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The Decriminalization of Marijuana: Ignoring Federal Laws

I. Introduction

A new school of thought is rapidly making its way into the minds of Americans and American lawmakers. Namely, the idea that the drug marijuana, and its active ingredient, tetrahydrocannabinol, should be treated differently than it currently is under the law. In this paper, the interplay between current U.S. Federal law and select state laws will be examined. The U.S. model will then be compared to other industrialized countries, including the Netherlands and Canada. This paper will focus on the history of the criminalization of marijuana in these countries, analyze the rationale behind why these countries are now ignoring their own marijuana laws, and look at reasons for reform of the current laws.

The concept of comparing the U.S. constitution to the constitutions of different countries to help interpret U.S. law is a largely debated topic. On one hand, proponents argue that there is no harm in looking to what laws other countries have implemented and seeing the affects that they have had on that countries' citizens. The potential benefits include a fast track to better-constructed U.S. laws, a better interpretation of current U.S. laws, and accordingly a happier population of citizens. Conversely, opponents recognize that comparing the U.S. to other countries just simply cannot work because the U.S. is too different from any other country in regards to the laws themselves, the court system, and the people. The U.S. as a whole has its own history, ideals, and values and by comparing its laws to another country's those will not be taken

into consideration. Opponents fear that using foreign laws to interpret the U.S. constitution will open up the opportunity for justices to pick and choose the foreign laws they like to show support for their underlying opinions, rather than interpreting the law as it is written.¹ However, the benefits of looking to other countries practices, especially those similar to the U.S., seem to outweigh the harm, which is why this paper will compare the U.S. to the Netherlands and Canada.

II. The Criminalization of Marijuana in the U.S.

Until the early 1900s, farmers were encouraged to produce marijuana as it was used domestically in utilitarian goods such as rope, sails, and clothing.² During this time it was also a popular ingredient in many medical products.³ After the Mexican Revolution of 1910, immigrant workers from Mexico came to the U.S. in large numbers and introduced Americans to the recreational use of the drug.⁴ Americans were jobless, hopeless, and fearful of the foreigners with whom they did not share a culture or a language.⁵ Marijuana quickly became associated with the immigrants, along with “violence, crime, and other socially deviant behaviors,” and by 1931, twenty-nine states had outlawed the drug.⁶ In 1930 the Federal Bureau of Narcotics (FBN) was founded.⁷ The FBN spread negative propaganda about the drug, which included reports that

¹ *Roper v. Simmons*, 543 U.S. 551, 624 (2005) Justice Scalia dissenting.

² *PBS Marijuana Timeline* (2014), at <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited November 9, 2014).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *National Archives: Records of the Drug Enforcement Agency* (1995), at <http://www.archives.gov/research/guide-fed-records/groups/170.html> (last visited on November 9, 2014).

it led to violent crime and insanity eventually ending in death.⁸ The propaganda had a significant effect on public opinion of the drug and by the end of 1936, all 48 states had initiated laws “regulating the sale, use, and possession of marijuana.”⁹ The Marihuana Tax Act was passed in October of 1937, which “levied a tax on all buyers, sellers, importers, growers, physicians, veterinarians, and all people who dealt in marijuana commercially, prescribed it professionally, or possessed it.”¹⁰ Although the Act did not explicitly outlaw marijuana, it placed taxes and burdensome restrictions on growers, distributors, sellers, and buyers making it nearly impossible for anyone to be involved with marijuana.¹¹ States followed suit thereafter and many passed laws making the sale or use of marijuana a felony.¹² In 1969 Richard Nixon became president after running on a campaign platform of “law and order.”¹³ Nixon was vehemently anti-drug and publically declared a war on marijuana.¹⁴ The Drug Reform Act of 1970 created the Nation Commission on Marijuana and Drug Abuse (the Marijuana Commission), which subsequently reclassified marijuana as a dangerous drug.¹⁵ However, even though the drug was reclassified as dangerous, the federal penalty for possession was lowered from a felony to a misdemeanor.¹⁶ Again, the states followed suit and in almost every state the penalty for a first time offense was

⁸ Dana Graham, Decriminalization of Marijuana: An Analysis of the Laws in the United States and the Netherlands and Suggestions for Reform, 23 *Loy. L.A. Int'l & Comp. L. Rev.* 297, 300 (2001).

⁹ Kara Godbehere Goodwin, Is the End of the War in Sight: An Analysis of Canada's Decriminalization of Marijuana and the Implications for the United States "War on Drugs", 22 *Buff. Pub. Int. L.J.* 199, 202 (2004).

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id. at 203.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

lowered from a felony to a misdemeanor.¹⁷ An official report issued by the Marijuana Commission in 1972 stated that it found that “moderate marijuana consumption is relatively harmless.”¹⁸ Oregon became the first state to decriminalize marijuana in 1973 when it changed the punishment for simple possession from jail time to a fine of \$100.¹⁹ Decriminalization typically means that for a first time possession of a small amount of marijuana for personal use there will be now prison time or criminal record.²⁰ “The conduct is treated like a minor traffic violation.”²¹ This was the beginning of the loosening of state marijuana laws.

III. The Current U.S. Model

There is currently an ongoing debate about marijuana, its beneficial and recreational uses, and the potential harm it could cause to users in the U.S. Generally speaking; under current federal law marijuana is illegal. While most state laws once agreed with the federal law, more and more states are amending their laws to allow for different levels of marijuana use. The friction between state and federal laws has been growing due to many states loosening their once tight restrictions.²²

The U.S. federal law provides that “[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance.”²³ The active ingredient in marijuana, tetrahydrocannabinol (herein after “THC”), is a Schedule I controlled substance. Schedule I drugs are those that, among other things, have a “high potential for abuse” and “no accepted

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *NORML: States the Have Decriminalized* (2014), at <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited on November 11, 2014).

²¹ *Id.*

²² *Id.*

²³ 21 U.S.C.A. § 844.

medical use in treatment in the United States.”²⁴ It is illegal to possess a “material, compound, mixture, or preparation” that contains any quantity of THC, thus it is illegal to possess any quantity of marijuana.²⁵

The basis for the constitutionality of federal regulation of marijuana lies in the commerce clause of the Constitution.²⁶ Under the commerce clause, congress has the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁷ Regulation of marijuana under the commerce clause has been challenged and upheld at the Supreme Court level.²⁸

In the U.S. there are currently varying degrees of state law ranging from strict control to complete leniency. In this section an analysis will be done of the laws of three different states and the affects the laws have on the population of that state. Each state looked at represents a varying degree of control exercised over marijuana use. The states looked at will be Texas, Colorado, and New Jersey. The first state to be analyzed is Texas. Texas laws promote stringent regulation of marijuana stating, “a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.”²⁹ The only exception to this rule is if the possession is for use in “a federally approved therapeutic research program.”³⁰ Note that the research facility must be federally approved, thus Texas seems to be taking a hands off approach to regulation, letting the issue filter up to the federal level. Next is Colorado. Colorado takes the approach opposite of Texas’. The Colorado Constitution states that “in the interest of the

²⁴ 21 U.S.C.A. § 812.

²⁵ 21 U.S.C.A. § 812; United States v. Harold, 588 F.2d 1136, 1143 (5th Cir. 1979) (Appellant was convicted with 0.289 grams of marijuana).

²⁶ Gonzales v. Raich, 545 U.S. 1, 17 (2005).

²⁷ U.S. Const. art. I, § 8, cl. 3.

²⁸ Gonzales v. Raich, 545 U.S. 1, 17 (2005).

²⁹ Tex. Health & Safety Code Ann. § 481.121.

³⁰ Tex. Health & Safety Code Ann. § 481.111.

efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.”³¹ In other words, marijuana can be used recreationally in Colorado by anyone over 21. This is in stark contrast to the Texas law that only allows federally approved use for medical research. The final state to look at is New Jersey. New Jersey takes an intermediate approach to marijuana regulation compared to the other two states. In New Jersey, “[i]t is unlawful for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, a controlled dangerous substance or controlled substance analog.”³² Thus, there is no recreational use of marijuana in New Jersey. However, there is an “exemption from criminal liability” for persons qualifying under the New Jersey Compassionate Use Medical Marijuana Act.³³ What this means is that for persons who qualify, marijuana can be used in New Jersey for medical purposes. The enactment of the New Jersey Compassionate Use Medical Marijuana Act is significant because the act recognizes that marijuana can be used for medical purposes whereas the federal laws declared that it could not be used as such when it was labeled as a Schedule I drug.

With the current system in the U.S., there is often a direct opposition between state and federal laws. On August 29, 2013 the Deputy Attorney General of the U.S., James M. Cole, issued a memorandum to all U.S. attorneys with the subject line, “Guidance Regarding Marijuana Enforcement.”³⁴ The memo outlines the reasons for the prohibition of marijuana under the Controlled Substances Act, stating, “Congress has determined that marijuana is a

³¹ Colo. Const. art. XVIII, § 16.

³² N.J. Stat. Ann. § 2C:35-10.

³³ N.J. Stat. Ann. § 2C:35-18; FOOD AND DRUGS—MEDICAL MARIJUANA, 2009 NJ Sess. Law Serv. Ch. 307 (SENATE 119).

³⁴ James M. Cole, *Memorandum for All United States Attorneys* (2013) (hereinafter *Memo*).

dangerous drug.”³⁵ The letter then sets forth eight bullet points that are meant to guide the Department’s enforcement of the Act with regard to marijuana related conduct:

- Preventing the distribution of marijuana to minors;
- Preventing the revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing stat-authorized marijuana activity from being used as a cover or pretext for trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.³⁶

The memo goes on to say that outside of these enumerated priorities, the “federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”³⁷ It describes that in jurisdictions that have enacted laws legalizing marijuana in some form, they have also implemented laws that are “strong and effective regulatory and enforcement systems” to control marijuana in such a way that “is less likely to threaten the federal priorities set forth above.”³⁸ Thus, “enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.”³⁹ In other words, the letter is telling prosecutors to overlook federal law and look to the state law in cases regarding

³⁵ *Memo, supra* note 34.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

marijuana. The memo does say, however, that prosecutors should still review marijuana cases on a case-by-case basis and determine whether “the conduct at issue implicates one or more of the priorities listed above.”⁴⁰ Finally, the memo warns that it does not create any rights and cannot be relied upon to do so.⁴¹

Based on this memo, it seems that the U.S.’s reason for essentially ignoring federal law in favor of state law is the tradition that regulation is the states’ job. If a state has made a law that is contradictory to the federal law, it’s ok, as long as the goals of the federal law, listed above, are still met. Considering the history of marijuana in the U.S., it makes sense why this approach has been taken. When it was outlawed, marijuana was portrayed as a truly horrible substance. In the 1930’s it was known as the “Devil’s Weed” and was associated with people involved in “deviant” behavior.⁴² However, today the average marijuana user is not a social deviant, rather he or she is just a regular person “engaging in experimental or recreational use of marijuana.”⁴³ The federal government seems to acknowledge this idea based on the attorney general’s letter. However, rather than an outright statement indicating this paradigm shift, the federal government seems to be easing itself into the allowance of the drug, perhaps so as not to have to admit outright that it might have made a mistake in labeling it as a Schedule I controlled substance. Other reasons given in past memos for non-enforcement are that “it likely was not an efficient use of federal resources.”⁴⁴ However, even this reasoning is stated with the caveat that it’s not an

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Graham, *supra* note 8, at 302.

⁴³ *Id.*

⁴⁴ *Memo, supra* note 34.

efficient use “to focus efforts on seriously ill individuals, or on their individual caregivers” and makes no reference to recreational use of the drug.⁴⁵

IV. The Netherlands

Prior to World War II, there was almost no marijuana use in the Netherlands.⁴⁶ Following the war, marijuana use was seen among few people in Dutch culture, mainly artists and writers.⁴⁷ Marijuana was banned in 1953, but this ban focused mainly on “American soldiers stationed in Germany visiting the Netherlands while on leave.”⁴⁸ Dutch citizens would acquire marijuana from sailors and then sell it to the American soldiers.⁴⁹ Most of the marijuana related arrests at this time were related to the Dutch smugglers selling to the American soldiers and of the soldiers themselves.⁵⁰ Then in the 1960’s more and more people were more visibly using marijuana, which led to strict regulations of the drug.⁵¹ However, with the rise of Sixties youth culture, more and more the government found that the criminalization in groups who regularly smoked marijuana resulted in the criminalization of otherwise law abiding citizens.⁵² Instead of cracking down harder on people who violated the law, the government felt it would be more beneficial to negotiate with the people.⁵³ The Baan Commission was formed in 1968 and issued its official report in 1972.⁵⁴ The report found that “criminalization of marijuana stigmatized youths who

⁴⁵ *Memo, supra* note 34.

⁴⁶ Kurt V. Laker, Smoke and Mirrors: The Self-Examination of Canadian Marijuana Policy in the Context of Decriminalization in the Netherlands, 14 *Ind. Int'l & Comp. L. Rev.* 341, 365 (2003)

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id. at 366.

⁵³ Id.

⁵⁴ Id.

used the drug and led to a continuing spiral of antisocial behavior.”⁵⁵ The report is also the basis for part of the current theory in the Netherlands regarding drug use; specifically that it is essential to keep marijuana users from coming into contact with hard drugs.⁵⁶ This is known as “separation of the markets” and is easily obtainable with controlled sale of marijuana, rather than forcing users to go to black markets.⁵⁷ Thus, the decriminalization of marijuana began, starting with reducing penalties for perpetrators.⁵⁸

The current drug law in the Netherlands is the Opium Act.⁵⁹ The Opium Act sets the rules for drug cultivation, sale, and use.⁶⁰ Similar to the U.S. system, the Act puts different drugs into categories based on whether it is a hard drug or a soft drug.⁶¹ Schedule I drugs are the hard drugs and include drugs such as heroine, cocaine, amphetamine, ecstasy, and GHB.⁶² Schedule II drugs are the soft drugs and include drugs such as cannabis products and sleeping pills.⁶³ The government has determined that Schedule II drugs “carry less serious risks than the hard drugs listed in Schedule I.”⁶⁴ Contrary to popular belief, recreational use of marijuana is not legal in the Netherlands.⁶⁵ However, “[t]he Netherlands has a policy of toleration regarding soft drugs.”⁶⁶ Members of the public are not prosecuted for small (no more than 5 grams) quantities of soft

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 367.

⁵⁸ *Id.*

⁵⁹ *Government of the Netherlands, Drugs* (2014), at

<http://www.government.nl/issues/drugs/difference-between-hard-and-soft-drugs> (last visited November 30, 2014).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Government of the Netherlands, Drugs* (2014), at

<http://www.government.nl/issues/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops> (last visited November 30, 2014).

⁶⁶ *Id.*

drugs.⁶⁷ This is because the Netherlands' drug laws are based on a theory of rehabilitation. The laws aim to prevent the use of serious drugs, but also promote the care and treatment of addicts.⁶⁸ It is because of the lowered risk that the sale of marijuana, a soft Schedule II drug, is tolerated in places such as coffee shops.⁶⁹ The rationale behind this is that cannabis users will not have to buy a soft drug from a criminal drug dealer that might then introduce them to hard drugs.⁷⁰ The coffee shops however, must follow a set of guidelines if they are going to sell marijuana, otherwise they may be subject to persecution.⁷¹ This market separation theory has proven effective, as asking for hard drugs in one of these coffee shops is seen as an absurdity.⁷²

The Netherlands follows the expediency principle regarding criminal law, prosecution, and police action.⁷³ What this means is that if it is not worth the effort to enforce a law, then the law will not be enforced.⁷⁴ Thus, even though it is outlawed, police do not investigate possession of marijuana for personal use.⁷⁵ The Netherlands is straightforward with its rationale for not punishing offenders of marijuana laws. Its goal is to maintain an efficient criminal justice system, keep its citizens safe, and help to rehabilitate them if they have a problem.⁷⁶ Its drug policy is rehabilitative rather than punitive. Further, the "Dutch government feels that marijuana is a drug that does not pose serious risks to individuals or society and thus, its use does not

⁶⁷ *Id.*

⁶⁸ Graham, *supra* note 8, at 305.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *European Monitoring Center for Drugs and Drug Addiction, Illicit Drug Use in the EU: Legislative Approaches* (2014), at <http://www.emcdda.europa.eu/> (last visited November 30, 2014) (hereinafter *EMCDDA*).

⁷² Laker, *supra* note 46, at 368.

⁷³ *EMCDDA, supra* note 71.

⁷⁴ *Government of the Netherlands, Drugs* (2014), at <http://www.government.nl/issues/drugs/difference-between-hard-and-soft-drugs> (last visited November 30, 2014).

⁷⁵ *EMCDDA, supra* note 71.

⁷⁶ *Id.*

warrant punishments with severe criminal sanctions.”⁷⁷ The government accepted that people were going to experiment with drugs and wanted to create a wall between hard and soft drugs thereby shielding experimenters from hard drugs.⁷⁸ In order to do this, the government set up a distribution system where people over 16 years old could buy small amounts of marijuana.⁷⁹

The leniency of the Netherlands marijuana policy may stem from its constitution.⁸⁰ Articles 10 and 11 grant the right to “respect for his privacy” and “inviolability of his person,” respectively.⁸¹ Also, Article 15 states, “no one may be deprived of his liberty.”⁸² It is clear that these provisions focus on personal autonomy, which may be one of the reasons that the Netherlands does not treat possession of marijuana as a serious crime, even though it is against the law.⁸³ Yet, the Dutch have chosen to keep marijuana illegal in the law so as to comply with international obligations.⁸⁴

V. Canada

It is important to look at the history of marijuana in Canada to understand how the current law has been shaped into its current form. The history of marijuana in Canada is similar to that of the U.S. In the 17th century, cannabis hemp was one of the first crops to be grown by Europeans in Canada.⁸⁵ Large amounts of hemp were needed for European warships, merchants, and naval

⁷⁷ Graham, *supra* note 8, at 305.

⁷⁸ *Id.* at 306.

⁷⁹ *Id.*

⁸⁰ <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1524&context=ilr>

⁸¹ Constitutin PDF

⁸² constitution PDF

⁸³ <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1524&context=ilr>

⁸⁴ Laker, *supra* note 46, at 371.

⁸⁵ *The Complete History of Cannabis in Canada* (Jan. 26, 1999), at <http://www.hackcanada.com/canadian/freedom/hempinfodoc2.html> (last visited November 30, 2014) [hereinafter *Cannabis in Canada*]

fleets.⁸⁶ Hemp became scarce in Europe and in looking for a new supplier, the French Royal Warehouses promised Canadian farmers that it would buy their hemp.⁸⁷ From the 1700s to the 1900s, opium, cocaine, and marijuana were used as legal ingredients in remedies for Canadian families.⁸⁸ Due to many Canadians living in rural areas, they were far away from doctors.⁸⁹ Thus, these remedies, which were available without a prescription, became vital for the health and survival of these families.⁹⁰ By the 19th century, international trade of mind-altering substances had begun.⁹¹ Britain moved a lot of goods all around the world at this time, including tea, alcohol, and opium.⁹²

In 1850, Chinese immigrants were brought to British Columbia to fill labor shortages for the construction of a railroad.^{93 94} The company constructing the railroad promoted a “get rich quick scheme” to the immigrants and promised a quick return to their homeland.⁹⁵ In reality, they were paid poorly, only earning one third of what their white counterparts were earning.⁹⁶ When the railroad was completed, there were thousands of impoverished Chinese immigrants living in Canada.⁹⁷ Living in such dismal circumstances caused many immigrants to turn to opium, which was sold by the British.⁹⁸ In an effort to restrict further Chinese immigration and

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ *Canadian Drug Policy Timeline* (2011), at <http://drugpolicy.ca/progress/timeline/> (last visited November 30, 2014) [hereinafter *Timeline*].

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ *Cannabis in Canada*, *supra* note 85.

⁹² Id.

⁹³ Id.

⁹⁴ *Timeline*, *supra* note 88.

⁹⁵ *Cannabis in Canada*, *supra* note 85.

⁹⁶ *Timeline*, *supra* note 88.

⁹⁷ *Cannabis in Canada*, *supra* note 85.

⁹⁸ *Cannabis in Canada*, *supra* note 85.

control the current immigrant population, the government began to regulate opium.⁹⁹ This was Canada's first narcotic regulation and it came about in 1908.¹⁰⁰ It was the Opium Act of 1908 and it made the sale, possession, manufacture, and import of opium illegal unless it was for medical purposes.¹⁰¹ Despite being instituted as a means to control immigration, this act became the basis for all of Canada's future drug legislation.¹⁰² However, the Act proved difficult to enforce, and the growth of opium smuggling networks spurred the creation of a royal commission on opium smuggling.¹⁰³ This resulted in the Opium and Drug Act of 1911, which broadened the scope of the 1908 act in terms of offenses and the police powers of search and seizure.¹⁰⁴ Then, in 1923 the Opium and Narcotic Drug Act was passed.¹⁰⁵ Due in large part to sensationalized anti-marijuana propaganda, the 1923 act made marijuana illegal.¹⁰⁶ By 1961, "the marijuana laws in Canada carried the second heaviest minimum sentence in Canadian criminal law, surpassed only by that imposed of capital and non-capital murder."¹⁰⁷ Despite strict laws with harsh penalties, marijuana use increased dramatically in the 1960's and 1970's.¹⁰⁸ This abundance in marijuana use and subsequent arrests caused a strain on Canadian courts, prompting a push for a more liberal drug policy.¹⁰⁹ A commission was formed in 1969 whose research found that "the social costs of marijuana prohibition did not justify the nation's current

⁹⁹ Goodwin, *supra* note 9, at 202.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Supra* note 99.

¹⁰³ *Cannabis in Canada, supra* note 85

¹⁰⁴ *Supra* note 99.

¹⁰⁵ *Cannabis in Canada, supra* note 85

¹⁰⁶ *Cannabis in Canada, supra* note 85

¹⁰⁷ *Cannabis in Canada, supra* note 85

¹⁰⁸ *Supra* note 99.

¹⁰⁹ *Supra* note 99.

drug policies.”¹¹⁰ Based on this report, public opinion was pushing for decriminalization of marijuana, however the results of the study were essentially ignored by Parliament.¹¹¹ However, opinions seemed to shift by the late 1970’s and it seemed as if Parliament was going to take steps toward legalizing marijuana.¹¹² Then, the Regan administration began and initiated its war on drugs.¹¹³ During this time, the U.S. increased the budget for the Drug Enforcement Agency (DEA) and imposed mandatory minimum sentences for drug possession.¹¹⁴ This led to Canada creating its own specialty drug task force called Canada’s Drug Strategy (CDS).¹¹⁵ This program brought in millions in funding towards drug enforcement, treatment, and prevention programs in Canada.¹¹⁶ However, by 1997 the funds for CDS had dried up.¹¹⁷ In May of 1997 the Controlled Drugs and Substances Act was enacted, which created the drug scheduling system that is currently in use by Canada today.^{118 119} Under the Act, marijuana is classified as a Schedule II drug, which is less dangerous than a Schedule I drug such as heroin or cocaine.¹²⁰ In 2001 medical marijuana regulations were established through a modification of the Controlled Drugs and Substances Act.¹²¹

Currently, marijuana is still a Schedule II controlled substance in Canada and thus it is illegal for recreational use. However, under common law, several provinces have ruled that

¹¹⁰ Goodwin, *supra* note 9, at 207.

¹¹¹ *Id.*

¹¹² *Cannabis in Canada, supra* note 85.

¹¹³ *Cannabis in Canada, supra* note 85.

¹¹⁴ *Cannabis in Canada, supra* note 85.

¹¹⁵ Goodwin, *supra* note 9, at 207.

¹¹⁶ *Id.* at 208.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Norml Canada: Frequently Asked Questions* (2014), at http://norml.ca/norml_faq.php (last visited November 30, 2014) [hereinafter *FAQ*].

¹¹⁹ *Id.*

¹²⁰ Goodwin, *supra* note 9, at 208.

¹²¹ *Id.*

simple possession for personal use is no longer illegal.¹²² These ruling, overwhelming public support for recreational use of marijuana, and the number of challenges made against the prohibition in the past decade have led to a tolerance of marijuana by the police and courts.¹²³ Despite this more lenient attitude, around 60,000 Canadians are arrested each year for simple possession of marijuana.¹²⁴ According to the Center for Addiction and Mental Health (CAMH), Canada’s largest mental health and addiction treating hospital, “[t]he prohibition of cannabis and criminalization of its users does not deter people from using it.”¹²⁵

VI. Analysis

Despite the differences in history and theories of justice, in each of the three countries discussed, there is a common underlying phenomenon. Namely, that each country has laws outlawing marijuana that it does not enforce. The concept of not prosecuting, or only imposing minimal fines on, an offender of a criminal law is known as decriminalization. To understand the shift towards decriminalization in these three countries it is helpful to look at the underlying theories of criminal justice in each.

The drug laws in the U.S. are punitive, meaning that their main purpose is to “punish, deter, and scare” people from using drugs.¹²⁶ This is evident from the harsh penalties once imposed at both the federal and state levels for even minor possession of marijuana. Canada’s theory of justice is similar to that of the U.S. except with less strict mandatory minimum

¹²² Goodwin, *supra* note 9, at 208.

¹²³ *FAQ*, *supra* note 119

¹²⁴ *Center for Addiction and Mental Health: Cannabis Policy Framework* (October 2014), at http://www.camh.ca/en/hospital/about_camh/influencing_public_policy/Documents/CAMHCannabisPolicyFramework.pdf (last visited November 30, 2014) (hereinafter *CAMH*)

¹²⁵ *Id.*

¹²⁶ Graham, *supra* note 8, at 307.

sentences. In the U.S. and Canada where a punitive theory of justice is in place, overlooking federal law does not seem to fit right because people are not being punished for their crimes. What this means is that these countries are completely disregarding their chosen theories of criminal justice by choosing not to enforce the law. The Netherlands theory of criminal justice is rehabilitative.¹²⁷ This means that rather than scare and punish people, it aims to rehabilitate those that are addicted to drugs.¹²⁸ However, the rehabilitative theory applies more towards the drugs that the Netherlands has labeled as hard drugs. This is because the Netherlands does not view marijuana as a harmful drug.¹²⁹ In all three cases, there is room for the overarching law to be changed to match the current practices in each country, yet this has not been the case in any of them. It seems odd that each of these three countries has the ability to correct the opposition between the laws and practices but has not done so. With these policies in mind, there seem to be four potential reasons for decriminalization as opposed to legalization of marijuana. These reasons include: 1) health risks, 2) economic benefits, 3) international treaties, and 4) history. This section will also discuss the problems that arise from decriminalization and the remedial steps that should be taken to quell them.

The first record of decriminalization efforts in the U.S. was in 1972 as set out in the First Report of the National Commission on Marihuana and Drug Abuse.¹³⁰ The report showed that most people arrested in relation to marijuana were arrested for possession.¹³¹ The report further stated that decriminalization would lead to less ‘criminals’ and accordingly it would be better for

¹²⁷ Goodwin, *supra* note 9, at 215.

¹²⁸ *Id.*

¹²⁹ *Government of the Netherlands, Drugs* (2014), at <http://www.government.nl/issues/drugs/difference-between-hard-and-soft-drugs> (last visited November 30, 2014).

¹³⁰ *Id.*

¹³¹ *Id.*

individuals and society as a whole.¹³² The first reason the government may be reluctant to change the laws because of the unknown long-term health effects.¹³³ The idea behind this is that decriminalization would lead to higher usage rates of marijuana.¹³⁴ If negative health effects were found, more of the population would be affected due to the decriminalization because more people are using the drug. In other words, decriminalization leads to increased use, increased use of a dangerous substance leads to an overall less healthy population. But, this argument does not work in the Netherlands, where the government has found that marijuana is not a dangerous drug.¹³⁵ In fact, proponents of decriminalization point to the Netherlands and argue that decriminalization has not lead to an increase in marijuana use.¹³⁶ Furthermore, a study in Canada by the Centre for Addiction and Mental Health shows that the health risks to typical adult marijuana users are modest and “significantly lower than tobacco or alcohol.”¹³⁷ Additionally, the study found that the criminalization of cannabis use causes additional harms without dissuading use.¹³⁸ The study points to the fact that the law does not deter users and “tougher penalties do not lead to lower cannabis use.”¹³⁹ Also, with marijuana criminalized, users are forced to turn to black markets or growing marijuana themselves, which in turn lead to production and/or trafficking charges under Canada’s current law.¹⁴⁰ This has an adverse effect

¹³² *Id.*

¹³³ *Id.* at 309.

¹³⁴ *Id.*

¹³⁵ *Government of the Netherlands, Drugs* (2014), at <http://www.government.nl/issues/drugs/difference-between-hard-and-soft-drugs> (last visited November 30, 2014).

¹³⁶ Graham, *supra* note 8, at 321-22.

¹³⁷ CAMH, *supra* note 124, at 5.

¹³⁸ CAMH, *supra* note 124, at 6.

¹³⁹ CAMH, *supra* note 124, at 7.

¹⁴⁰ CAMH, *supra* note 124, at 6.

on society in two ways.¹⁴¹ First, citizens now have criminal records, making it difficult to get jobs and in some cases making it difficult to travel.¹⁴² Second, the cost of enforcing the laws in Canada in 2013, including police, courts, and corrections, was estimated at \$1.2 billion.¹⁴³ Criminalization is bad for the citizens and bad for the economy. Even in the U.S. in the case of *NORML v. Bell*¹⁴⁴ evidence was presented that showed that marijuana “is not a narcotic, is not physically addictive, is generally not a stepping stone to harder, more serious drugs, nor does it cause aggressive behavior or insanity.”¹⁴⁵ Also, marijuana presently is allowed for medical use in a number of states in the U.S., supporting the idea that there can be beneficial uses for the drug.¹⁴⁶ Based on these facts, the argument of protecting the population from adverse health effects seems rather weak.

The second potential reason why marijuana has not been legalized is economic. It is possible that governments wanted to make money off of fines for the decriminalized offenses. However, this reasoning has been proven flawed with the massive revenue that Colorado has made by legalizing and taxing marijuana sales. In January of 2014 the tax revenue in Colorado was just over \$3 million.¹⁴⁷ These numbers steadily increased and in July of 2014 the tax revenue reached over \$8 million due to an increase in recreational users buying more marijuana.¹⁴⁸ It

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *NORML v. Bell*, 488 F. Supp. 123 (D.D.C. 1980).

¹⁴⁵ Graham, *supra* note 8, at 309-10.

¹⁴⁶ N.J. Stat. Ann. § 2C:35-18; FOOD AND DRUGS—MEDICAL MARIJUANA, 2009 NJ Sess. Law Serv. Ch. 307 (SENATE 119).

¹⁴⁷ *The Washington Post*, Colorado Marijuana Tax Revenues Surge as Recreational Sales Surpass Medical (September 11, 2014), at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/09/11/colorado-marijuana-tax-revenues-surge-as-recreational-sales-surpass-medical-for-the-first-time/> (last visited November 30, 2014).

¹⁴⁸ *Id.*

seems unlikely that marijuana arrests and fines would be able to bring in this type of revenue, especially when factoring in law enforcement and court costs.

The third potential reason for why marijuana is merely decriminalized rather than legalized is international treaties.¹⁴⁹ The U.S., Canada, and the Netherlands were three out of 73 countries represented at the 1961 Single Convention on Narcotic drugs.¹⁵⁰ The treaty ties into the health issues discussed previously. This is because the treaty aims to protect the “health and welfare of mankind.”¹⁵¹ The guiding principle of the treaty was to limit the use of drugs exclusively to medical and scientific purposes.¹⁵² This idea is apparent in the preamble, which states, “addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind.”¹⁵³ While there have been further conventions in 1971 and 1988, this convention sparked the prohibitive nature of the drug laws that were put in place in the 1960’s and 1970’s.¹⁵⁴ It is possible that in order to maintain alignment with the treaty and its goals that these countries have refused to outright legalize marijuana and instead opted for decriminalization.

The fourth potential reason why marijuana has been decriminalized rather than legalized is because of the way history has shaped our current drug laws. This is especially true in the U.S.

¹⁴⁹ Laker, *supra* note 46, at 371.

¹⁵⁰ *The International Drug Control Conventions* (1961), at https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf (last visited November 30, 2014) (hereinafter *Single Drug Convention*).

¹⁵¹ *Id.*

¹⁵² *Drug Law Reform in Latin America, Fifty Years of the 1961 Single Convention of Narcotic Drugs: A Reinterpretation* (March 2011), at <http://www.druglawreform.info/en/publications/legislative-reform-series-/item/1201-fifty-years-of-the-1961-single-convention-on-narcotic-drugs-a-reinterpretation> (last visited November 30, 2014).

¹⁵³ *Single Drug Convention*, *supra* note 147.

¹⁵⁴ *Id.*

and Canada because of the way in which marijuana, and drugs in general, was viewed by a majority of the people. Marijuana was viewed as an “evil” drug associated with deviants and deviant social behavior. It was classified in the U.S. as a Schedule I narcotic, meaning that it has no medical value and a high potential for abuse.¹⁵⁵ However, these statements have been proven to be untrue about marijuana, as noted in the above paragraph related to health risks.¹⁵⁶ The theory is that these countries are reluctant to admit outright that they have wrongly classified marijuana. It is especially difficult for the U.S. and Canada to admit this considering the racially discriminatory undertones involved with the initial criminalization of drugs and the subsequent propaganda and fear mongering surrounding the era. The public opinion currently seems to be in favor of at least decriminalization of marijuana, based on the current trends in the U.S. and Canada of exactly that. People have access to more objective information at the touch of their fingers tips due to the prominence and ease of access to the Internet, where unbiased studies about marijuana are posted. So, perhaps by the law shifting state-by-state toward decriminalization and the federal government choosing to allow this movement is a way to ease into marijuana reform without having to admit that perhaps someone made a mistake in the mid 1900’s. Also, it is much easier and faster to change the laws through the states or the courts as opposed to federal laws being changed via the legislation. This is due to the inevitable gridlock between opposing political parties.

Decriminalization is a strange phenomenon within the legal system. With the current status of the laws being essentially disregarded by law enforcement officers and courts, it leads to the questioning of the legitimacy of our legal system.¹⁵⁷ Due to federal laws being ignored in

¹⁵⁵ 21 U.S.C.A. § 812.

¹⁵⁶ *CAMH*, *supra* note 124, at 5.

¹⁵⁷ *Id* at 313.

favor of state law and judges and prosecutors using loopholes to prevent certain convictions, marijuana laws tend to foster disrespect for the legal system.¹⁵⁸

The police, prosecutors, and courts exercise discretion in deciding whom to arrest or convict for marijuana offenses, usually deciding that the young or otherwise unlikely, offender does not deserve the stigma of a criminal record. Thus, law enforcement spares the “innocent” offender from the consequences of criminalization. “The police respond unsystematically and inconsistently, ...the prosecutors decline to prosecute, ...and the judges respond according to their own views of the offense and of their role as judges.”¹⁵⁹

With practices like this happening throughout the U.S. it is not surprising why people are cynical towards the legal system. The point of having laws is so that citizens know the rules. When laws are enforced randomly, it seems unlikely that the citizens made to abide by them will garner respect for the rules. Also, the laws can be confusing for citizens traveling across state lines. The most reasonable course of action at this point seems to be reform of the laws governing the use of marijuana. Specifically, based on the information presented in this paper, the best option would be to legalize marijuana at all levels, federal and state, and regulate and tax it. This would create a more nation friendly approach to regulation because it would spread across state lines. Reform is called for because legitimacy needs to be restored to the legal system, the current prohibitions are expensive yet ineffective, and as seen in Colorado, states are missing out on a lot of potential extra revenue.

VII. Conclusion

This paper looked at the history of the criminalization of marijuana in the U.S., the Netherlands, and Canada. It analyzed the rational behind why these countries are now ignoring

¹⁵⁸ Id.

¹⁵⁹ Id. at 313-14.

their own marijuana laws, or decriminalizing, and looked at reasons to reform the current laws. In the U.S. the rise in marijuana use among Mexican immigrants led to fear and then strict prohibitions against the drug.¹⁶⁰ A similar situation happened in Canada with opium and the Chinese immigrants, eventually leading to the outlawing of marijuana.¹⁶¹ In the Netherlands, Dutch smugglers and American soldiers led to the outlawing of marijuana.¹⁶² In all three countries essentially, marijuana was viewed as a bad thing associated with deviant behavior prior to it being outlawed. Then, the restrictions were challenged as more people began to use the drug in the 1960's and 1970's. The U.S. and Canada responded to the rise in marijuana use with strict laws and harsh penalties.¹⁶³ The Netherlands took a different approach and decided to work with the people in adopting a policy of toleration.¹⁶⁴ The Netherlands' method of decriminalization means that even though marijuana is illegal, there are no punishments for certain offenses.¹⁶⁵ Slowly, the U.S. and Canada seem to be adopting policies similar to that of the Netherlands.¹⁶⁶¹⁶⁷ This can be seen in many U.S. state laws allowing for medical and sometimes recreational use of marijuana even though it is still outlawed under federal law.¹⁶⁸ In Canada, decriminalization

¹⁶⁰ *PBS Marijuana Timeline* (2014), at <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited November 9, 2014).

¹⁶¹ *Cannabis in Canada*, *supra* note 85.

¹⁶² Laker, *supra* note 46, at 365.

¹⁶³ *Cannabis in Canada*, *supra* note 85.

¹⁶⁴ *Government of the Netherlands, Drugs* (2014), at <http://www.government.nl/issues/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops> (last visited November 30, 2014).

¹⁶⁵ *Id.*

¹⁶⁶ Colo. Const. art. XVIII, § 16.

¹⁶⁷ Goodwin, *supra* note 9, at 208.

¹⁶⁸ Colo. Const. art. XVIII, § 16.

can be seen in certain provinces where common law has allowed for certain uses of marijuana, even though it is still outlawed under federal law.¹⁶⁹

The reasons for a policy of decriminalization, rather than outright legalization, are not straightforward. For the Netherlands, it seems that the reason the government has not changed the law is due to certain international treaties regarding the treatment of drugs.¹⁷⁰ For the U.S. and Canada the argument has been that the health risks are unknown. However, as discussed, studies have made public the exact health risks and benefits associated with marijuana.¹⁷¹ The risks seem to be minimal for the average recreational user while there are numerous benefits in the medical field. The negative effects of decriminalization include decreased legitimacy of the legal system and potential confusion among citizens. Laws can sometimes seem arbitrary, thus reducing the average citizen's faith in the system. Thus I advocate for legalization with regulation in order to restore legitimacy, alleviate confusion, and increase government revenue through taxes on marijuana.

¹⁶⁹ Goodwin, *supra* note 9, at 208.

¹⁷⁰ *Drug Law Reform in Latin America, Fifty Years of the 1961 Single Convention of Narcotic Drugs: A Reinterpretation* (March 2011), at <http://www.druglawreform.info/en/publications/legislative-reform-series-/item/1201-fifty-years-of-the-1961-single-convention-on-narcotic-drugs-a-reinterpretation> (last visited November 30, 2014).

¹⁷¹ *CAMH*, *supra* note 124, at 5.

