhoods of color continue to be arrested for marijuana offenses at much higher rates than their similarly situated counterparts in predominantly white communities. Such arrests, of course, can have significant impacts on arrestees' jobs, schooling, families, and futures. On the other hand, the punishments imposed, after arrest, fingerprinting, and court appearances, are almost always minimal or non-existent. The result is that large numbers of our residents are becoming stigmatized and alienated from the police at a huge cost to the criminal justice system, for virtually no punitive, rehabilitative, or deterrent purpose.

A similar evaluation in recent months led our office to announce a new policy whereby we now decline to prosecute the vast majority of theft of service (turnstile-jumping) arrests in Manhattan, which previously numbered nearly 8,000 per year. There, too, the arrests, after

processing and court appearances, produced no meaningful criminal justice outcome, other than to impede the future prospects of a predominantly minority cohort of defendants. Instead, these "farebeat" offenses (in the absence of an identifiable public safety risk) are now being handled through the issuance of a summons without an arrest, and there has been no apparent increase in subway crime. On the other hand, the elimination of thousands of cases from our Criminal Court dockets will result in an appreciable savings in criminal justice resources.

In the absence of immediate legislative change, we have now decided, for analogous reasons, to decline to prosecute those who are arrested for smoking or possessing small amounts of marijuana in Manhattan. (In 2017, the number of such arrests was 5,505.) As of August 1, 2018, any arrestee who has been issued a Desk Appearance Ticket (DAT) by the New York City Police Department for possession or smoking marijuana (90 percent of our current marijuana caseload) or who has been subject to custodial arrest (the remaining ten percent) will not be prosecuted by our office in the absence of an identifiable public safety risk. Instead, we believe such individuals, as in theft of services cases, should be issued summonses instead.

Of course, any more permanent and state-wide reform will have to come through legislation. As noted above, the purpose of this report is to provide a guide to lawmakers and others about lessons learned from other states' efforts to date. A summary of those recommendations is as follows:

1. It is imperative that any serious discussion of marijuana reform include data and perspectives from law enforcement stakeholders who have been dealing with our marijuana laws and related public safety issues for decades. If anything, the enforcement issues that arise in the wake of legalization are likely to be more, and not less, complex than in the past. The experiences of other states suggest that, if lawmakers ignore the views of law enforcement in the drafting process, they do so at their constituents' peril.

2. As in many other legislative areas, it is important to recognize the diversity of New York state, including in population density, topography, and culture. Localities should be given broad discretion to implement rules and regulations so they can tailor marijuana reforms to their particular needs and values. For example, localities should be able to establish their own ordinances about where and when marijuana can be smoked and sold, and whether and to what degree individuals can cultivate it on their properties or in their homes.

3. The state should anticipate that the illegal black market for the sale of recreational marijuana may continue. To limit such activity, legislators and regulators must carefully assess what taxes and licensing fees will be imposed on retail sellers: these should be high enough to bring in sufficient revenue to fund the huge regulatory burden of a newly licensed market, but not so high as to prevent legal suppliers from competing with black market sales. The state should also consider limiting the number of licenses it issues to market participants, to reduce the number of regulators and inspectors required to oversee compliance, and to discourage an oversupply that will make its way to the black market.

4. To better track and understand trends involving marijuana-impaired driving, state law enforcement agencies, toxicology labs, and the Division of Criminal Justice Services should begin

now to collect statistics from DUI arrests to specifically identify the substances that have been used by DUI arrestees. Also, absent a new forensic test that accurately measures marijuana impairment, state and local law enforcement agencies should increase the number of officers who are trained as drug recognition experts, to better anticipate a possible increase in marijuana-impaired driving.

5. The state should adopt strict regulations regarding marijuana product packaging and labeling, in particular to discourage juvenile use. Packaging should not be designed in ways that might appeal to children, and should not permit children to gain access to the product. To prevent accidental overdose in adults, package labeling should also include information about serving size and the time it may take for any psychoactive affects to be experienced by a consumer.

6. Other states have reported confusion among the public and members of the criminal justice community about post-reform distinctions between lawful and unlawful conduct. To avoid such confusion, New York should fully fund a wide-reaching educational campaign to help residents understand and comply with the new laws. The state should also establish and fund a campaign to educate parents and children about the health dangers of marijuana use by juveniles.

7. To address continued racial disparities in marijuana enforcement after any legalization, police and prosecutors in the state should continue to weigh carefully the costs and benefits of arrests for lower-level conduct that remains criminal. The experience of legalized states to date shows that disparate treatment is likely to continue, underscoring the ongoing importance of local discretion in policing and prosecution.

These are just some of the lessons learned to date from other states that have pursued the path of legalization. More information about that recent history is detailed below. Obviously, New York should continue to monitor and learn from other states' experiences as criminal justice policy in this complex area unfolds.

I. An Overview of Marijuana Laws and Regulations

Marijuana is classified as a Schedule I controlled substance under the federal Controlled Substances Act of 1970 (the "CSA"), making it illegal under federal law to sell, use, or transport the substance.[1] Over the past few decades, however, most states have passed laws that either:

1) decriminalize the personal use and possession of small amounts of recreational marijuana;

2) legalize the cultivation, distribution, sale, possession, and use of medicinal marijuana;

3) legalize the use and possession of recreational marijuana (but not the sale); or

4) legalize the use, possession, cultivation, distribution, and sale of recreational marijuana.[2]

Decriminalization of Personal Use

In states that have decriminalized the personal use of marijuana, it is a violation—a non-criminal offense—for an individual to possess for personal consumption small amounts of marijuana. It is still a crime in such states, however, to publicly consume it (or, in some states, to have it in public view); to possess marijuana in amounts exceeding the state's prescribed limits; and/or to cultivate, distribute, and sell recreational marijuana.

For example, in New York, it is a violation—not a crime—to possess 25 grams or less of marijuana, with a penalty of not more than a $100 fine.[3] However, it is a class B misdemeanor crime to possess more than 25 grams but less than two ounces, or to possess any marijuana in a public place when it is burning or open to public view. It is a class A misdemeanor to possess more than two ounces or to sell marijuana, and a felony (the severity of which depends on the amount) to sell marijuana in larger amounts, or to possess it in larger amounts.[4]

Eight other states, like New York, have decriminalized, but not legalized, the personal use of recreational marijuana: Connecticut, Delaware, Illinois, Maryland, Mississippi, Nebraska, New Hampshire, and Rhode Island. Four states still classify personal use of marijuana as a criminal misdemeanor, but the offenses do not carry a threat of jail time: Minnesota, Missouri, North Carolina, and Ohio.

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[1] 21 U.S.C § 801 et seq.

[2] As explained in the next section, decriminalization of recreational marijuana makes it a violation, and not a crime, to possess small amounts of marijuana for personal consumption. Legalization of recreational marijuana makes that conduct fully lawful. In states that have neither decriminalized nor legalized marijuana, it is still a crime to possess small amounts for personal use.

[3] NY Penal Law § 221.05.

[4] NY Penal Law §§ 221.05 to 221.55.

Legalization of Medical Marijuana

Forty-six states and the District of Columbia have laws legalizing some form of medical marijuana. These laws vary widely in scope and form. For example, some states only permit the use of cannabidoil (CBD oil), and some states only permit ingestion and not smoking, while other states permit the use of medical marijuana in all forms. There are also wide differences in individual states' laws pertaining to the cultivation and distribution of medical marijuana.

In New York, Governor Andrew Cuomo signed into law in July 2014 the Compassionate Care Act, legalizing medical marijuana.[5] The law established five "Registered Organizations" (ROs) authorized to cultivate, distribute, and sell medical marijuana at a licensed dispensary, and prohibits medical marijuana from being smoked (so it must be in other forms such as capsules, pills, and oils).[6] Each RO is permitted to have four dispensaries, so the law authorizes a total of 20 dispensaries statewide.[7] Patients must be certified by practitioners registered with the Department of Health,[8] and must have a "serious" condition as defined by the law, including cancer, AIDS, and Parkinson's disease. (The law was later amended to add other qualifying conditions, such "severe or chronic pain" and severe nausea.)[9]

The Legalization of Recreational Marijuana to Date

As of April 2018, nine states and the District of Columbia have legalized the recreational use of marijuana for individuals 21 years old and over. The District of Columbia and Vermont have legalized the possession of recreational marijuana, but not the sale. Eight states have legalized the use, possession, cultivation, distribution, and sale of recreational marijuana: Alaska, California, Colorado, Maine, Massachusetts, Nevada Oregon, and Washington. These states have established (or are in the process of establishing) licensing, regulatory, and taxation schemes to govern the industry. They impose civil and criminal penalties for unlicensed activity and violations of regulations; for example, felony crimes still apply to the possession and sale of large amounts of marijuana without a license from the state. The laws differ with regard to the amount in which an individual may purchase, carry, privately possess, and privately grow marijuana plants, but public use, *e.g.,* smoking in public, is still banned.

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5 Chapter 90 of the Laws of 2014 (NY).
6 NY Pub. Health L. §§ 3360, 3365.
7 NY Pub. Health L. § 3365.
8 NY Pub. Health L. § 3361.
9 NY Pub. Health L. § 3360.

	Effective date of recreational marijuana legalization	Start of commercial sale	Public possession by adults over 21 (in usable form[10])	Penalties for public consumption	Home grow limits
Colorado	December 2012	January 2014	Up to 1 ounce	Criminal violation	Up to 12 plants (localities can pass stricter laws)
Washington	December 2012	July 2014	Up to 1 ounce	Civil violation	Home grow banned except for licensed medical use
Alaska	February 2015	October 2016	Up to 1 ounce	Civil violation	Up to 6 plants
Washington DC	February 2015	Sale is still unlawful	Up to 2 ounces	Criminal violation	Up to 6 plants
Oregon	July 2015	October 2016	Up to 1 ounce	Civil violation	Up to 4 plants
California	November 2016	January 2018	Up to 1 ounce	Civil violation	Up to 6 plants
Massachusetts	December 2016	Expected July 2018	Up to 1 ounce	Civil violation	Up to 12 plants
Nevada	January 2017	July 2017	Up to 1 ounce	Misdemeanor	Up to 6 plants
Maine	January 2017	Legislature still debating; no timetable	Up to 2.5 ounces	Civil violation	Up to 3 plants
Vermont	Goes into effect July 2018	Sale is still unlawful	Up to 1 ounce	Civil violation	Up to 6 plants

Conflicts with Federal Law

To address the increasing conflict between states' marijuana laws and the federal Controlled Substances Act, the Department of Justice under Attorney General Eric Holder issued a series of memoranda establishing guidelines for federal investigations and prosecutions of marijuana crimes. In 2009, Deputy Attorney General David W. Ogden issued a memorandum that gave U.S. Attorneys "guidance and clarification" on how to enforce the CSA in states that have legalized medical marijuana.[11] The Ogden Memo stated that the Justice Department, in exercising

[10] Usable form is typically defined as dried marijuana flowers or leaves that are ready to be smoked or vaped. The states' laws also vary as to the amount an individual can possess in other forms, such as edibles and infused products, extracts, and concentrates.

[11] Memorandum of Deputy Attorney General David W. Ogden, US Dept. of Justice, "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," Oct. 19, 2009, available at https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

its broad discretion, and being "committed to making efficient and rational use of its limited investigative and prosecutorial resources," would not prosecute individuals who use marijuana for medical purposes, or their caregivers, so long as they act in accordance with their respective state's laws. The Department, however, was to continue to make it a "core priority" to prosecute significant marijuana traffickers.[12]

Two years later, Deputy Attorney General James Cole sought to clarify the Ogden Memo. In a June 2011 memorandum to U.S. Attorneys, he noted that there had been a vast increase in the scope of commercial cultivation, distribution, sale, and use of marijuana for purported medical purposes, and that the Ogden Memo was never intended to shield large-scale, privately-operated industrial cultivation facilities. Cole directed U.S. Attorneys, in the exercise of their discretion and consistent with resource constraints, to bring federal enforcement actions against such operations. Pursuant to this directive, state laws and local ordinances were not to be viewed as a defense to civil or criminal enforcement of federal law, including enforcement of the CSA. Furthermore, Cole noted, "[t]hose engaging in transactions involving the proceeds of such activity may also be in violation of money laundering and other federal crimes."[13]

After Colorado and Washington passed ballot initiatives legalizing the use and sale of recreational marijuana, Cole issued another memorandum to U.S. Attorneys on August 29, 2013, frequently referred to as the "Cole Memo." In it, Cole reiterated that the Justice Department is committed to enforcing the CSA, but is also committed to using its limited resources to address the most significant threats. He then stated that the Department's priorities with regard to marijuana enforcement were to prevent:

- Distribution of cannabis to minors.
- Cannabis revenue from funding criminal enterprises, gangs, or cartels.
- The diversion of cannabis to other states.
- State-authorized activity from being used as a cover or pretext for trafficking of other illegal drugs or other illegal activity.
- Violence and the use of firearms in the cultivation and distribution of marijuana.
- Drugged driving and the exacerbation of other public health effects.
- The growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands.
- Marijuana possession on federal property.[14]

Outside of these priorities, Cole wrote, "the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws."[15] In this regard, jurisdictions that had implemented strong and effective

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[12] *Id.*

[13] Memorandum of Deputy Attorney General James M. Cole, U.S. Dept. of Justice, "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use," June 29, 2011, available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.

[14] Memorandum of Deputy Attorney General James M. Cole, U.S. Dept. of Justice, "Guidance Regarding Marijuana Enforcement," Aug. 29, 2013, available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[15] *Id.* at p. 2.

regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana were to be viewed as less likely to threaten the Department's priorities.[16]

In January 2018, Jeff Sessions, Attorney General under President Donald Trump and a vocal opponent of marijuana, rescinded the Cole Memo.[17] Both Republican and Democratic legislators in states that had legalized marijuana strongly objected to the prospect of federal prosecutions, claiming a violation of their states' rights.[18] In particular, Colorado Republican Senator Cory Gardner said he would block all Department of Justice nominations unless he received assurance that his state's marijuana industry would be safe from federal interference. On April 13, 2018, Senator Gardner announced that he had received such an assurance from President Trump, and that the President told him he will support "a federalism-based legislative solution to fix this states' rights issue once and for all."[19] As of this writing, the future of federal enforcement of marijuana laws remains to be seen.

II. Continuing Enforcement Challenges in Legalized States

As discussed above, even in states that have legalized the recreational possession (and, in some cases, sale) of marijuana, it remains unlawful to possess the product in somewhat higher amounts, and to smoke it in public.[20] One question that arises in such states is whether and how legalization has affected enforcement at these slightly higher possession levels, and whether members of the public and law enforcement are able to understand and observe the somewhat indistinct line between non-criminal and criminal possession. Another question is whether legalization has reduced the much-discussed racial disparities that often arise in the context of marijuana enforcement. A sampling of state and local law enforcement experience with these issues follows.

Colorado

According to the Colorado Department of Public Safety, arrests for low-level criminal marijuana offenses have declined significantly since legalization in 2012. Between 2012 and 2015, the number of filings for misdemeanor marijuana-related offenses declined by 30 percent, and

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[16] *Id.*

[17] Memorandum of Attorney General Jefferson B. Sessions III, US Dept. of Justice, "Marijuana Enforcement," Jan. 4, 2018, available at https://www.justice.gov/opa/press-release/file/1022196/download.

[18] *See* Josh Gerstein and Christiana Lima, "Sessions Announces End to Policy that Allowed Legal Pot to Flourish," *Politico*, Jan. 4, 2018, available at https://www.politico.com/story/2018/01/04/jeff-sessions-marijuana-policy-us-attorney-enforcement-324020; Jesse Paul, "Cory Gardner Says AG Jeff Sessions' Decision to Rescind Marijuana Policy 'Has Trampled on the Will' of Colorado Voters," *Denver Post*, Jan. 4, 2018, available at https://www.denverpost.com/2018/01/04/cory-gardner-jeff-sessions-marijuana-policy/.

[19] *See* Seung Min Kim, "Trump, Gardner Strike Deal on Legalized Marijuana, Ending Standoff over Judicial Nominations," *Wash. Post,* April 13, 2018, available at https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html?noredirect=on&utm_term=.8a80847067ad.

[20] This section addresses possession cases involving quantities that exceed the legal limit for personal possession, but that do not support a case for intent to sell. Cases involving possession of large quantities with intent to sell are discussed in the "Black Market and Trafficking" section of this report.

filings for petty[21] marijuana offenses declined by 89 percent.[22] More specifically, filings for marijuana possession cases declined by 88 percent.[23] Prosecutors from the Denver and Boulder County District Attorney's Offices stated that, in their experience, judges and jurors have no appetite for prosecutions of possession offenses, even if a crime can be established. (In one Boulder County case, a jury acquitted a defendant accused of possessing more than two pounds of marijuana and later asked prosecutors why their time was being wasted.)[24]

During this same period, there has been no significant change in the number of public consumption of marijuana citations issued since 2012.[25] (As noted above, every state that has opted to legalize and regulate marijuana still prohibits public consumption.)

Finally, although overall marijuana arrests have declined since legalization, marijuana enforcement in Colorado still disproportionally affects minorities. Based on data from the Colorado Department of Safety, the number of marijuana arrests since 2012 decreased by 51 percent for whites, 33 percent for Hispanics, and 25 percent for African-Americans. The marijuana arrest rate for blacks (348 per 100,000) was almost triple that of whites (123 per 100,000) in 2014.[26]

Washington State

In 2003, Seattle voters passed Ballot Initiative I-75, instructing the police and the City Attorney to make adult marijuana possession cases the city's "lowest law enforcement priority."[27] In addition to following this voter directive, the Seattle Police Department deprioritized the ban on public consumption of marijuana because the offense carries a $27 fine, while processing an arrest costs approximately $150.[28] The Office of King County Prosecuting Attorney Dan Satterberg (whose jurisdiction includes Seattle) and the Office of Seattle City Attorney Pete Holmes are seeing fewer cases involving low-level marijuana offenses and have largely ceased prosecuting such cases.[29] Statewide, law enforcement incidents[30] involving marijuana decreased by 63 percent between 2012 and 2015.[31]

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[21] Colorado has three classes of offenses: petty, misdemeanor, and felony.

[22] Division of Criminal Justice of the Colorado Department of Public Safety, Office of Research and Statistics, "Marijuana Legalization in Colorado: Early Findings, A Report Pursuant to Senate Bill 13-283," March 2016, at p. 24, http://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf (hereinafter Colo. Dept. of Public Safety 2016 Report).

[23] *Id.*

[24] Interviews with the Denver District Attorney's Office, March 19, 2018, and the Boulder County District Attorney's Office, March 20, 2018.

[25] Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 24.

[26] *Id.* at pp. 5, 21.

[27] Seattle Initiative Measure 75, available at http://clerk.ci.seattle.wa.us/~public/initref/init75.htm.

[28] Interview with the Seattle Police Dept., March 7, 2018.

[29] Interviews with the King County Prosecuting Attorney's Office and the Seattle City Attorney's Office, March 7, 2018.

[30] An "incident," as defined by the FBI and adopted by the Washington State Office of Financial Management, occurs when a law enforcement officer investigates a scene or situation, whether that investigation results in an arrest or not. *See* Forecasting and Research Division, Washington State Office of Financial Management, "Monitoring Impacts of Recreational Marijuana Legalization: 2016 Update," March 2017, at p, 4, http://www.ofm.wa.gov/reports/marijuana_impacts_update_2016.pdf (hereinafter Wash. State 2016 Update Report).

[31] *Id.* at pp. 3-4.

According to King County Prosecuting Attorney Satterberg, based on anecdotal evidence, the decrease in police stops of individuals for public consumption of marijuana in Seattle has removed a flashpoint between law enforcement and communities that tend to have greater police presence, which has improved the relationship between police officers and the communities they serve.[32]

Oregon

As in many other major cities, Portland's law enforcement agencies, since Oregon's legalization of marijuana in 2015, have not been aggressively enforcing the state's remaining low-level marijuana crimes and infractions.[33] Rather, their focus is combating the state's black market and trafficking of controlled substances, including of heroin, cocaine, methamphetamines, synthetic opiates, and to a lesser extent, marijuana.[34]

Statewide, arrests of adults for marijuana possession dropped from 1,796 in 2010 (pre-legalization) to 540 in 2015 (post-legalization).[35] Again, however, while rates of marijuana arrests have declined among all adult race groups, the rate of arrests of black adults was still more than 50 percent higher than the rate of arrests among white adults in 2015.[36]

Nevada

Unlike other states that have legalized recreational marijuana, public consumption remains a misdemeanor in Nevada rather than a civil infraction (unless that public consumption is on one's own property).[37] Nonetheless, enforcement of marijuana offenses is still a low priority for law enforcement, according to Police Director Chuck Calloway of the Las Vegas Metropolitan Police Department. Instead, Nevada law enforcement agencies are using limited resources to combat the state's methamphetamine and opioid crises.[38]

Even where police issue citations for marijuana offenses, prosecutors from the Office of Clark County District Attorney Steve Wolfson, whose jurisdiction includes Las Vegas, stated that, in their experience, judges frequently dismiss such cases without input from the prosecutor.[39]

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[32] Interview with King County Prosecuting Attorney Dan Satterberg, March 7, 2018.

[33] Convictions of an infraction, unlike a misdemeanor, is not a criminal conviction.

[34] Interviews with the Multnomah County District Attorney's Office, and Lt. Art Nakamura, Drugs and Vice Division, the Portland Police Dept., March 8, 2018.

[35] Oregon Public Health Division, "Marijuana Report: Marijuana Use, Attitudes, and Health Effects in Oregon," Dec. 2016, at p. 67, available at https://apps.state.or.us/Forms/Served/le8509b.pdf (hereinafter Oregon Public Health Division 2016 Report).

[36] *Id*. at p. 69.

[37] The Las Vegas City Council is currently debating an ordinance to permit public consumption of marijuana. Because Las Vegas does not have alcohol open-container laws, many tourists are reportedly not aware that public consumption of marijuana is unlawful; furthermore, hotels and casinos ban marijuana from their properties, so many tourists have no lawful place to consume it.

[38] Interview with Chuck Calloway, Police Director, Intergovernmental Services, Las Vegas Metropolitan Police Dept., April 3, 2018.

[39] Interview with the Clark County District Attorney's Office, April 3, 2018.

California

Between 2004 and 2006, several California localities passed voter initiatives or City Council resolutions directing law enforcement agencies to make low-level marijuana offenses their lowest priorities. These jurisdictions include Oakland, Santa Barbara, Santa Cruz, San Francisco, Santa Monica, and West Hollywood.[40]

According to law enforcement representatives in Los Angeles and San Francisco, public consumption and personal possession offenses have not been heavily enforced since California legalized medical marijuana in 1996.[41] San Francisco District Attorney George Gascon has explicitly de-prioritized prosecuting marijuana-related cases that do not involve an element of public safety, and has eliminated his Office's Narcotics Unit. (Major drug-related cases are now handled by general felonies prosecutors.)[42]

Notwithstanding the fact that many law enforcement agencies in California have deprioritized the enforcement of low-level marijuana offenses, statistics from 2012 to 2016 show that, where arrests were made for such violations, black individuals were twice as likely as white individuals to be arrested.[43]

Massachusetts

The Office of Suffolk County District Attorney Dan Conley, whose jurisdiction includes Boston, prosecuted 65 marijuana possession cases against adults and two cases against minors in 2016. After Massachusetts legalized personal possession, the office prosecuted only 20 cases against adults and four cases against minors in 2017. But many of these cases (in both 2016 and 2017) involved other charges, such as domestic violence abuse or possession of other drugs; few, if any, involved solely a marijuana possession charge. During DA Conley's sixteen-year tenure as the district attorney, only five defendants have received a sentence of incarceration for marijuana possession, and all five of those defendants were sentenced concurrently for other crimes committed in the same transaction.[44]

Like many areas of the country, Massachusetts is experiencing an epidemic of opioid-related overdoses and deaths. This crisis has forced police departments around the state to focus their limited resources on combating opioids rather than marijuana offenses. Additionally, even where police officers issue tickets for public consumption, which carry a civil fine of $100,

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[40] *See* Marijuana Policy Project, "Lowest Law Enforcement Priority Jurisdictions," available at https://www.mpp.org/lowest-law-enforcement-priority-jurisdictions/.

[41] It is reportedly common practice for police officers to tell individuals to put out their marijuana cigarettes rather than issuing citations. Interviews with the Los Angeles County District Attorney's Office, Feb. 22, 2018, and the San Francisco District Attorney's Office, March 9, 2018. Furthermore, California law only bans the smoking of marijuana in public; it does not prohibit ingesting marijuana except in or upon the grounds of a school, day care center, or youth center while children are present. Cal. Health and Safety Code § 11362.3(a)(5).

[42] Interview with the San Francisco District Attorney's Office, March 9, 2018.

[43] Data from the Cal. Dept. of Justice cited in Drug Policy Alliance, "From Prohibition to Progress, A Status Report on Marijuana Legalization," Jan. 2018, at p. 42, available at http://www.drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf (hereinafter Drug Policy Alliance 2018 Report).

[44] Interview with the Suffolk County District Attorney's Office, Jan. 18, 2018.

individuals are not required to show identification. Therefore, there is no way to ensure that the individual gives the officer his or her real name and will ever pay the fine, further disincentivising officers from enforcing the public consumption ban.[45]

Washington, D.C.

According to statistics provided by the Office of the Attorney General of the District of Columbia, arrests in marijuana distribution and possession cases have dropped dramatically since D.C. legalized recreational marijuana use by adults in 2015, from 3,654 arrests in 2012 to 661 in 2017. However, arrests for public consumption have risen, from 99 arrests in 2014 to 266 in 2017.[46] Prosecutors report that, while it is clear to most residents that sale of marijuana is still unlawful, there is some confusion among the populace as to where they can legally consume. (Pursuant to D.C. law, consumption is only legal in one's private dwelling.)[47]

As in other jurisdictions, statistics indicate that the enforcement of marijuana laws, notwithstanding legalization, still has a disparate impact on communities of color in D.C. Black individuals are twice more likely than individuals of other races and ethnicities to be arrested for marijuana offenses, and they are eleven times more likely to be arrested for public consumption of marijuana than white individuals. From 2014 to 2016, 82.8 percent of arrests for public consumption were of blacks, even though black residents only make up approximately 49 percent of D.C.'s population.[48]

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While many of the foregoing reports are anecdotal, several themes emerge. First, even after legalization, arrest and prosecution decisions still need to be made in cases involving lower-level marijuana possession, and the exercise of discretion will continue to be the responsibility of police and prosecutors, taking into account public sentiments and competing law enforcement resources. Second, the fact of legalization may inadvertently (but perhaps understandably) lull members of the public into believing that public consumption and possession of larger amounts are protected, when they remain illegal. (In other words, after legalization, some confusion should be assumed, and the question is how law enforcement should respond to any such ambiguities.) Finally, the problem of racially disparate enforcement will not necessarily be eliminated as a result of legalization. The number of arrests will decline, but the remaining cases may well continue the disparity apace.

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45 *Id*.

46 Statistics provided by the Office of the Attorney General of the District of Columbia Karl Racine.

47 Local D.C. officials, including Attorney General Karl Racine, have expressed their support for regulating and taxing recreational marijuana, but the U.S. Congress has prevented the District of Columbia from doing so. Interview with the Office of the Attorney General of the District of Columbia Karl Racine, Jan. 26, 2018.

48 D.C. Metropolitan Police Dept. statistics cited in Drug Policy Alliance 2018 Report, *supra* note 43, at pp. 30-31, 50.

III. The Black Market and Trafficking in Legalized States

One justification often used for legalizing recreational marijuana sales is that it will eliminate the black market.[49] But nearly five years after the first recreational marijuana store opened in Colorado, a black market continues to thrive in legalized states.

The black market for marijuana has been a source of violent crime, often perpetrated against illegal growers and juvenile sellers. There also has been a rising number of explosions from the illegal production of butane hash oil, an extremely potent marijuana concentrate with high levels of tetrahydrocannabinol (or "THC"), the chemical responsible for physiological effects, which has been hugely profitable on the black market.

While the black market for marijuana has unique characteristics in each state, there are several common reasons why it persists:

1) **Overproduction**: Some states are permitting the cultivation of marijuana in amounts that far exceed what can be sold and consumed within their borders, and that surplus is being trafficked out-of-state.

2) **Out-of-state consumers will pay higher prices**: Traffickers can sell marijuana at far higher prices in states where marijuana is illegal. This is compounded by the fact that sellers in the legal, regulated market must pay high taxes, regulatory fees, and overhead costs that substantially cut into profit margins.

3) **Continuing markets for unlawful in-state sales**: It is still unlawful for juveniles to use and purchase marijuana, and some employers ban the use of marijuana by their employees. These restricted individuals, as well as those who do not want to pay taxes at licensed stores, are continuing to purchase marijuana on the black market in legalized states.

4) **The ease of cultivation**: Because cultivating marijuana is legal (albeit with proper licenses), the purchase and accumulation of equipment required to grow marijuana no longer raises suspicions. Additionally, many states permit adults to grow plants in their homes for personal use, and it is difficult for law enforcement to determine which homes are cultivating more than the maximum number of plants allowed by state law or city ordinances.

5) **Financing of illegal grow houses by foreign nationals**: Law enforcement representatives in Washington, Oregon, California, and Colorado have conducted raids of hundreds of homes illegally growing marijuana plants. The plants are often tended by foreign nationals, and law enforcement agents suspect that some of the individuals tending to the plants are human trafficking victims who have been forced to work in these illegal "grow homes."

What follows is a more particularized discussion of these concerns.

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[49] The black market is one in which marijuana is grown illegally and sold illegally. The gray market is one in which marijuana is grown legally but sold illegally. For ease in terminology, this report will refer to all illegal cultivation and sale as the black market.

Colorado

According to the Colorado Department of Safety, between January 2014 and August 2015, 65 percent of illegal drug interceptions that originated in Colorado involved marijuana, and almost all of those marijuana seizures (166 of 169) were destined for states outside of Colorado.[50] The Rocky Mountain High Intensity Drug Trafficking Area (HIDTA) reported that highway seizures of Colorado marijuana increased 43 percent in the four-year period since Colorado legalized recreational marijuana, compared to the prior four-year period; seizures of Colorado marijuana in the U.S. mail increased 844 percent in that same time period.[51]

Over the last several years, the Denver and Boulder County District Attorney's Offices have successfully secured a number of convictions against interstate marijuana traffickers. Although jurors generally have been unwilling to convict individuals for low-level marijuana offenses, they have convicted traffickers who are cheating the system by not paying taxes and following regulations. Prosecutors from the Boulder County DA's Office also noted that they aggressively prosecute individuals who sell marijuana to juveniles, but otherwise their marijuana enforcement efforts are primarily focused on large-scale trafficking.[52]

Federally, the U.S. Attorney for the District of Colorado Robert Troyer believes that the marijuana black market is one of the state's most serious drug enforcement issues. His office has yet to bring a civil or criminal action against a licensed retail store or grow facility, because serious marijuana-related crimes, including violent crimes, are occurring almost solely on the black market. While burglaries of licensed facilities have fallen due to tighter security, robberies, burglaries, aggravated assaults, and homicides remain high in the black market for marijuana.[53]

In Denver, seven homicides in 2017 reportedly involved the marijuana black market, and the Denver Police Department recovered approximately 140 guns in marijuana-related cases.[54] Additionally, there has been a rash of explosions in Colorado involving the production of butane hash oil. (In one Boulder County case in 2016, the defendant blew out the entire wall of a hotel during a hash oil extraction operation.[55])

Prosecutors and police officers from Denver and Boulder, as well as U.S. Attorney Troyer, believe that Colorado's black market will exist as long as marijuana remains illegal in other states, and as long as there is a demand by out-of-state consumers willing to pay far higher prices. Like other legalized states, Colorado is experiencing an overproduction of marijuana; growers and

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[50] Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 37.

[51] Rocky Mountain High Intensity Drug Trafficking Area, "The Legalization of Marijuana in Colorado: The Impact," Oct. 2017, at pp. 4-5, available at https://www.rmhidta.org/html/FINAL%202017%20Legalization%20of%20Marijuana%20in%20Colorado%20The%20Impact.pdf (hereinafter Rocky Mountain HIDTA 2017 Report).

[52] Interviews with the Denver District Attorney's Office, March 19, 2018, and the Boulder County District Attorney's Office, March 20, 2018.

[53] Interview with U.S. Attorney for the Dist. of Colo. Robert Troyer, March 30, 2018.

[54] Interview with Commander James Henning, Denver Police Dept., March 19, 2018.

[55] Interviews with the Boulder County District Attorney's Office and Sgt. Jeffrey Kessler, Boulder County Drug Task Force, Boulder Police Dept., March 20, 2018.

sellers (both legal and illegal) are offloading their supply to interstate traffickers at nearly double the price of the in-state legal market.[56]

Washington State

Although growing marijuana in the home is illegal in Washington (unlike in other legalized states), large-scale "home-grow" operations have been discovered throughout the state, with much of the marijuana destined for the East Coast. As of January 2018, the King County Prosecuting Attorney's Office had 30 pending cases involving illegal grow houses. Many of these cases involve multiple homes and thousands of plants. One case set for trial involves 17 houses, in which police seized more than 8,000 plants, more than $700,000 in cash, and nine vehicles.[57]

Many of these operations are reportedly controlled by foreign nationals, who purchase homes and staff them with low-level employees to cultivate the plants. They pay for the homes and utility bills in cash, so it is difficult to trace the operations back to the principals abroad. King County Prosecuting Attorney Satterberg said that the defendants in these cases have been more frequently opting to go to trial rather than pleading guilty and facing deportation, arguing that they did not know that such cultivation is unlawful in Washington. Jurors, moreover, have been generally unwilling to convict these low-level defendants unless there are other crimes associated with the unlawful marijuana cultivation. Even where there is a conviction, the maximum penalty for illegally growing 100 plants is six months in jail. Finally, according to Prosecuting Attorney Satterberg, some of the individuals tending to the plants may be human trafficking victims forced or coerced into working in the illegal grow homes.[58]

In addition to out-of-state trafficking, Washington's black market also thrives due to demand by in-state consumers, such as juveniles and individuals who want to pay lower prices, according to Chief of Police Carmen Best of the Seattle Police Department. Again, jurors have been generally unwilling to convict defendants accused of unlawful marijuana sales that do not rise to the level of major trafficking.[59]

Alison Holcomb, an attorney with the American Civil Liberties Union and the primary author of Washington's ballot initiative, said that state officials and members of the marijuana industry are working to determine the right tax rate and price point for products that better allow them to compete with the black market. The price point must be high enough for businesses to earn a profit, and the tax rate must be high enough for the government to bring in tax revenue. But the prices cannot be so high that legal sellers are undercut by unlawful sellers and distributers not paying licensing fees and taxes.[60]

Seattle officials have been more successful in their efforts against unlicensed marijuana businesses. For example, the King County Prosecuting Attorney and the Seattle City Attorney

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[56] Interviews with the Denver District Attorney's Office and the Denver Police Dept., March 19, 2018; the Boulder County District Attorney's Office and the Boulder Police Dept., March 20, 2018; and U.S. Attorney for the Dist. of Colo. Robert Troyer, March 30, 2018.

[57] Case information provided by the King County Prosecuting Attorney's Office.

[58] Interview with King County Prosecuting Attorney Dan Satterberg, March 7, 2018.

[59] Interview with Chief of Police Carmen Best, Seattle Police Dept., March 7, 2018.

[60] Interview with Alison Holcomb, Director of Strategy, American Civil Liberties Union, March 7, 2018.

threatened to take civil action against unlicensed stores purporting to be legitimate medical marijuana dispensaries, and were successful in shutting them down. The Seattle City Attorney also brought criminal charges against illegal marijuana delivery drivers as a result of police sting operations, largely reducing those operations as well.[61]

Oregon

Oregon's climate, soil composition, and altitude makes the state particularly suitable for outdoor marijuana cultivation, and its crop yields are worth more than any other agricultural commodity. Furthermore, Oregon's legalization law did not set a cap on the number of licenses it grants, in part because it wanted to encourage participants on the black market to move into the legal market. Therefore, the marijuana production rate of Oregon, a relatively low-population state, has saturated its domestic market. The Oregon State Police estimate that the state may be producing more than one million pounds of marijuana per year than its residents are consuming.[62]

Portland prosecutors report that the out-of-state diversion of marijuana has been a significant drug enforcement issue in Oregon since the state legalized medical marijuana. Compounding this problem is that there is little law enforcement presence in high-production regions of Oregon. In 2017, the Oregon State Legislature increased the state's ability to combat the black market by increasing funding for marijuana regulators and for the Oregon State Police to add cannabis enforcement positions.[63]

California

Although most cities in California have not yet begun legal recreational sales, the state has had a robust medical marijuana industry for more than two decades, and with it, a robust intrastate and interstate black market. A study commissioned by the California Department of Food and Agriculture found that, in 2016, California produced 13.5 million pounds of marijuana, yet it only consumed 2.5 million pounds — resulting in a surplus of five times the amount consumed.[64] That surplus is being trafficked to other states. In 2016, federal, state, and local law enforcement agencies seized 5.3 million marijuana plants throughout the nation; 70 percent of those seizures were confiscated in California.[65] As in Washington State, law enforcement in California has discovered a large number of illegal marijuana grow operations financed by foreign nationals, with much of the contraband trafficked to the East Coast.[66]

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[61] Interviews with the King County Prosecuting Attorney's Office and the Seattle City Attorney's Office, March 7, 2018.

[62] Oregon State Police Drug Enforcement Section, "A Baseline Evaluation of Cannabis Enforcement Priorities in Oregon," January 2017, at pp. 7, 9-10, 11, available at https://mass-cannabis-control.com/wp-content/uploads/2017/12/A-Baseline-Evaluation-of-Cannabis-Enforcement-Priorities-in-Oregon_.pdf (hereinafter Oregon State Police 2017 Report).

[63] Interviews with the U.S. Attorney's Office for the Dist. of Oregon and the Multnomah County District Attorney's Office, March 8, 2018.

[64] Cal. Dept. of Food and Agriculture study cited in Patrick McGreevy, "As the Top Pot-Producing State in the Nation, California Could Be on Thin Ice with the Federal Government," *L.A. Times*, Oct. 1, 2017, available at http://www.latimes.com/politics/la-pol-ca-marijuana-surplus-export-20171001-story.html.

[65] *Id.*

[66] *See, e.g.,* U.S. Attorney's Office for the Eastern Dist. of Cal., "Sweeping Two-Day Operation Targets International Organized Crime in Sacramento Area Neighborhoods," Press Release, April 4, 2018, available at

Nevada

Because Nevada's drug enforcement efforts are largely focused on the methamphetamine and opioid crises, its HIDTA and local police departments are not using significant resources to investigate and prosecute illegal marijuana grow operations and unlicensed sales. HIDTA's few cases involving marijuana trafficking also involve firearms and other drugs. However, at the urging of the marijuana industry, law enforcement agencies have been dismantling and making arrests at "pop-up parties." These unlawful sales events are advertised on social media without a precise location until shortly before the event, and many of them have been organized by marijuana growers in California looking to offload surplus in Nevada.[67]

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In short, an unintended consequence of legalization in a number of states has been an expansion of black market sales and related criminal activity that has taken advantage of a lack of foresight in state planning and regulation. Obviously, this should be studied and anticipated by any state that is responsibly considering the possibility of legalization in the future. As noted above, regional differences in geography, topography, and climate are all factors that have contributed to the causes and characteristics of each legalized state's black market for marijuana.

IV. Derivative Crimes in Legalized States

In each of the states that have legalized marijuana sales, the most common derivative crimes—marijuana-related crime that does not directly involve trafficking, possession, sale, or consumption of marijuana—are robberies of stores and their customers, and burglaries of stores. The number of burglaries, however, have steadily dropped over the last few years to a point where many law enforcement agencies no longer view them as a major issue, primarily because business owners have heavily increased security at their stores. Local and state laws often now require facilities to install cameras, safes, and other security measures, and to lock cash and products in safes when stores are closed. Business owners have also increased security measures surrounding the transportation of cash and products.

Colorado

Colorado's overall crime rate remained consistent after the state's first recreational marijuana store opened in January 2014. However, in 2016, the state's overall crime rate increased by five percent, while other states trended downward. Colorado's violent crime in 2016 went up 12.5 percent, while violent crime nationwide increased by less than five percent. In Denver, violent crime increased by nine percent from 2013 to 2016, and overall crime increased by four percent.[68]

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https://www.justice.gov/usao-edca/pr/sweeping-two-day-operation-targets-international-organized-crime-sacramento-area.

[67] Interviews with the Clark County District Attorney's Office, and Chuck Calloway, Police Director, Intergovernmental Services, Las Vegas Metropolitan Police Dept., April 3, 2018.

[68] Colo. Bureau of Investigation statistics cited in Scott McLean and Sara Weisfeldt, "Colorado Governor Won't Rule Out Banning Marijuana Again. Here's Why," *CNN*, April 20, 2018, available at https://www.cnn.com/2018/04/20/us/colorado-marijuana-and-crime/index.html.

Furthermore, filings of felony complaints have increased in many jurisdictions, including in Boulder by 33 percent.[69]

Although overall crimes rates in Denver have increased, the number of crimes related specifically to the marijuana industry remained stable and made up a small portion of overall crime.[70] As a result, Commander James Henning of the Denver Police Department said it is too soon to draw conclusions about any correlation between marijuana legalization and the increase in overall crime rates.[71] Similarly, Colorado's Department of Public Safety, in analyzing crime data from 2012 to 2015, stated that "it is too early to draw conclusions about the potential effects of marijuana legalization or commercialization on public safety, public health, or youth outcomes, and this may always be difficult due to the lack of historical data."[72] Governor John Hickenlooper, in a CNN story from March 2018, also said that the state's increase in crime cannot be conclusively attributed to marijuana legalization.[73]

Although most state and local government officials have not publicly blamed marijuana for Colorado's increase in crime, the state has nonetheless increased law enforcement resources to focus on marijuana enforcement. The Denver Police Department has added more officers to combat the marijuana black market, and the state legislature in 2017 established a $6 million fund to reimburse district attorneys and police and sheriffs' departments for enforcement of marijuana laws.[74]

Washington State

Chief of Police Carmen Best of the Seattle Police Department said that, prior to marijuana regulation, she was concerned there would be a high number of burglaries and robberies at or near licensed stores, but that has not occurred.[75] More generally, crime rates have remained steady in Washington, and continue on a downward trend after retail sales began in mid-2014. In 2015, violent crime increased by 3.9 percent, but property crimes decreased by 2.6 percent, as compared to the prior year.[76] In Seattle, violent crime increased 4.9 percent in 2016, but murders decreased 17 percent, as compared to 2015. During this same period, violent crime increased nationally by 4.1 percent and murder rates increased by 8.6 percent.[77] By way of comparison, data compiled by

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69 Interview with the Boulder County District Attorney's Office, March 20, 2018.

70 Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 26.

71 Interview with Commander James Henning, Denver Police Dept., March 19, 2018.

72 Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 5.

73 McLean and Weisfeldt, "Colorado Governor Won't Rule Out Banning Marijuana Again. Here's Why."

74 Interview with Commander James Henning, Denver Police Dept., March 19, 2018.

75 Interview with Chief of Police Carmen Best, Seattle Police Dept., March 7, 2018.

76 FBI Seattle, "The FBI Releases 2015 Crime Statistics for Washington State," Press Release, Sept. 26, 2016, https://www.fbi.gov/contact-us/field-offices/seattle/news/press-releases/the-fbi-releases-2015-crime-statistics-for-washington-state.

77 FBI 2016 Violent Crime Report, available at https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/violent-crime, and cited in Sara Jean Green, "FBI: Violent Crime Up In Seattle and Washington in 2016, But Murders Specifically Down," *The Seattle Times*, Sept. 26, 2017, https://www.seattletimes.com/seattle-news/crime/fbi-violent-crime-up-in-seattle-and-washington-in-2016-but-murders-specifically-down/.

the Washington Association of Sheriffs and Police Chiefs showed that violent crimes decreased slightly from 3.6 violent offenses per 1,000 residents in 2012 to 3.3 per 1,000 in 2016.[78]

Oregon

Oregon's legalization law went into effect in July 2015 and the first stores opened in October 2016. FBI data shows that crime rates stayed largely the same between 2015 and 2016.[79] Prosecutors from the Multnomah County District Attorney's Office attributed most of Oregon's marijuana-related violent crimes to the black market rather than the legal market.[80]

Nevada

According to the Clark County District Attorney's Office and the Las Vegas Metropolitan Police Department, marijuana stores were frequently burglarized after the state legalized recreational sales. Since then, stores have increased their security measures, and this has substantially decreased burglaries. Law enforcement representatives in Las Vegas also noted that, while violent crime rates have not increased due to marijuana laws, they also have not decreased as a result, as some proponents of legalization had projected.[81]

Other States

In California, recreational marijuana sales started in some cities in early 2018, including Los Angeles, but have not started in other major cities such as San Francisco. Sales have not yet started in Massachusetts and Maine. Therefore, it is too early in these states to assess marijuana-related crime and overall crime rates.

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In short, while the available reports are largely anecdotal, there does not appear to be a basis to conclude that legalization of marijuana to date has resulted in any material increase in crimes related to the cultivation or sale of the substance. In Colorado, where crime rates have risen, law enforcement and other public officials have said that it is too soon to draw any conclusions about whether the state's increase in crime is a result of marijuana legalization.

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[78] Wash. Assoc. of Sheriffs and Police Chiefs, "2016 Crime in Washington," available at http://www.waspc.org/assets/CJIS/2016%20crime%20in%20washington.small.pdf.

[79] FBI 2016 Release of FBI Uniform Crime Reports for Oregon, available at http://www.oregon.gov/cjc/SAC/Documents/2016_FBI_UCR_Oregon.pdf.

[80] Interview with the Multnomah County District Attorney's Office, March 8, 2018.

[81] Interviews with the Clark County District Attorney's Office, and Chuck Calloway, Police Director, Intergovernmental Services, Las Vegas Metropolitan Police Dept., April 3, 2018.

V. Public Health Issues in Legalized States

In contrast to derivative crimes, the number of marijuana-related emergency room visits and calls to poison control centers have jumped markedly in states that have legalized marijuana. In a November 2017 article published in the American Journal of Health-System Pharmacy, physicians discussed common reasons for marijuana-related emergency room visits. One of the most frequent problems is marijuana consumption by children, particularly of high-potency edibles that children find in their homes. Hospitals have also seen an increase in "acute intoxication," or overdosing due to the greater potency of marijuana, especially by patients who are unfamiliar with the differences between eating and smoking marijuana. Reportedly, patients who consumed too much marijuana were unaware that peak effects of edibles do not show up until about 30 minutes after consumption, whereas the effects of smoking are immediate.[82] Additionally, patients with a long history of daily marijuana use can suffer from cannabis hyperemesis syndrome (CHS), which causes severe abdominal pain and vomiting.[83]

In Oregon, marijuana-related calls to the Oregon Poison Center began to increase in 2015, coinciding with the state's legalization of recreational use. The number of calls peaked in April through June 2016, corresponding with the start of legal sales of edibles and extracts. The number of calls has since dropped, but is still at a level higher than pre-legalization.[84] These calls were commonly from users experiencing racing heartbeats, drowsiness or lethargy, agitation or irritability, vomiting, and nausea.[85] The rate of emergency room visits in Oregon also increased after legalization.[86]

The Oregon Health Authority noted that the state's increase in marijuana-related emergency room visits may be due to a number of reasons: 1) a true increase in medical events;
2) patients' increased comfort with disclosing their use of marijuana after legalization; or
3) increased screening or documentation of marijuana use by health care facilities after legalization.[87]

Colorado and Washington experienced similar increases in marijuana-related health events with the start of retail sale. Colorado reported 1,879 marijuana-related hospitalizations and emergency room visits from 2010 to 2013; that number jumped to 3,369 from 2014 to 2015 (the two years after the start recreational sales).[88] Similarly, Washington reported a 70 percent increase in the number of marijuana-related calls to its Poison Center from the three years after regulation as compared to the prior three years.[89]

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[82] American Journal of Health-System Pharmacy article cited in Jon Gettman, "Why Are People Going to the Emergency Room Because of Pot?" *High Times*, Jan. 25, 2018, available at https://hightimes.com/health/people-going-emergency-room-pot/.

[83] These patients' symptoms reportedly can be relieved with hot baths or showers. See further discussion of CHS in Roni Caryn Rabin, "A Perplexing Marijuana Side Effect Relieved by Hot Showers," *N.Y. Times*, April 5, 2018, available at https://www.nytimes.com/2018/04/05/well/a-perplexing-marijuana-side-effect-relieved-by-hot-showers.html.

[84] Oregon Public Health Division 2016 Report, *supra* note 35, at p. 50.

[85] *Id*. at p. 52.

[86] *Id*. at p. 54.

[87] *Id*. at p. 53.

[88] Colo. Dept. of Public Health 2016 Report, *supra* note 22, at p. 49

[89] Wash. State 2016 Update Report, *supra* note 30, at p. 10.

While there may be little conclusive evidence about the health impact of long-term marijuana use by adults,[90] the health dangers of marijuana use by juveniles are well-documented, particularly the drug's damaging effects on children's brain development.[91] As noted above, more children are visiting emergency rooms due to the ingestion of edibles found in their home, but there is conflicting data regarding whether juveniles are more frequently consuming marijuana as a result of marijuana legalization. Much of the data collected on this topic has been through self-reporting surveys, and the results of these surveys vary widely. For example, a survey by the National Survey on Drug Use and Health showed that marijuana use by juveniles in Colorado dropped between 2013 and 2016.[92] A survey by the Colorado Department of Public Health and Environment also showed declining use by high school students.[93] But the Rocky Mountain HIDTA found that youth usage in Colorado increased 12 percent in the three years after legalization (2013-2015) as compared to the three years prior to legalization (2010-2012).[94]

Law enforcement agencies also reported a lack of resources and programs to enforce marijuana laws pertaining to juveniles. For example, Massachusetts requires juveniles under 18 charged with possession of less than one ounce to complete a drug diversion program within one year of the offense, and failure to complete the program may result in a delinquency proceeding. The state, however, has not established and funded such an education course, so this law has been unenforceable.[95]

Law enforcement agencies and regulators also expressed a concern about the increased accessibility of marijuana to children, despite the ban on juvenile sales. Oregon's Office of Liquor Control Commission (OLCC) conducted a decoy operation to make sure that retail stores were checking for identification. In its first decoy operation in Portland, four out seven dispensaries sold to minors. Statewide, approximately 70 to 80 percent of the stores complied with identification requirements. In response, the OLCC increased the penalties for selling marijuana to minors at licensed stores, from a 10-day license suspension or $1,650 fine for a first-time offense, to a 30-day suspension or a $4,950 fine for subsequent offenses. Later decoy operations found 100 percent compliance.[96]

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[90] *See, e.g.,* Patti Neighmond, "Mariuana's Health Effects? Top Scientists Weigh In," *NPR*, Jan. 12, 2017, available at https://www.npr.org/sections/health-shots/2017/01/12/509488977/marijuanas-health-effects-scientists-weigh-in.

[91] *See, e.g.,* Centers for Disease Control and Prevention, "What You Need to Know About Marijuana Use in Teens," https://www.cdc.gov/marijuana/factsheets/teens.htm; Kirsten Weir, "Marijuana and the Developing Brain," American Psychological Association, Nov. 2015, available at http://www.apa.org/monitor/2015/11/marijuana-brain.aspx; "Marijuana Use: Detrimental to Youth," American College of Pediatricians, April 2017, available at https://www.acpeds.org/marijuana-use-detrimental-to-youth.

[92] Cited in Christopher Ingraham, "Following Marijuana Legalization, Teen Drug Use is Down in Colorado," *Wash. Post*, Dec. 11, 2017, available at https://www.washingtonpost.com/news/wonk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?utm_term=.af20494fc977.

[93] Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 55.

[94] Rocky Mountain HIDTA 2017 Report, *supra* note 51, at p. 33.

[95] Interviews with the Suffolk County District Attorney's Office, Jan. 18, 2018.

[96] Interview with the Oregon Liquor Control Commission, March 8, 2018.

VI. Marijuana-Impaired Driving

Many law enforcement representatives report that their biggest concern regarding marijuana legalization is the danger of marijuana-impaired driving. However, it has been difficult to accurately determine whether more people are driving while under the influence of marijuana in legalized states; whether a driver is marijuana-impaired without sufficient evidence-based tests; and how to secure convictions without such tests at trial.

A. Testing for Marijuana Impairment

Law enforcement officers can determine whether a driver is under the influence of alcohol by measuring his or her blood alcohol concentration (BAC), or through a standard alcohol field sobriety test. Alcohol-impaired driving has been well-researched for more than 60 years, and the science behind BAC and alcohol field sobriety tests has long been validated by the scientific community and accepted by the courts. Researchers have shown through laboratory studies how alcohol consumption affects drivers' behavior, attention, and cognition. Studies also show that this impairment increases with rising alcohol concentration and declines with dropping alcohol concentration. This well-established correlation has supported the use of a driver's BAC level (through breathalyzers, blood draws, or urine tests) and the standard field sobriety test in Driving While Under the Influence (DUI) prosecutions.[97]

There is no comparable scientifically-validated research that determines whether a user is impaired by marijuana based on the level of THC in his or her system. The absorption, distribution, and elimination of marijuana from a user's body, as well as the drug's effects on a user's behavior and cognitive functions, are very different than alcohol, and also vary widely from person to person. And, unlike alcohol, a user's impairment does not rise and fall uniformly based on how much THC enters and leaves the body.[98]

Additionally, far fewer studies have been conducted regarding the impairing effects of marijuana as they relate to driving skills. As noted by the U.S. Department of Transportation, "[a] clearer understanding of the effects of marijuana use will take additional time as more research is conducted."[99] The lack of research into these issues is in part due to marijuana's classification as a Schedule I controlled substance, which imposes challenges on researchers' ability to obtain, store, use, and dispose of marijuana.[100]

Nevada's DUI law uses a quantitative threshold as a measure of impairment: two nanograms of delta-9 THC (marijuana's primary psychoactive ingredient) per milliliter of blood drawn, or five nanograms of delta-11 THC (a marijuana metabolite that is also associated with

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[97] *See* National Highway Traffic Safety Admin., U.S. Dept. of Transportation, "Marijuana-Impaired Driving, A Report to Congress," July 2017, at pp. 2-4, available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf (hereinafter NHTSA 2017 Report).

[98] *See id.* at pp. 4-6.

[99] *Id*. at p. 6; *see also* Richard P. Compton and Amy Berning, "Drug and Alcohol Crash Risk," National Highway Traffic Safety Administration, Feb. 2015, available at http://www.nhtsa.gov/staticfiles/nti/pdf/812117-Drug_and_Alcohol_Crash_Risk.pdf.

[100] NHTSA 2017 Report, *supra* note 97, at p. 6.

cognitive impairment).[101] Nevada's statute is a *per se* law that holds a driver strictly liable if his THC concentration meets or exceeds those levels. Prosecutors in Las Vegas said they have been successful in securing DUI convictions (unlike in other marijuana-related offenses) using this *per se* law because jurors recognize the dangers of drugged driving and believe these offenses warrant harsh penalties.[102]

Washington State's DUI statute is also a *per se* law that uses five nanograms of active THC per milliliter of blood drawn as a measure of impairment.[103] The law requires that the concentration level be found in the user's body within two hours after driving, but it is often difficult for law enforcement to obtain a warrant for a blood draw in that period of time.[104] In 2016, the U.S. Supreme Court ruled that states may not prosecute suspected impaired drivers for refusing blood draws when they are arrested without obtaining a search warrant.[105] While the Court also ruled that states may require warrantless breath tests because such tests are less intrusive,[106] breathalyzers cannot be used to determine THC concentration levels.

Colorado uses five nanograms of active THC as a permissible inference of impairment. Anything at or above that concentration triggers a presumption of impairment, and a driver may rebut that presumption at trial with evidence of non-impairment.[107] Oregon does not use a quantitative threshold for marijuana and instead relies on police officers' observations.[108] The state currently employs approximately 200 drug recognition experts, but need far more, particularly in rural areas, to adequately handle the rising number of DUI stops.[109]

Despite the use of THC concentration as a quantitative threshold by some states, there is no clear science supporting its use as an objective measure for marijuana impairment, unlike the well-established correlation between blood alcohol levels and impairment.[110] Even if researchers do find a quantitative threshold that can be scientifically supported, a high THC concentration in a driver's blood may drop below that level before a test is administered. While alcohol metabolizes at a steady rate, the peak THC level occurs at the cessation of smoking and drops rapidly thereafter. After a short period—and often before law enforcement can obtain a warrant for a blood draw or

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[101] Nev. Rev. Stat. § 484C-110(4). Delta-9 and Delta-11 THC are the compounds in marijuana that create the psychoactive effects and leaves the bloodstream relatively quickly. Carboxy-THC, by comparison, is a non-psychactive metabolite that resides in a user for varying lengths. Because THC is a fat-soluble drug, chronic users who have not smoked recently and are not impaired could still exhibit a high level of carboxy-THC in their system. As of July 2017, Nevada law no longer allows prosecutors to use carboxy-THC concentration to prove impairment.

[102] Interview with the Clark County District Attorney's Office, April 3, 2018.

[103] Wash. Rev. Code § 46.61.502(1)(b).

[104] Interview with the King County Prosecuting Attorney's Office, March 7, 2018.

[105] *Birchfield v. North Dakota,* 136 S.Ct. 2160, 2181 (2016).

[106] *Id.* at 2177-78.

[107] Colo. Rev. Stat. § 42-4-1301(6)(a)(IV).

[108] Or. Rev. Stat. § 813.10.

[109] Interview with Senior Assistant Attorney General Deena Ryerson, Traffic Safety Resource Prosecutor, Oregon Dept. of Justice, March 8, 2018.

[110] *See* AAA Foundation for Traffic Safety, "An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per Se Limits for Cannabis," May 2016, at pp. 2-3, https://www.aaafoundation.org/sites/default/files/EvaluationOfDriversInRelationToPerSeReport.pdf; NHTSA 2017 Report, *supra* note 97, at pp. 5-6.

the driver is transported to a hospital post-crash—only low or no active THC can be detected in the driver's blood.[111]

Without a reliable chemical test, some jurisdictions conduct the standard alcohol field sobriety test on drivers suspected of drug impairment. But marijuana affects a user's cognitive and mobile functions differently than alcohol. The Massachusetts Supreme Judicial Court ruled in September 2017 that, in marijuana impairment cases, police officers can only testify to the results of a field sobriety test if they are specially trained to recognize drug impairment.[112] The Court stated that, because "the effects of marijuana may vary greatly from one individual to another, and those effects are as yet not commonly known, neither a police officer nor a lay witness who has not been qualified as an expert may offer an opinion as to whether a driver was under the influence of marijuana."[113] While an officer who is not specially trained in drug recognition could tell a jury that the driver smelled strongly of marijuana or seemed confused, that there was smoke in the car, or other such observations, the officer cannot use those observations to conclude that the driver was impaired.[114] As a result of this ruling, Massachusetts law enforcement is in the process of training more drug recognition experts (DREs).[115]

A growing number of other jurisdictions are also increasing the number of DREs in their police and sheriff's departments. In the 1970s, the Los Angeles Police Department developed the Drug Evaluation and Classification Program (DECP) after noticing that many individuals arrested for driving under the influence had very low or zero BAC levels, despite clear signs of impairment. In response, the LAPD worked with medical doctors, psychologists, and other medical professionals to develop a standard test to recognize drug impairment. DECP now trains law enforcement officers to become specially trained as DREs.[116]

B. Statistics Regarding the Frequency of Marijuana-Impaired Driving

There are also challenges to determining whether marijuana legalization has increased the number of marijuana-impaired drivers on the road. Opponents of marijuana legalization point to statistics indicating that the number of traffic crashes involving marijuana-impaired drivers have increased in the past few years. In a 2017 report, the Rocky Mountain HIDTA found that traffic deaths in Colorado where a driver tested positive for marijuana more than doubled from 55 deaths in 2013 to 123 deaths in 2016. Total marijuana-related traffic deaths increased 66 percent in the four-year average since Colorado legalized recreational marijuana (2013-2016), as compared to the prior four-year period.[117]

However, it is difficult to draw conclusions from these statistics because most DUI crashes involve poly-drug use, *i.e.*, the driver tested positive for two or more drugs, or for alcohol and

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[111] NHTSA 2017 Report, *supra* note 97, at p. 7; *see also* Marilyn Huestis and Michael L. Smith, "Cannabinoid Markers in Biological Fluids and Tissues: Revealing Intake," *Trends in Molecular Medicine*, Jan. 25, 2018.

[112] *Commonwealth of Mass. v. Gerhardt,* 477 Mass. 775 (2017).

[113] *Id.* at 776-77.

[114] *Id.* at 783-84.

[115] Interview with the Suffolk County District Attorney's Office, Jan. 18, 2018.

[116] *See* Int'l Assoc. of Chiefs of Police, "The International Drug Evaluation & Classification Program," http://www.decp.org/about.

[117] Rocky Mountain HIDTA 2017 Report, *supra* note 51, at p. 1.

drugs.[118] HIDTA's statistics regarding the number of marijuana impaired-driving cases include cases where the driver was also impaired by alcohol and/or other drugs; therefore, HIDTA's data may merely reflect the fact that more drivers are now being *identified* by law enforcement as being impaired by marijuana in addition to alcohol and/or other drugs. In recent years, Colorado has increased the number of officers trained to identify driving impairment by drugs other than alcohol, raising the number of officers trained as DREs from 129 officers in 2012 to 228 officers in 2015.[119] Therefore, the increase in the number of drivers testing positive for marijuana may be the result of an increase in DREs called to the scene, as well as an increase of drivers' samples sent to toxicology labs to test for marijuana.

Additionally, the dearth of statistics regarding marijuana-impaired driving prior to legalization calls into question the validity of comparing pre-legalization data to post-legalization data. Colorado's DUI statute does not differentiate between drugs and alcohol, and there is no central database of toxicology results that would allow for analyzing trends.[120] The Colorado Task Force on Drunk and Impaired Driving only recently made it a goal to improve data collection on marijuana-impaired driving, and the Denver Police Department started collecting data on cases involving drug-impaired driving in 2013, after the state had already legalized recreational marijuana.[121]

In Washington State, which legalized recreational marijuana in December 2012 and started sales in July 2014, the frequency of drivers involved in traffic fatalities who tested positive for THC (alone or in combination with alcohol or other drugs) increased to 75 drivers in 2014, compared to the previous four-year average of 36 drivers per year.[122] However, drug-only DUI arrests, which do not differentiate marijuana from other drugs, decreased 28 percent in 2015, as compared to 2011.[123] The largest increase in fatal crashes involved poly-drug cases, which saw a steady climb from 82 crashes in 2011 to 172 crashes in 2016.[124] From 2015 to 2016, alcohol impaired drivers involved in traffic fatalities increased by 20 percent and drug positive drivers increased by 10 percent, while marijuana positive drivers decreased by 5.2 percent.[125]

Because Oregon's DUI law does not use a quantitative concentration threshold, the state is training more law enforcement officers to identify marijuana impairment.[126] In Oregon, from 2010 to 2016 (pre- and post-legalization), drivers who tested positive for marijuana were involved in an

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118 *See* Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 28; Wash. State 2016 Update Report, *supra* note 30, at p. 12; Oregon State Police 2017 Report, *supra* note 62, at p. 21.

119 Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 28.

120 *Id.* at p. 27.

121 *Id*. at p. 29.

122 Washington State Traffic Commission, "Driver Toxicology Testing and the Involvement of Marijuana in Fatal Crashes, 2010-2014," Oct. 2015, at p. 2, http://wtsc.wa.gov/wp-content/uploads/dlm_uploads/2015/10/Driver-Toxicology-Testing-and-the-Involvement-of-Marijuana-in-Fatal-Crashes_REVFeb2016.pdf.

123 Wash. State 2016 Update Report, *supra* note 30, at pp. 3, 4, 12.

124 Wash. State Traffic Safety Commission, "Washington State Traffic Safety Annual Report 2017," Dec. 31, 2017, at p. 7, available at http://wtsc.wa.gov/wp-content/uploads/dlm_uploads/2014/12/2017WTSCAnnualReport.pdf.

125 *Id.* at p. 3.

126 Interview with Senior Assistant Attorney General Deena Ryerson, Traffic Safety Resource Prosecutor, Oregon Dept. of Justice, March 8, 2018.

average of six fatalities annually. However, these statistics do not consider that nearly one-third of fatal crashes in Oregon are not subject to toxicology screening.[127]

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Further study is required to better understand what impact marijuana-impairment has on driving. As previously noted, many traffic fatalities that involve marijuana use are poly-drug cases, so there is no clear evidence in these cases that marijuana—rather than alcohol or another drug—was the cause of the crash.

VII. A Path Forward For New York

A. Recommendations for Legislators

As noted above, thousands of New Yorkers enter our criminal justice system each year for personal use of marijuana, at a time when polls show increasing support by New Yorkers for legalization. A Quinnipiac University poll released in May 2018 found that 63 percent of New Yorkers support legalization.[128] Other recent polls show similar results: a poll released in February 2018 by Siena College found 56 percent support by New Yorkers statewide, and 60 percent support in New York City.[129] Another poll released in November 2017 by Emerson College showed 62 percent of New York voters support legalization.[130] New York's neighboring states, including New Jersey and Connecticut, have advanced marijuana legalization bills, with polls showing wide support by residents in those states.[131]

As a consequence, as in much of the nation, New York's elected officials, advocates, and other stakeholders are assessing the pros and cons of marijuana legalization. If, as a result of these discussions, New Yorkers at some point choose to legalize the use and sale of recreational marijuana (a decision this office will support), the drafting and implementation of such laws should be informed by the lessons learned in our sister states. As discussed above, our Office's conversations with prosecutors, law enforcement officers, and regulators in states that have legalized recreational marijuana to date have provided insights into how their states' marijuana laws have impacted public safety and the criminal justice system in their jurisdictions. Their experiences and expertise form the basis of the following recommendations.

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[127] Oregon State Police 2017 Report, *supra* note 62, at p. 21.

[128] Poll cited in Glenn Blain, "Poll Shows 63% of New York Residents Support Legalizing Marijuana," *N.Y. Daily News*, May 3, 2018, available at http://www.nydailynews.com/news/politics/63-new-york-residents-support-legalizing-marijuana-article-1.3970339.

[129] Poll cited in Robert Harding, "Poll: NY Voters Support Legalizing Marijuana," *The Citizen (Auburn)*, Feb. 13, 2018, available at http://auburnpub.com/blogs/eye_on_ny/poll-ny-voters-support-legalizing-marijuana/article_bdc98c0c-0f82-11e8-9400-8fcceb9d924b.html.

[130] Poll cited in Glenn Blain, "Majority of New York Voters Support Legalizing and Taxing Marijuana, Poll Reveals," *N.Y. Daily News*, Nov. 27, 2017, available at http://www.nydailynews.com/news/politics/majority-n-y-voters-support-legalizing-taxing-pot-poll-article-1.3660456.

[131] *See, e.g.,* Matthew Ormseth, "Q Poll: Americans Oppose Sessions' Bid to Crack Down on Pot-Happy States," *Hartford Courant*, April 24, 2018, available at http://www.courant.com/news/connecticut/hc-news-q-poll-pot-20180111-story.html; Payton Guion, "Majority of N.J. Residents Want Legal Weed: Here's What a New Poll Found," *NJ.com,* April 19, 2018, available at http://www.nj.com/marijuana/2018/04/will_legal_weed_boost_njs_economy_heres_what_new_j.html.

1. Engagement in the Legislative Process by All Stakeholders

Every legalized state except Vermont passed its legalization laws through a voter ballot initiative rather than through the legislative process.[132] Many law enforcement representatives interviewed for this report stated that the law enforcement community was not adequately consulted with, and that their positions were not adequately taken into account, in the drafting of their states' ballot measures. This left gaping holes and poorly drafted criminal justice provisions they are now struggling to address. For example, some initiatives did not consider important criminal procedure issues that would have been raised by criminal justice experts had they been consulted. As a result, some states are now litigating subjects such as what constitutes probable cause to search a person's home in states that allow for limited personal cultivation of marijuana; whether the police must return marijuana to its owner upon the close of an investigation (which may force an officer to violate federal law); and how to handle canines who are trained to detect for marijuana as a contraband. Some states' ballot initiatives also did not adequately define what constitutes unlawful behavior in certain instances. For example, it is unlawful in each of these states to consume marijuana while driving or riding in a vehicle, or to have marijuana unconcealed or in an open package in a vehicle. However, some of these statutes are unclear about what constitutes a "concealed" or "open package."

Others also recommend that any legalization law be passed as a statutory amendment rather than as a constitutional amendment. Colorado is now in its fifth year of retail sale, but many regulators, law enforcement officials, and members of the industry agree that the state is still suffering the "growing pains" of establishing a new market, despite having a medical marijuana system in place since 2000. Lawmakers are frequently unable to address problems as they arise because the state's law was adopted as a constitutional amendment. Advocates for legalization wanted the law to be part of the state constitution so a Colorado resident's right to use marijuana could not be easily repealed by a new governor and legislature. But this has made it difficult to amend provisions, even if stakeholders agree that certain changes are necessary.

2. The Importance of Local Control

The possession and smoking of marijuana in both public and private places remains a complicated issue in legalized states, as they struggle to balance quality of life concerns with the desire to reduce people's negative interactions with law enforcement. To address some of these concerns, localities should be given broad discretion that allows communities to tailor marijuana laws to their particular needs and values.

New York in particular is a diverse state with varying population density, culture, topography, and land use, and the impact of growing and consuming marijuana could vary widely, depending on the locality. For example, in suburban or rural areas, residents may not have concerns about indoor smoking by their neighbors. But in densely populated urban environments, residents may not want marijuana smoke circulating through their buildings' ventilation systems. Such localities might allow building owners to ban marijuana smoke in buildings, but allow for other forms of consumption such as vaping or ingesting edibles and beverages. These localities could

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[132] A state ballot initiative allows proposed legislation to be placed on a popular ballot to be approved or disapproved by registered voters.

also choose to permit outdoor smoking of marijuana as they do for tobacco, and make exceptions for parks, subway stations, and other specified locations.

The cultivation of marijuana inside homes also raises varied concerns, depending on the characteristics of a locality. Residents in densely populated urban areas, and even in suburbs, may choose to ban home cultivation because it can emit noxious odors and requires substantial use of water and electricity. Rural areas that are less densely populated may have fewer (or different) concerns.

3. The Black Market and Trafficking

As discussed above, the marijuana black market continues to thrive in legalized states because illegal sellers can earn a greater profit with untaxed, unregulated sales. Most marijuana retail stores are operating on slim or even negative profit margins because of high licensing fees and taxes, as well as the need to keep prices competitive with the black market. To control the black market, New York will have to carefully study the experiences of other states to determine the right tax rate and price point for products. Nicole Elliott, Director of San Francisco's Office of Cannabis, advises that states should consider initially imposing lower tax rates to help participants enter and stay in the market. A state can gradually increase tax rates as market participants begin to earn profits and meet the financial requirements associated with regulatory compliance.[133]

New York should also carefully consider and limit the number of licenses it grants to market participants. States that do not cap the number of licenses are experiencing an oversaturation of the market. For example, Colorado currently has more than 500 recreational marijuana retail stores, compared to 322 Starbucks. In Denver, there are 169 recreational marijuana stores, compared to 80 Starbucks and 31 McDonalds.[134] This market saturation has required stores to lower prices in order to compete with each other and the black market. Oregon also does not limit the number of licenses they issue to market participants, and this has contributed to the state's vast overproduction of marijuana being diverted to the black market.

The enormous volume of licensed market participants has also made it difficult for regulators to properly inspect and ensure compliance by cultivation facilities and retail stores. Some legalized states are utilizing a "seed-to-sale" inventory tracking system that allows regulators, at any given moment, to know where a marijuana plant is during the cultivation process. One of the goals of the tracking system is ensure that legally grown marijuana is not diverted to illegal distributers and sellers. In order for such a tracking system to be effective, however, there must be enough analysts to review the data and look for anomalies, as well as enough facility inspectors to ensure the accuracy of the data being provided. Regulators in Oregon say they do not have enough analysts to adequately track the data or the number of inspectors to ensure compliance at facilities and stores.[135]

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[133] Interview with Nicole Elliott, Director of the San Francisco Office of Cannabis, March 27, 2018.

[134] *See* "How Many Dispensaries are in Denver, Colorado?," *My 420 Tours*, Feb. 28, 2018, available at https://my420tours.com/many-dispensaries-denver-colorado.

[135] *See* Andrew Selsky, "Oregon Marijuana: Lots of Data, Few to Analyze and Check It," *AP*, April 26, 2018, available at https://www.cnbc.com/2018/04/26/the-associated-press-oregon-marijuana-lots-of-data-few-to-analyze-and-check-it.html.

4. Marijuana-Impaired Driving

Should New York legalize marijuana, the state should prepare for a possible rise in marijuana-impaired driving by providing funding for the following:

1) Expanding the number of officers trained by the state's Drug Recognition Expert program.

2) Expanding the capacity of state toxicology labs.

3) Supporting scientific research to better understand the correlation between marijuana impairment and driving ability, as well as the correlation between impairment and THC concentration levels.

Additionally, to better understand statistical trends, district attorneys' offices, law enforcement agencies, and toxicology labs should start now collecting information from DUI cases regarding the specific substance(s) at issue in arrests. The lack of such data collection in legalized states has stymied their ability to analyze information comparing the prevalence of marijuana-impaired driving pre- and post-legalization.

5. Regulatory Requirements: Packaging, Labeling, and Security Measures

New York should also establish specific requirements for product packaging and labeling in order to prevent misuse. For example, edibles should not be in a form that may appeal to children (*e.g.*, gummies cannot be in the shape of bears or other animals), and products should be in tightly sealed packages that make it difficult for children to open. Product labels should include what constitutes a proper serving size, and approximately how long it takes for psychoactive effects to occur per serving size. Such steps are necessary to stem rising numbers of emergency room visits, hospitalizations, and calls to poison control centers by users who overdosed on high-potency marijuana after legalization. Retail stores should also be required to implement security measures to prevent burglaries and robberies. This includes security cameras, safes, secure walls and ceilings to prevent break-ins, and a requirement that all products and cash be locked in safes overnight.

Additionally, any legalization law should give localities enough time to establish and implement an effective, tightly controlled regulatory scheme. One frequent concern raised by regulators discussing legalization is the lack of time they had to properly develop and implement rules and regulations. Even in San Francisco, where a robust medical marijuana retail system has existed since 1996, retail sales have not yet started because the city requires more time to implement local regulations. California's marijuana law permitted retail sales to start in January 2018, but as of February 2018, only 14 percent of jurisdictions have completed their regulatory proposals.[136]

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[136] Interview with Nicole Elliott, Director of the San Francisco Office of Cannabis, March 27, 2018.

6. Public Education Campaigns

Finally, as discussed above, there remains confusion in legalized states among members of the public, judges, and law enforcement officials about the lines between legal and illegal possession and use. For example, members of the public often tell officers that they thought smoking marijuana in public is lawful because their state has now legalized recreational marijuana, and smoking tobacco in public is lawful. There is also much confusion about laws concerning cultivation. Washington, which has relatively permissive marijuana laws, bans the home cultivation of marijuana except for licensed medical use. Law enforcement officers frequently hear from members of the public that they assumed home grow is lawful because it is permitted in all other legalized states. To further add to the confusion, localities can pass their own ordinances related to marijuana. For example, Colorado state law permits the home grow of up to 12 plants, but localities can choose to pass stricter laws. States' laws and regulatory schemes also differentiate between recreational and medical marijuana.

In short, residents of these states have not been adequately educated about the new, often complicated, state laws and local ordinances pertaining to marijuana. In advance of any legalization, New York should fund and implement a wide-reaching public education campaign that informs residents about what conduct is lawful and what is still unlawful in their particular locality. The state should also establish and fund training courses for all members of the criminal justice system. Similarly, for the reasons discussed above, New York should also implement and fund a public education campaign regarding the health dangers of marijuana use by children.

B. Dealing with Racial Disparities in Enforcement

As noted above, the public debate about legalizing marijuana has been evolving amid the increasing recognition that criminal enforcement of laws against possession and use has overwhelmingly disfavored communities of color. For example, at a New York City Council hearing on February 26, 2018, City Council Members questioned the New York City Police Department (NYPD) about data showing racial disparity in marijuana arrests. In 2017, 16,925 people in New York City were arrested on the charge of Criminal Possession of Marihuana in the Fifth Degree. Of that total, 86 percent were people of color: 48 percent were black, 38 percent were Hispanic, and 9 percent were white.[137]

The NYPD did not dispute these statistics at the hearing, but testified that the department has the obligation to respond to community complaints of open marijuana smoking, and that

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[137] Statements of City Council Members Donovan Richards and Rory Lancman, NY City Council Hearing, "Oversight – Enforcing Marijuana Laws," Feb. 26, 2018, video available at http://legistar.council.nyc.gov/MeetingDetail.aspx?ID=593243&GUID=026A8759-3483-4DC6-BD2A-B8CD4396B412&Options=info&Search (hereinafter NY City Council Hearing). *See also* NYPD statistics cited in Beth Fertig, "Still Too High? Marijuana Arrests Barely Budget in NYC," *WNYC*, Jan. 16, 2018, available at https://www.wnyc.org/story/still-too-high-marijuana-arrests-barely-budge-nyc/; NYS Division of Criminal Justice Services statistics cited in Brendan Cheney, "Racial Disparities Persist in New York City Marijuana Arrests," *Politico*, Feb. 13, 2018, available at https://www.politico.com/states/new-york/city-hall/story/2018/02/13/racial-disparities-continue-in-new-york-city-marijuana-arrests-248896.

officers make arrests based on where they receive 311 or 911 complaints.[138] However, 311 and 911 call data later produced by the NYPD to the City Council show that, of the five precincts where the most marijuana arrests occurred in 2017, only two were in the top five for the number of marijuana-related calls. In 2016, of the five neighborhoods with the most marijuana arrests, only one ranked in the top five for calls.[139]

Politico analyzed this call data from 2017, and found that in El Barrio, a predominantly Hispanic community in East Harlem, there were 304 marijuana-related complaints made to 311 or 911, and 683 arrests were made. In the Upper East Side, a largely white neighborhood, there were 123 complaints, but only 63 arrests. Similarly, in the 113th precinct, a predominately black neighborhood in Jamaica, Queens, there were 281 marijuana complaints, and 280 arrests. In the 84th precinct, which includes wealthier neighborhoods like Brooklyn Heights and Boerum Hill, there were 136 complaints, but only 56 arrests.[140]

The February 26, 2018 City Council hearing also cited data showing that racial disparities exist even within neighborhoods. In Forest Hills, a neighborhood in Queens, black and Latino individuals make up 16 percent of the population, but 80 percent of the arrests. In Flushing, Queens, they make up 19 percent of the population, but 71 percent of the arrests. Similar trends in Brooklyn were noted: in Greenpoint, black and Latino individuals make up 19 percent of the population, but 70 percent of the arrests; in Park Slope, they make up 24 percent of the population, but 73 percent of the arrests; and in Williamsburg, they make up 37 percent of the population, but 83 percent of the arrests.[141]

As noted at the outset of this report, these racial disparities become all the more intolerable in light of the fact that they produce no meaningful criminal justice outcome. In 2017, for example, 5,333 people were arrested in Manhattan for being in possession of a burning marijuana cigarette or having it in open view.[142] Of that total, 4,297 arrestees were brought to the precinct, booked and fingerprinted, and issued a Desk Appearance Ticket to appear in Criminal Court at a date in the future. Our office declined to prosecute 163 of those cases at the outset and later dismissed without charges 17 cases prior to arraignment. Of the remaining cases, 2,596 received an Adjournment in Contemplation of Dismissal (ACD), which results, after a period of time, in a dismissal and a sealed record.[143] The remaining 924 pleaded guilty to a misdemeanor,[144] and of these, at least 96

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[138] Testimony of Chief Dermot Shea, NYPD Crime Control Strategies Bureau, NY City Council Hearing, *supra* note 137.

[139] Data provided by NYPD to NY City Council cited in Erin Durkin, "New Data Raises Doubts on NYPD's Claim That 911 Gripes Lead to Pot Arrests Amid Racial Gap Criticism," *NY Daily News*, Feb. 27, 2018, available at http://www.nydailynews.com/new-york/nypd-claim-911-gripes-lead-pot-arrests-wrong-article-1.3845656.

[140] Analysis of NYPD data by Brendan Cheney, "Data Don't Show Link Between Marijuana Complaints and Arrests," *Politico,* March 7, 2018, available at https://www.politico.com/states/new-york/city-hall/story/2018/03/07/data-dont-show-link-between-marijuana-complaints-and-arrests-294825. *See also* Noah Manskar, "NYPD's Marijuana Arrest Claims Don't Add Up, Figures Show," *Patch*, Feb. 28, 2018, available at https://patch.com/new-york/new-york-city/nypds-marijuana-claims-not-backed-complaint-figures.

[141] City Council Member Donovan Richards, NY City Council Hearing, *supra* note 137.

[142] NY Penal Law § 221.10(1).

[143] Criminal Procedure Law § 170.15 permits a case to be dismissed or sealed, without any conviction, after a period of adjournment.

[144] Most, if not all, of the defendants who pleaded guilty were not offered an ACD because they had previously consented to an ACD for prior marijuana offenses.

percent either paid a fine, performed community service, were sentenced to time served, or received a conditional discharge.[145]

Similarly, in the same period, 120 people were arrested for possessing more than 25 grams but less than two ounces of marijuana.[146] Of that total, 68 arrestees were brought to the precinct, booked and fingerprinted, and issued a DAT. Of those cases, three were dismissed without charges, and 55 received ACDs. Twenty-six pleaded guilty to a misdemeanor, and at least 96 percent of these paid a fine, performed community service, or were sentenced to time served.[147]

In short, these arrests waste an enormous amount of criminal justice resources for no punitive, rehabilitative, deterrent, or other public safety benefit. And they do so in a racially disparate way that stigmatizes and disadvantages the arrestees and causes significant anger and distrust of the police in a large segment of our community.

It is for this reason that, as noted above, our office has decided no longer to expend our limited resources to criminally prosecute people who are arrested in Manhattan for smoking or possessing small amounts of marijuana. This is not to say that we believe individuals should be able to smoke marijuana in public or possess it with absolute impunity. It is simply that such conduct need not be addressed with the full weight and resources of our criminal justice system. Instead, as with quality-of-life and other infractions such as drinking alcohol in public, public urination, and – now – jumping the turnstile, low-level marijuana offenses should be dealt with through the issuance of summonses and appropriate public education campaigns.

Optimally, this result should be achieved through legislative reform that recognizes the policy logic and economic reality of this position. At the end of the day, our state should not have to rely solely on discretionary decisions by local police and prosecutors' offices to ensure that our laws are sensible and just. In the meantime, our office is indeed vested with the discretion to make such choices for the residents of Manhattan, which we will continue to do as fairly and thoughtfully as we can.

Finally, we should recognize that legalization itself will by no means eliminate the problem of racial disparity in the enforcement of lower-level marijuana offenses. Legalization would vastly reduce the number of people brought into the criminal justice system, but arrests would no doubt continue for some categories of conduct that the legislature decides to criminally prohibit. As the above survey of legalized states makes clear, such arrests may well continue to disproportionately burden communities of color. For this reason, police, prosecutors, and others involved in criminal justice throughout our state should continue to be mindful of these disparities, even in the wake of any legalization, because local discretion will continue to be a critical mechanism for achieving fairness and balance in our system.

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145 Of the remaining four percent, 11 individuals received jail time, and 30 individuals' sentencing data is unavailable.

146 NY Penal Law § 221.10(2).

147 Sentencing data is unavailable for the remaining four percent.

Conclusion

We recognize the complexity of the issues addressed in this report, and that there will continue to be serious disagreement and debate about the recommendations and positions advanced herein. We stand ready to assist in the effort to determine the fairest and most sensible way forward for the people of the state of New York.

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Mina Malik, Deputy Attorney General
James Pittman, Deputy Attorney General

Washington State

Office of King County Prosecuting Attorney Daniel T. Satterberg, Seattle, Washington
Daniel T. Satterberg, King County Prosecuting Attorney
Dan Clark, Assistant Chief, Maleng Regional Justice Center (Kent)
Amy Freedheim, Felony Traffic Senior Deputy Prosecuting Attorney
Mark Larson, Chief of the Criminal Division

Seattle Police Department, Seattle, Washington
Chief of Police Carmen Best
Christopher Fisher, PhD, Chief Strategy Officer
Assistant Chief Marc Garth Green, Criminal Investigations Bureau

Office of Seattle City Attorney Pete Holmes, Seattle, Washington
Pete Holmes, Seattle City Attorney
John Schochet, Deputy City Attorney

American Civil Liberties Union, Seattle, Washington
Alison Holcomb, Director of Strategy