THE LURE OF TAX REVENUE FROM RECREATIONAL MARIJUANA:
AT WHAT PRICE?

By

Mystica M. Alexander and William P. Wiggins*

INTRODUCTION

On National Weed Day\(^1\) proponents of legalized marijuana gathered in cities throughout the country with much to celebrate. Great strides had been made in the past twenty plus years in getting states to relax marijuana restrictions, and momentum in the crowds was high to continue the push to bring marijuana legalization to all fifty states. At present, seventeen states have decriminalized the possession of minimal amounts of marijuana up to a certain threshold,\(^2\) twenty-three states plus the District of Columbia have legalized medical marijuana,\(^3\) and two states, Colorado and Washington, have gone much further by legalizing the production, sale, and use of recreational marijuana.\(^4\) As shown in Figure 1, as of August 2014, twenty-seven states plus the District of Columbia are considering some form of marijuana law reform, including decriminalization and legalization for medical or recreational purposes.\(^5\) Of these, fourteen states are seeking to follow the trail blazed by Colorado and Washington and legalize recreational marijuana.

\* Mystica Alexander is an Assistant Professor at Bentley University. William Wiggins is a Professor at Bentley University. The authors are grateful for the research assistance of Katie Dunn and Sharon Patton. The authors thank Michael Alexander-Yang, Jonathan Darrow, and Cheryl Kirschner for sharing their advice and insights.

Figure 1: Breakdown of Reform Efforts Underway:

| Fourteen states considering legalization: |
| Arizona, Hawaii, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin. |

| Twelve States plus the District of Columbia considering decriminalization: |

| Eleven states considering establishing medical marijuana programs: |

This country has witnessed decades of debate over the legalization of marijuana, the essence which is often overly simplified as a debate between those who view the drug as a "harmless weed" and those who see it as a "gateway drug" leading the user down a very dark and dangerous path in life. For some this is an ideological debate over states’ rights. For others, however, the legalization question is driven by another sentiment - the lure of the almighty dollar. The notion of legalized marijuana as a potential revenue stream to aid ailing state coffers has gained prominence as states continue to feel the effects of the economic crisis that has gripped the country since 2008. “For marijuana advocates, taxes were one of the major selling points of legalization. They have said that expanding the market for the federally prohibited plant could give the states money for school construction, health care, substance abuse programs, and public health.” In Northglenn, Colorado, for example, there are tentative plans for a senior center and improvements to traffic safety funded by marijuana sales tax revenue.

Colorado received approximately $2 million from taxes on recreational marijuana in January, the first month that sales of recreational marijuana were permitted. By June, 2014 that figure had more than doubled with the state collecting $4,775,679 in tax revenue that month. Colorado expects tax revenue to be in the $180 million dollar range in the first 18 months of legalization. In Washington, sales of recreational marijuana did not begin until June, 2014 so tax revenue data is not yet available, "but Washington predicts a ‘fully functioning’ market could bring in $1.9 billion in five years, although the state isn’t counting those figures on future budgets.”

The potential tax revenue stream that would come along with mainstream marijuana is not without a price. The purpose of this paper is to help define that "price." All eyes are on Colorado and Washington as they engage in this "experiment" of recreational use. This is not surprising as states are often considered laboratories of legislative and policy experiment. However, a true experiment requires data and analysis of that data to reach a conclusion on the effects of the experiment. Recreational marijuana dispensaries opened in Colorado in January, 2014 and in Washington in June, 2014, and as a result, it is simply too early to know and appreciate the short or long term effects of mainstream marijuana. Unlike decriminalization and medical marijuana authorization which provide limited categories of permissible cultivation, possession, and use, the legalization of recreational marijuana brings the drug into the mainstream economy.

Part I of this paper explores the nature of the revenue stream from recreational marijuana
sales, which is primarily derived from the imposition of "sin taxes" and considers the appropriateness of using sin taxes as a way of generating revenue and attempting to regulate behavior. Part II addresses the current dichotomy between federal and state treatment of marijuana and argues that such a position is untenable, leading to confusion in enforcement efforts for citizens and public officials alike. Part III explores the multitude of social costs that are likely to be part and parcel of increased recreational marijuana use. Finally, Part IV takes an even broader perspective of the concerns raised by legalization of marijuana and considers how this may impact America's standing in the global community.

I. UNDERSTANDING THE TAX SIDE OF MARIJUANA LEGALIZATION

Will elected officials of the various state legislatures have an insatiable appetite for enhancing their state coffers by taxing legalized marijuana sales? Professor David McCuan predicts the drive for revenue will swell,

It will only take a small chink in the armor of a law-enforcement organization that embraces some type of legalization effort that could grow the number of measures across the country seeking to tax dope as a way out of a fiscal crisis."18

Trying to accurately predict the revenue stream from legalized marijuana is difficult since the level of demand is an unknown variable, but estimates for Colorado and Washington vary "from tens of millions of dollars in the first few years to as much as $2 billion in the first half-decade of legalization. The disparity comes, in part, over uncertainty about demand."19 In Colorado there are two levels of state taxation that were overwhelmingly approved by voters. The first is a 15 percent tax imposed on the wholesale price of retail marijuana, with the first $40 million dedicated to school construction.20 The second layer is a retail sales tax of 10 percent imposed on consumers, which is in addition to the state sales tax of 2.9 percent.21 Some cities, such as Denver, have also opted to impose an additional local tax on retail sales.22 In Washington there is a twenty-five percent tax imposed at three different transaction points, sales by growers, sales by wholesalers/processors, and sales by retailers to consumers.23 "The effective tax rate for individuals ends up being between 35 percent and 45 percent, depending on how many transfers are involved and other variables."24

Another unknown variable in terms of how much tax revenue recreational marijuana will bring in results from the uncertainty with regard to the extent to which federal authorities will refrain from interfering with state activities. According to economics professor Jeffrey Miron, "It’s easy to get a little overexcited that legalizing marijuana is going to solve the world’s budgetary problems...But the question for the tax revenue part of this will be how much the federal government allows these markets to come completely above ground.” Consequently, as states consider the possibility of legalizing marijuana, voters and legislatures must consider the possibility of some form of intervention by the federal government. As the presidential election of 2016 looms closer, bringing with it a change in the White House along with possible changes in the House and the Senate, it may be preferable for states considering legalization in the coming year to take a "wait and see" approach.

Of equal importance, and as explained in this Part I, voters and legislatures should also consider other factors such as the appropriateness of an additional sin taxes and concerns about
the black market. Legalization of recreational marijuana is not without parameters and enforcement efforts will be necessary to ensure compliance with the law, thus potentially driving up enforcement costs. Because of this, “opponents and some skeptical economists say the dreams of a windfall are far too optimistic. They worry that the higher cost of enforcement and regulation could outweigh any tax revenue from marijuana sales.”

A. States Rely on Excise Taxes

States rely on excise taxes as a means to fund governmental operations. Increasingly, states are looking to enhance their revenue streams through alternative forms of excise taxation. “State governments are much more likely than their local counterparts to depend on taxes other than sales, property, and personal income taxes. Excises on alcohol, beer, tobacco, gambling, and business taxes are among the alternative taxes.” State excise taxation is nothing new. For example, in 1650 New York had a tax on wine and beer and in 1653 extended taxes to tobacco, grain, hemp, butter, cheese, and flax. Pennsylvania soon followed New York’s lead and taxed items such as wine and rum. Other colonies, such as New Hampshire, did not enact excise taxes until almost a hundred years later when in 1756 the colony imposed a tax on cider, rum, wine, and tea. In contemporary society excise taxes imposed on products that are deemed undesirable or those products considered best used in moderation are often referred to as “sin taxes.”

1. The Popularity of Sin Taxes

Both federal and state governments have long recognized the potential for revenue from targeting specific products and activities for taxation. The end of Prohibition came about as the country was trying to recover from the Great Depression. Repealing Prohibition resulted in revenue to the government of approximately $500-$600 million per year in the 1930s, a great aid to covering New Deal spending which was approximately $2 billion per year. At the state level as well, states were eager to tax alcohol sales, “in part because they were desperate for revenue after the Great Depression.” Sin taxes are often used to offset budget shortfalls. “An examination of the legislative history of various sin taxes will reveal that, no matter the justification offered to the public, sin taxes are enacted when states are having budget crises and need money.”

2. The Effectiveness of Sin Taxes

Are sin taxes an effective means of raising revenue at the state level, and why are they so appealing?

“Vices are attractive targets for selective taxation because sinners are not very sensitive to increases in the price of the sinful goods and services that they buy. They reduce their purchases of course, but not by much. Taxing sin thus is a revenue-generating engine...Such taxes may ‘nudge’ consumption in the desired downward direction, but bad habits are hard to break.”

Proponents of sin taxes often make the argument that sin taxes are effective in discouraging unhealthy behavior while concurrently providing funds to support worthy causes. However, ”[i]f the tax is actually effective at discouraging consumption of a ‘sinful’ good, after
all, then there would be very little revenue raised because people would purchase much less of the more expensive good in question." For example, a study of the effects of food prices (and taxes and subsidies) on obesity levels concluded that while changes in BMI or obesity would not likely result from a low tax, “nontrivial pricing interventions might have a measurable effect on Americans’ weight outcomes.”

Programs to discourage marijuana use by minors are planned to be implemented with part of the tax revenue stream from marijuana sales. Whether these will have the intended effect of reducing marijuana use remains to be seen. However, some analogy can be drawn to cigarette smoking. The first comprehensive tobacco control program in the United States was implemented in California in 1989. The program includes a variety of elements such as media campaigns highlighting the harmful effects of smoking, restrictions on tobacco advertising, school programs to work the anti-smoking message into the curriculum, and enforcement of policies designed to prevent the youth from gaining access to tobacco. A study assessing the literature with regard to the effectiveness of these programs has concluded that such programs are an effective means of reducing teenage smoking. Armed with evidence linking tax increases on the purchase of tobacco with a corresponding decline in its use, legislatures are increasingly using sin taxes to advance public health policies and practices. For example, “[i]nflation-adjusted state cigarette taxes more than tripled, on average from 1982 to 2007, contributing to a more than 160 percent rise in average cigarette prices during this period.” These price increases have helped to reduce the prevalence of adult smoking.

Does a similar pattern occur with the consumption and taxation of alcohol? Looking to alcohol use, a review of the literature produced over the past several decades on the relationship between the alcohol tax and price levels and alcohol sales or consumption measures identifies price as an important influence on drinking habits. “We know of no other preventative intervention to reduce drinking that has the number of studies and consistency of effects seen in the literature on alcohol taxes and prices.” Another study found that changing the tax rate for only one part of the alcohol market is not as effective as changing the tax rate for entire market. “Findings add to the literature by demonstrating that alcohol taxation remains a robust policy instrument for reducing alcohol related disease mortality even when state-level alcohol consumption and alcohol related disease are very low.”

Similar results were reached in a later study of alcohol price and consumption which concluded that “higher alcohol price and alcohol taxes are associated with reductions in both excessive alcohol consumption and related, subsequent harms. Results were robust across different countries, time periods, study designs and analytical approaches, and outcomes.” Although these studies report an inverse relationship between the consumption of alcohol and a tax increase on the purchase of alcohol, other studies have shown that people simply replace alcohol with equally harmful products when the price of alcohol becomes too high. For instance, “two studies showed that teen marijuana consumption increased when states raised beer taxes or increased the minimum drinking age.” These studies demonstrate the inherent risk and the unpredictability of results when trying to influence behavior by manipulating the rates of sin taxes.

3. The Problems with Sin Taxes

Sin taxes are often advocated by lawmakers as a means of raising money while at the same time encouraging moral behavior. Taking each of these goals to their logical outcome
highlights the inherent tension between them:

Ironically, these justifications are at odds with one another; you either stamp out an activity or you make money off of its continued consumption. This conflict puts government in the position of having to decide whether to encourage destructive behavior in order to maintain the same income levels, or to come up with more creative ways to balance tight budgets. This moral hazard of governments indicates that legislators may not always be acting with their citizens’ best interests at heart…

Consider, for example, when Congress was considering the imposition of a twenty-five percent tax on internet pornography. Some of those opposed to the tax argued that, “if the government stood to make money from adult websites, it would lack incentive to discourage the maintenance and patronage of such sites.” Applying similar concerns to legalized recreational marijuana, if the states proceed with the goal of raising revenue to fill state coffers, it will be challenging to ensure that use of the drug actually decreases instead of increases since reducing drug sales will negatively impact the revenue stream. Perhaps instead of rushing to legalize recreational marijuana, those states moving toward legalization should observe the dynamics of the relationship between taxes and use in Colorado and Washington in the coming years in order to fully understand the extent to which sin taxes might be effective in preventing increases in drug use.

Another problem with sin taxes is the greater degree through which the government seeks to judge and direct individual behavior. Economist Thomas DiLorenzo warns of the future government encroachment upon liberty, “once it becomes ‘legitimate’ for government to protect individuals from their own follies, there is no way to establish limits to governmental power.” As Nobel Prize winner James Buchanan pointed out, any attempt of government to restrict private consumption choices with sin taxes is nothing but a 'meddlesome preference'. While few people would argue with the importance of initiating policies and programs to discourage destructive behavior, “sin taxes are not an appropriate remedy for social ills.”

**B. Excessive Excise Taxes May Increase Black Market Sales**

With the push in Colorado and Washington to impose on marijuana consumers a high level of excise taxation to help fund education and other worthy causes, the question that remains unanswered at this time is whether higher prices will drive consumers back to the black market.

1. **Black Market Alternative**

If a state increases the rate of excise taxation, is there a risk of driving transactions underground? Evidence suggests that a correlation exists between excessive excise taxation (driving prices higher) and an increase in black market sales. "When the price of an item increases substantially, it can induce people to shop on the black market."

Robert Corry, Treasurer of the "No to Proposition AA Campaign" in Denver, sees the high tax rates of Colorado Proposition AA as just another form of prohibition: "Proposition AA would reestablish prohibition and drive marijuana back underground to the detriment of all Coloradans." A recent Wall Street Journal editorial echoes this sentiment:
The [marijuana tax] money [in Colorado] is earmarked for education, so now parents can tell their kids they’re getting high for their future, or something. The problem is that the tax rate, which can reach 35% is some localities, will be so high that it may encourage a black market, thus defeating the supposed purpose of legalization. This is what comes from taking up before economics class.\textsuperscript{58}

Lieutenant Mark Comte of the Colorado Springs Police Force has indicated that, “Legalization has done nothing more than enhance the opportunity for the black market.”\textsuperscript{59} The price disparity between the legalized marijuana and that available on the black market are helping keep the black market dealers in business. Black market prices undercut legal prices since black market dealers do not collect state and local sales taxes. For example, one dealer sells high-quality marijuana for between $225 and $300 an ounce compared to the $400 plus price tag of the legal sales taxes.\textsuperscript{60} Narcotics News reports that black-market high grade offerings can run as low as $156 to $250 an ounce.\textsuperscript{61} As the amount of marijuana available for legal sale becomes more readily available, the gap between the prices of the two markets will likely close a bit although the extra cost due to taxes and other regulatory costs will continue.\textsuperscript{62}

2. The Uruguay Model

One country has decided to combat the possibility of driving transactions to the black market by deciding not to impose any taxation on the sale of marijuana. Uruguay passed legislation in December 2013 allowing for the growing and selling of marijuana, making it the first country to pass such legislation.\textsuperscript{63} “Uruguay will exempt marijuana production and sales from taxes in a bid to ensure prices remain low enough to undercut competition from black market pot smuggled in from Paraguay, according to consultants advising the government on a legalization plan.”\textsuperscript{64}

Registered Uruguayans over the age of 18 are permitted under the new law to purchase up to 1.4 ounces of marijuana a month.\textsuperscript{65} In May 2014, regulations were announced providing that eligible citizens would be able to purchase up to “10 grams of pot a week for just about US$0.90 per gram.”\textsuperscript{66}

Government officials have been clear in their rationale for exempting the sale of marijuana from taxation. “The low price was established in a bid to fight against drug cartels and compete with black market marijuana smuggled mostly from Paraguay, a neighboring South American country which is one of the region’s largest producers of illegal cannabis. But opponents of the law insist the legalization will only expose more people to drugs.”\textsuperscript{67}

Although the bill passed the Senate by a margin of 16 to 13, many opposed the bill. One opposition senator expressed the following concern, “This project envisages a social engineering experiment and respects none of the ethic safeguards of experimentation on human beings, and these are important in the case of a substance like marijuana, which causes damage to human beings.”\textsuperscript{68} Criticism is not limited to local politicians. “The International Narcotics Control Board (INCB) warned the law would ‘be in complete contravention to the provisions of the international drug treaties to which Uruguay is party.’”\textsuperscript{69}
II. THE DICHTOMY BETWEEN FEDERAL AND STATE LAWS ON LEGALIZED RECREATIONAL MARIJUANA IS NOT A TENABLE POSITION

No dispute is as fundamental in our nation as the struggle of states to maintain their rights in the shadow of the strong central government in our federalist system. One area in which the battle is waged is the authority to regulate drugs. Early in the nation’s history, drug use was unregulated at both the state and federal level. It wasn’t until the Civil War era that concerns about drug use and addiction began to surface. During that time it was standard practice for pharmaceutical companies to add cocaine and opiates to medications, resulting in addictions. For example, so much morphine was administered to wounded soldiers during the Civil War that "chronic morphine use became known as 'soldiers' disease'. As a result of concerns about morphine addiction, heroin became the drug of choice for pharmaceutical companies, such as Bayer, that often added heroin to its cough suppressants and doctors routinely prescribed heroin to treat 'female problems' and hiccups. By the end of the nineteenth century, cocaine gained prominence in many elixirs and pain relief products and was even added to wine, chewing gum, and cheese. By 1905, Americans were consuming eleven tons of cocaine each year, often unknowingly. As a result, the federal government passed the Pure Food and Drug Act of 1906 requiring that the drug content of all medicines be included on the label. In 1914, the federal government went a step further and passed the Harrison Narcotics Act of 1914 criminalizing nonmedical uses of narcotic drugs. In 1937 Congress passed the Marijuana Tax to criminalize the drug which had grown in popularity from the time American sailors started smoking it in the early 1900s. Despite restrictions, marijuana use, especially among college students, was widespread in the 1960s and 1970s. In 1970, comprehensive federal legislation, the Controlled Substances Act of 1970 ("CSA"), was signed into law, classifying drugs into five schedules, depending on the potential for abuse and medical benefit. Marijuana was categorized, along with drugs such as heroin and LSD, as a Schedule I drug having no accepted medical use and a high potential for abuse.

Not content to abide by the authority of the federal government to dictate drug classification and penalties, states have crafted their own parameters of permissible marijuana use. In fact, state marijuana legalization efforts often fly in the face of federal restrictions and enforcement of federal authority is becoming increasingly complex. There have been repeated calls to remove marijuana from federal regulation under the CSA. David Schwartz has gone so far as to dub state legalization of marijuana "a federalism crisis." This part will take a closer look at the issues that arise from the conflicting approach of federal and state law and the cases that come before the courts due to this lack of certainty.

A. Understanding the Operation of the Controlled Substances Act and the Interaction with State Law

As part of its opening declarations in the Controlled Substances Act, Congress made clear that a distinction between interstate and intrastate flow of controlled substances was not possible because the manufacture and intrastate possession and local distribution are integral parts of interstate commerce, thereby explaining the need for the federal government to regulate local transactions. Experience dictates that the states have been partners with the federal government in drug regulation and enforcement efforts. In fact, the CSA makes clear that it does not intend the federal legislation to be a blanket preemption of state law. Rather, the CSA provides:
No provision of this subchapter shall be construed in indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any state law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict that provision of this subchapter and that State law so that the two cannot consistently stand together.  

1. The Basis of the "Federalism Crisis"

The conflict between federal authority and state marijuana legalization efforts necessarily involves two specific doctrines: the anti-commandeering doctrine of the Tenth Amendment and the Supremacy Clause governing the federal preemption of state law. Pursuant to the anti-commandeering doctrine, the federal government lacks the authority to force states to criminalize conduct. With regard to enforcement of drug laws, this means that Congress cannot demand that a state criminalize marijuana or prosecute those who violate the CSA. The federal government's primary recourse, then, appears to be to take action to directly enforce prohibition laws on its own and prosecute violators under federal law. However, such action is not without challenges. “That the federal government relies on the assistance, infrastructure, and know-how of state and local governments is evinced by, as an example, the fact that ninety-nine percent of drug related investigations and arrests are carried out by state agents.” A look at California provides an example of the magnitude of the problem that the federal government would face, in California alone, should it seek to enforce the CSA. In 2008, when George W. Bush left office there were approximately 700 medicinal marijuana storefronts in the entire state of California. "Since 2011, the Obama administration has waged war on state medicinal marijuana laws, and yet in late-2012, it was estimated that there were at least 500 (and perhaps more than 1,000 dispensaries in Los Angeles alone).” Should the federal government decide to enforce federal law, it is likely that resources will prove to be woefully inadequate.

The Supremacy Clause adds another layer of complexity to the federal/state approach to marijuana. This clause, adopted as Article VI, paragraph 2 of the U.S. Constitution establishes the precedence of federal laws over state laws and state constitutions. "[S]tate laws that conflict with federal law are generally preempted and therefore void." However, the Supremacy Clause is not without its limits. “There is...a presumption against federal preemption when it comes to the exercise of ‘historic police powers of the States’.“ Since state police powers include the ability to regulate drugs and the practice of medicine, medical marijuana laws will sometimes come within this presumption. A question for the courts to assess is to what extent Congress, through the CSA, intended to preempt state legislative actions regarding marijuana. The legislative history of the CSA sheds no helpful light on federal/state conflict resolution.

2. Judicial Reaction to Preemption Claims

"[T]he rapid proliferation of state marijuana law reforms has occasioned the need for the courts to make more in-depth inquiries into Congress's preemptive intent under the CSA. Courts have been confronted with a growing docket of suits claiming that state reforms are preempted by the CSA." Some courts have found that, in the absence of a "positive conflict" with the CSA, preemption did not apply. For example, in the recent case of John Ter Beek v. City of
Wyoming, the Supreme Court of Michigan found that the CSA did not preempt the Michigan Medical Marihuana Act (MMMA) which provides immunity for the medical use of marijuana. This case resulted from a challenge to a zoning ordinance adopted by the City of Wyoming ("City") that prohibits any use of property in violation of federal or state law or local ordinance. Plaintiff John Ter Beek was a resident of the City and he was also a medical marijuana patient who wished to grow and use marijuana as allowed by the Michigan statute. He therefore challenged the validity of the City ordinance. The court first considered whether the CSA preempted the Michigan statute. The court decided that it did not because § 4(a) of the MMMA did not “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA.” The next issue the court had to decide was whether the City ordinance was preempted by the MMMA. In this instance the court found preemption to exist because “the Ordinance directly conflicts with the MMMA by permitting what the MMMA expressly prohibits—the imposition of a ‘penalty in any manner’ on a registered qualifying patient whose medical use of marijuana falls within the scope of § 4(a)’s immunity.”

In 2013, a year before the Michigan court’s ruling in Tar Beek, the Supreme Court of California also grappled with the state/local authority issue. California law allowed the cultivation and use of medicinal marijuana. The dispute in City of Riverside v. Inland Empire revolved around a local zoning ordinance adopted by the City of Riverside (City) that banned medical marijuana facilities in the City on the grounds that they constituted a public nuisance. As an operator of a medical marijuana dispensary, the defendant in the case argued against the City’s request for injunctive relief that would close the dispensary’s operations. The state supreme court agreed with the conclusion of both the trial court and court of appeals that the local zoning ordinance should be respected, finding that “…neither the CUA [Compassionate Use Act] or the MMP [Medical Marijuana Program] expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medicinal marijuana, and to enforce such policies by nuisance actions…” Relying on the court’s ruling in Riverside, in March 2014, the Court of Appeals of California upheld the right of the County of San Bernardino to adopt an ordinance that banned the operations of medical marijuana dispensaries in the county.

3. Department of Justice and Enforcement of Federal Law

In light of the increasing number of states either decriminalizing individual possession of small amounts of marijuana or authorizing the cultivation and use of medicinal marijuana, the federal government has found itself seeking to clarify its approach to state legislation. The Department of Justice has sought to clarify the federal approach through enforcement guidelines. For example, in October, 2009, a “Memorandum for Selected United States Attorneys” was issued by Deputy Attorney General Ogden on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana. This memorandum acknowledges that the department has “limited investigative and prosecutorial resources” and reminds US Attorneys that,

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department…and the Department’s
investigative and prosecutorial resources should be directed toward these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.107

Two years later, Deputy Attorney General James Cole issued a “Memorandum for United States Attorneys” on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use in response to inquiries from state and local governments, some of which were considering “approving the cultivation of large quantities of marijuana, or broadening the regulation and taxation of the substance.”108 Concerned about the increased quantities of the drug cultivated and the revenue projections in the millions of dollars, the memo reminded the US attorneys that, “The Ogden Memorandum was never intended to shield such activities from federal enforcement actions and prosecution, even where those activities purport to comply with the state law. Persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.”109 In December, 2012, after recreational marijuana was legalized in Colorado and Washington, President Obama, in an interview with ABC news expressed the sentiment that the federal government has “bigger fish to fry” than legal recreational users in Colorado and Washington, “It would not make sense for us to see a top priority as going after recreational users in states that have determined it's legal.”110 Deputy Attorney General Cole issued yet another memorandum in August, 2013 to update US Attorneys on the Department of Justice position in light of actions in Colorado and Washington authorizing the production, processing, and sale of recreational marijuana.111 Almost twice the length of the previous memos, this memorandum goes into greater detail on how US Attorneys should assess activities involving marijuana. Specifically, Cole reminds the US Attorneys that, “The primary question in all cases – and in all jurisdictions-should be whether the conduct at issue implicates one or more of the [federal] enforcement priorities…”112 If it does, then such conduct is a matter for the federal authorities to address. But if it does not, federal resources should not be used to interfere with activities that are legal under state law. The federal government has provided what it considers to be the blueprint for the Attorney General’s actions; how that will unfold in application remains to be seen.

In addition, although the Attorney General may have a blueprint for action, such a blueprint does not yet exist for the various federal agencies that may interact with the legalized marijuana industry. Legislators in Colorado and Washington have voiced concerns over a lack of uniformity in the approach of various federal agencies toward legalized marijuana. In a July 28, 2014 letter addressed to the White House Chief of Staff and to Attorney General Eric Holder, the US senators from Colorado and Washington have made clear that,

It is incumbent on the Administration to work with all federal departments and agencies setting forth a clear, consistent, and uniform interpretation and application of the CSA and other federal laws that could affect the [marijuana] industry. Such guidance should reflect the same deference to our state laws as does the Cole memorandum.113
B. The Dichotomy Causes a Host of Practical Problems

Consider the following hypothetical which was raised during a May 2014 Congressional hearing:

"If Congress allows a District of Columbia law to take effect that would decriminalize the possession of small amounts of marijuana, and someone with one foot on the National Mall and another foot on city property is caught carrying the drug, would that person be charged with a crime under federal law?"

According to Robert MacLean, the acting chief of the United States Park Police the answer is yes, but according to Assistant Police Chief Newsham, the Assistant Chief of DC Metropolitan Police Department, the answer is no. These conflicting responses by those charged with enforcing the law in DC epitomize the practical implications of an inconsistent marijuana policy.

1. Local Officials Are Uncertain How to Reconcile the Federal/State Conflict

Law enforcement officers have reported that the inconsistency between state and federal law is a significant problem, especially when trying to determine the correct manner of handling seized marijuana. Cases demonstrate the uncertainty of state and local officials on determining how to proceed in light of the conflicting regimes. For example, in *City of Garden Grove v. The Superior Court of Orange County,* the question before the court was whether marijuana that was seized from Felix Kha, a medical marijuana patient, by police officers during a traffic stop could lawfully be returned to him after the criminal charge of transporting marijuana was dropped. The trial court ordered the City to return the marijuana as soon as the charges were dropped. The City, however, appealed the order of the trial court. While agreeing that Mr. Kha’s possession of marijuana was legal under California law, the City nevertheless refused to return the marijuana because the drug was illegal under federal law. The City also argued that to the extent state law authorizes a return of the marijuana, that authorization is preempted by federal law and further that police officers could be criminally liable under the CSA if they returned the marijuana to Mr. Kha. The Attorney General of California filed an amicus brief in the case, in support of the trial court’s ruling. An amicus brief was also filed on behalf of California’s sheriffs’, police chiefs’, and peace officers’ associations asking the court to overrule the trial court. Citing “due process and fundamental fairness,” the appeals court ordered that the marijuana that rightfully belonged to Mr. Kha should be returned.

In Oregon, a similar dispute arose over the proper handling of 2.5 grams of marijuana seized from an individual, a medical marijuana user. When the state charges against the individual were dismissed, the Portland police were ordered by the court to return the marijuana, but the City argued that they could not do so because such action “would constitute delivery of a controlled substance in violation of federal law.” The Oregon Court of Appeals rejected the City’s argument.

2. Financial Institutions are Receiving Mixed Messages

In February 2014, separate decisions by the U.S. Department of the Treasury and the U.S.
Department of Justice moved the production and sale of marijuana from the shadows of the underground economy to the commercial mainstream of the U.S. financial system. The Treasury Department issued a set of rules aimed at making it easier for U.S. banks to transact business with marijuana-focused businesses in those states where the sale of marijuana is legal. The Justice Department instructed U.S. Attorneys not to pursue banks that conduct business with organizations that deal in the production or sale of marijuana as long as they follow the rules issued by the Treasury Department.

However, months after the guidance was issued by the Treasury Department and the Justice Department, marijuana dispensers continued to have difficulty trying to do something as simple as opening a checking account. The problem for banks is that the current rules and guidance provide minimal comfort and protection against the possibility of federal prosecution. There is no guarantee that banks will not be prosecuted for transacting business with marijuana dispensers; there is simply a directive from the Justice Department instructing U.S. attorneys not to pursue banks. Not surprisingly, such uncertainty has caused banks to remain hesitant to work with state-based dispensaries.

To help address this uncertainty, in July, 2014 the House of Representatives passed an amendment, referred to as the Heck Amendment, that would prevent both securities and treasury regulators from using federal funds to seek to penalize banks that transact business with the marijuana industry. Although the measure has made it through the House, it still requires Senate approval. Further, the amendment does not go so far as to provide banks unfettered permission to do business with the marijuana industry, instead it merely prevents resources from being used to penalize banks that do so. As a result of the uncertainty, the huge marijuana industry in the U.S. continues to be primarily a cash-based industry with little access to mainstream commercial banks.

One negative ramification of the lack of available banking services is the inability to pay expenses via check or bank wire. Consider for, example, the requirement of the Internal Revenue Service ("IRS") that all businesses submit quarterly withholding taxes to the IRS via bank wire. Without banking services, the marijuana industry has been unable to comply with this requirement and as a result some businesses have faced a ten percent penalty for paying in cash.

In a lawsuit filed against the IRS in the U.S. Tax Court, Allgreens LLC, a marijuana dispensary located in Denver, Colorado, has challenged the ability of the IRS to impose this penalty.

In an attempt to combat the banking problem, the Colorado legislature approved the “world’s first financial system for the marijuana industry, a network of uninsured cooperatives designed to give [marijuana] businesses a way to access basic banking services.” The purpose of the legislation is to develop a financial services system for marijuana businesses. As noted by a Colorado state senator, “We are trying to improvise and come up with something in Colorado to give marijuana business some opportunity, so they do not have to store large amounts of cash.” Colorado Governor John Hickenlooper signed this legislation into law on June 6, 2014.

3. Individuals Pay the Price for Engaging in an Lawful State Activity

With the current trend in the U.S. of developing a more tolerant view toward the use of marijuana, people often forget that “[n]early half of all drug arrests each year are for marijuana-related offenses, the overwhelming majority of which are for personal possession.” However, the consequences of a marijuana conviction are serious and can deprive offenders of basic rights
and deny them access to resources. For example, a marijuana conviction could “make it difficult or impossible to vote, obtain educational loans, get a job, secure housing, or even adopt a child.” Additionally, a conviction could influence the outcome of a child custody case in family court or deprive offenders of federally subsidized housing. Other basic rights that can be affected include the right to possess firearms, the right to receive food stamps and other welfare benefits, and the right to enter some foreign nations. An offender’s ability to secure gainful employment may also be affected by a marijuana conviction. Proponents of legalization see these consequences of marijuana possession and use as out-of-proportion to the gravity of the offense. However, legalization efforts at the state level cannot guarantee that such consequences will not occur as long as the drug remains illegal for federal purposes.

Uncertainty exists at both the state and local level as a result of conflicting federal and state rules with regard to marijuana. These situations often involve application of medical marijuana laws, which carve out specific permissible behavior with regard to cultivation, possession, and use of the drug. A growing number of disputes over state legislation can be expected now that Colorado and Washington have brought marijuana into the mainstream economy, and these certainly can be expected to further complicate this “crisis of federalism.”

III. ARE THE SOCIAL COSTS OF MARIJUANA TOO HIGH TO JUSTIFY LEGALIZATION FOR RECREATIONAL PURPOSES?

Because recreational marijuana did not go on sale in the United States until January 2014 in Colorado and June 2014 in Washington, it is too soon to answer this question with certainty. Nevertheless, it is a question that must be given serious consideration, especially since numerous states are already seeking to follow in the footsteps of Colorado and Washington. One of the most significant unknowns at this point is to what extent marijuana consumption may increase.

If legalization led to a consumption increase of 10 percent above current levels it would have to be counted as a good move. If legalization led instead to a tripling of use - particularly in the number of heavy users - any but the most sanguine about the drug’s effects would probably count legalization as a disaster... The problem for the analyst is that a 10 percent increase and a tripling seem equally plausible outcomes of legalization.

Recent findings published in a report released by the Colorado Department of Revenue confirm this inability to accurately predict increased usage as a result of legalization. The study, released July 9, 2014, “finds total marijuana demand to be much higher than previously estimated.” The report explains the extent to which expected demand was underestimated:

Our point estimate of demand is 121.4 tons per year for adult residents. This is 31 percent higher than a recent Department of Revenue assessment, 89 percent higher than a study by the Colorado Futures Center, and 111 percent higher than an older study by the Colorado Center for Law and Policy.

Analogizing to society's experience with the prohibition of alcohol, consider that the repeal of Prohibition changed consumption levels. In fact, that experience showed that "changes in a drug's legal status, even if the drug is already widely consumed and even if
enforcement is far from perfect, can substantially change the number of very heavy users." Consider the possibility that legalization of recreational marijuana leads to an increase in use to the point that voters consider whether marijuana should once again be considered illegal. Unfortunately, at some point the situation may be irreversible because not all users who began using marijuana when it was legal would have the desire or inclination to quit when the drug once again becomes illegal. Those who do not quit, "would swell the revenues of illicit marijuana dealers and multiply the headaches of marijuana enforcement agencies." An increased user population makes enforcement that much more difficult.

But whether the number of users and heavy users increases significantly or not, it is worth bearing in mind that legalized recreational marijuana is not without cost both to our society and to our youth.

C. Costs to our Society

The opening of the marijuana shops makes a wide variety of marijuana products available to the public, including cereal, soda, cookies, cooking oils, rubs, and gummy bears. There are a multitude of marijuana edibles available and they are appealing to broad segments of society from college students to senior citizens. The purchase of marijuana has moved into the mainstream to such an extent that Fodor's Travel now provides tourists with advice on "Pot Tourism." In Colorado, the first sales of recreational marijuana were made on January 1, 2014 by eighteen licensed shops, by the end of March 2014, one hundred and sixty shop licenses were issued. Such widespread availability may contribute to the message that marijuana is simply a "harmless drug," while downplaying the health and economic consequences that may accompany it. Another factor that contributes to the belief that marijuana is a "harmless drug" is a conception that hearkens back to the marijuana of the 1960s and 1970s and "the lack at that time of conclusive findings regarding short- or long-term health consequences." The marijuana purchased in times past was of poor quality, with a level of marijuana's psychoactive ingredient, tetrahydrocannabinol (THC), equal to anywhere from three to six percent. "Today's cannabis, with THC levels that range from six percent to twenty-two percent is much more potent, and concentrates of cannabis can reach THC levels of sixty percent."

1. The Health Effects of Marijuana

It is beyond the scope of this paper to explore the full range of health effects that may occur as a result of marijuana usage. These are well-documented and have been addressed by those more qualified to do so. Among other things, marijuana use has been linked to respiratory illness, and cognitive impairment. And while there are some who maintain that marijuana is not addictive, according to the Department of Health and Human Services, of the 4.3 million cases of drug addiction that require treatment each year, two thirds of them involve marijuana. It is safe to say these numbers are likely to increase as marijuana goes mainstream.

One challenge for consumers of the legalized drug is developing an understanding of an appropriate level of marijuana consumption. This is especially challenging for those consuming marijuana infused edibles. Such confusion can lead to tragic results. In the few months since legalization two deaths have possibly been connected to the ingestion of marijuana edibles. The first death occurred in March, 2014, when a nineteen-year-old college student fell from a balcony after eating a marijuana infused cookie. The student was visiting Colorado from
Wyoming for spring break to try marijuana. Eating one cookie caused the young man to go "off the wall," according to his friends. The coroner determined that the student's death was attributable to "marijuana intoxication" since THC was the only drug in his system. The cookie consumed by the student contained 65mg of THC, while a single serving is considered to be 10 mg. However, most people are used to eating a whole cookie and so the student may not have had an appropriate frame of reference for safe consumption. A few weeks later, a woman was shot by her husband while she was on the phone with the 911 dispatcher. According to the woman, her husband had eaten high-potency marijuana-infused candy and was hallucinating. While the gunman may have also been on prescription painkillers at the time of the shooting, this second death possibly linked to marijuana use caused Colorado lawmakers to recognize the need for enact the increased restrictions on potency and labeling for the edibles. In May, 2014 Colorado's Governor signed legislation that would, among other things, (1) convene a task force to regulate packaging for marijuana edibles to ensure that the product is easily differentiated from regular food and (2) regulate the amount of concentrated marijuana that an individual can purchase. As a follow-up to the Governor's request for tightened restrictions on the packaging and labeling of marijuana edibles, Colorado's marijuana regulators have drafted proposed rules that will require "makers of edible pot to physically demark their products so that consumers can ‘intuitively determine’ how much constitutes a dose of marijuana’s intoxicating ingredient, THC." Another concern is whether marijuana is a "gateway drug," meaning whether it opens the door to experimentation with other additional drugs. Although a direct causal relationship between marijuana use and use of other drugs has not been proved, there is evidence that "adults who were early marijuana users were found to be eight times more likely to have used cocaine, 15 times more likely to use heroin, and 5 times more likely to develop a need for treatment of abuse or dependence on any drug." In fact, "the single best predictor of cocaine use is frequent marijuana use during adolescence."  

2. Economic Impacts  

A correlation has also been shown between marijuana and a loss of productivity in the workplace. For example, absence from work was 75 percent higher for marijuana users than non-users, and the marijuana users were 55 percent more likely to have an industrial accident. Marijuana use also increases public health costs. For example, emergency room visits are also likely to be on the rise. In 2010, marijuana use resulted in 461,000 emergency room visits in the United States, representing 39% of all visits that were related to drug use. Also impacting the health system are illnesses resulting from accidental ingestion. At about the same time the federal government adopted a "hands off" policy with regard to those using marijuana in accordance with state medicinal marijuana laws, the physicians at Children's Hospital in Colorado first began noticing children brought in after accidental ingestion. "From January 2005 through September 2009, there were no marijuana-related visits...Between October 2009 and December 2011, however, 14 of 588 children were seen for marijuana exposure," some from medicinal marijuana and others from edibles. Like any addictive drug, marijuana has the propensity to lead users in a downward cycle in which they become consumed with securing their next high, sometimes at any cost, even resorting to crime to obtain money to pay for their habit. In fact, one study showed that "more than 41 percent of male arrestees in sampled U.S. cities tested positive for marijuana."
Research has confirmed a connection between the use of marijuana and an increase in violent behavior; youth who use marijuana are four times more likely than non-users to act violently.\textsuperscript{176}

Of great interest is a report issued by The National Center on Addiction and Substance Abuse (CASA) at Columbia University which represents the first time a study was done of the total amount spent by federal, state, and local governments on substance abuse.\textsuperscript{177} The study found that social costs indeed outweighed the revenue stream generated by alcohol and tobacco. "Alcohol and tobacco taxes fail to pay their way...For each dollar in alcohol and tobacco taxes and liquor store revenues that hit federal and state coffers, these governments spent $8.95 cleaning up the wreckage of substance abuse and addiction."\textsuperscript{178} An earlier study which considered the social costs of alcohol use, caused the federal government to remark that "The cost to society of alcohol alone is estimated to be more than 15 times the revenue gained by their taxation."\textsuperscript{179}

D. Costs to Our Youth (Our Future)

When considering whether legalization of recreational marijuana will result in increased use by teenagers, a preliminary question to consider is whether legalization will change public perception about marijuana, particularly in the young.\textsuperscript{180} A study designed to determine whether California's legalization of medical marijuana in 1996 resulted in a change in attitude about marijuana found that "medical marijuana policy had little impact on youth and young-adult marijuana related attitudes and use."\textsuperscript{181} This survey was completed only three years after legalization, perhaps too short a time frame in which to discern changes in attitude. A later study conducted in 2013 showed a significant change in the attitude of middle and high school students toward marijuana use.\textsuperscript{182} While 72.5 percent of 12th graders considered regular marijuana use to be unsafe in 1993, by 2013 that percentage was down to only 39.5%.\textsuperscript{183} In 2013, 46.5 percent of 10th grade students perceived marijuana as unsafe, compared to 78.5 percent in 1993.\textsuperscript{184} The views of 8th grade students also shifted, although to a lesser extent, with 79.6 percent believing regular marijuana use to be harmful in 1993 dropping to 61 percent twenty years later.\textsuperscript{185} Although these changes in attitude could be attributable to factors other than legalization efforts, the pro-marijuana campaigns that characterize marijuana "harmless" and encourage legalization should no doubt be among those factors.\textsuperscript{186} According to the Office of National Drug Control Policy, "Confusing messages being presented by popular culture, media, proponents of "medical" marijuana, and political campaigns to legalize all marijuana use perpetuate the false notion that marijuana is harmless. This significantly diminishes efforts to keep our young people drug free and hampers the struggle of those recovering from addiction."\textsuperscript{187}

1. Psychological Impacts

Marijuana use, even in modest amounts, can negatively affect mental health, causing, among other things, panic attacks, anxiety, and schizophrenia.\textsuperscript{188} Teenagers are especially at risk for these psychiatric effects: a risk that increases the younger the age at which marijuana use begins.\textsuperscript{189} The more frequent the use, the greater the risk. Consider, for example, the experience of Jolan Tobias, who became addicted to marijuana by age 18 after first beginning to casually use the drug at age 15.\textsuperscript{190} Although she overcame her addiction, several years after recovering she found herself experiencing many of the same symptoms that accompanied her marijuana use: hallucinations, hearing voices, and having a compulsion to jump out of a window.\textsuperscript{191} Psychiatric
experts concluded that her past marijuana use caused her to develop schizophrenia. Marijuana use is especially troubling for those who are already vulnerable to mental illness. Identifying those most vulnerable to adverse effects from marijuana is a challenge, since that vulnerability can result from a variety of factors, including genetics and personality type. For example, eighty percent of people who develop schizophrenia have no immediate family members with it, and, therefore, it is difficult for someone to know if they are vulnerable to schizophrenia. Cannabisdamages teenage brains by restricting blood flow, an especially important fact given that the brain is not fully "wired" until a person reaches the mid-twenties. Psychiatrist Dr. Campbell indicated that about seventy percent of his patients with psychosis have used marijuana in the past.

2. Marijuana Impedes Academic Achievement

A correlation between marijuana use and negative academic performance has been found. A study of public high school students in Mississippi determined that "frequent smokers, binge drinkers, and current marijuana users were more likely than other students to report poor academic performance." Marijuana users were found to be "significantly more likely than all other students to report having lower grades." Another study concluded that those who use marijuana are 2.3 times more likely to drop out of high school than those who have never smoked marijuana. Since marijuana has been found to interrupt memory, it is not surprising that this could impede a student’s academic ability. The loss of energy and procrastination caused by marijuana would also make it much more difficult for a student to succeed academically.

A drop in IQ later in life has also been connected to long-term marijuana use. Neuropsychological testing of more than 1,000 individuals over a span of twenty-five years (from ages thirteen through thirty-eight) showed that those who began to use cannabis in adolescence and became dependent on the drug before eighteen had an IQ drop of eight points which did not improve after discontinuing the use of marijuana. M.H. Meier considers this drop significant indicating that on average this would be comparable to "going from the 50th to the 29th percentile in intelligence." Michelle Lipinski, who runs a school in Massachusetts (a state in which marijuana has been decriminalized) has shared anecdotal information about how students are now coming to school stoned and how difficult it has become to overcome the students' perception that "It's just weed." Colorado school officials are also seeing an increase in incidents related to marijuana use in the schools. Such incidents initially increased after Colorado first legalized medical marijuana in 2010, but increased even more after the legalization of recreational marijuana in 2012. Officials believe this increase is attributable to the changing attitudes toward marijuana in the state. Students now smoke pot before school and even during lunch breaks. In fact, thirty-two percent of the expulsions from the Colorado public schools during 2012-2013 were associated with marijuana. While the vast majority of young people addicted to marijuana can become symptom free, they may not bounce back to full capacity academically or professionally. Even if the addiction ceases, the long-term effects of newer, more potent marijuana continue to pose a danger.

From an academic perspective, any hindrance to academic performance should be kept to a minimum. This is especially true given the recent measurement of the academic performance of U.S. students in relation to their international counterparts. In December 2013, Arne Duncan, the Secretary of Education, reported that the performance results for United States students on
the 2012 Programme for International Student Assessment [PISA] were "mediocre" and "the US [was] not among the top performing OECD nations in any subject tested by the PISA."\textsuperscript{211} Secretary Duncan went on to express concern about the future:

"A more pressing concern...is the fact that American students are standing still while others are advancing. In a knowledge-based global economy, where education is more important than ever before, both to individual success and collective prosperity, our students are basically losing ground."\textsuperscript{212}

Secretary Duncan's concerns were echoed by the secretary-general of the OECD, Angel Guirra, who said, "The United States' lack of progress is particularly worrisome when it comes to math...This is a great loss to the American economy, it's obviously a very great consequence to people's futures."\textsuperscript{213}

IV. WILL LEGALIZATION OF MARIJUANA IMPACT U.S. STANDING IN THE GLOBAL COMMUNITY?

As described in Part II, inconsistency between the classification of marijuana for purposes of federal and state laws, creates a multitude of problems. Enforcement challenges will only continue to increase as more states legalize marijuana and, as a result, there have been repeated calls for the federal government to take marijuana off of the controlled substance list. For example, in February, 2013, Colorado Representative Jared Polis introduced Ending Federal Marijuana Prohibition Act of 2013\textsuperscript{214} that would remove marijuana from the controlled substances list of the CSA and essentially treat the drug in the same manner as alcohol for legal purposes. This paper has explored a variety of the "costs" of legalization of marijuana for recreational purposes. We now explore some of the possible issues that may be presented by legalization as a result of US commitments under international agreements.

E. Understanding the Requirements of International Conventions

The international conventions governing the possession and/or use of illicit drugs are adhered to by almost two hundred countries and are, therefore, considered to be "among the most successful international agreements in terms of formal adherence."\textsuperscript{215} Historically, it was the United States that initiated the plans for an international agreement on drug prohibition, and supported such efforts first at the League of Nations, and then at the United Nations.\textsuperscript{216} Currently there are three conventions in effect that frame drug policy for the signatory nations: (1) 1961 Single Convention on Narcotics Drugs, as amended in 1972 ("1961 Convention")\textsuperscript{217}; (2) the 1971 Convention on Psychotropic Substances\textsuperscript{218}; and (3) the 1988 Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances.\textsuperscript{219} These Conventions are overseen by the UN International Narcotics Board ("INCB").\textsuperscript{220}

As one of the signatories to the 1961 Convention the United States has committed to the following general obligations:

a) To give effect and carry out the provisions of this Convention within their own territories;
b) To co-operate with other States in the execution of the provisions of this Convention; and

c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, and possession of drugs.  

It is an understanding of all parties to the Conventions "that eradication of illicit traffic is a collective responsibility of all states, and that, to that end, co-ordinated action within the framework of international co-operation is necessary."  Action or inaction by a member State which is not in conformity with obligations under the Convention has the capacity to undermine the international drug systems and so consistent implementation of drug policy is essential. The federalist systems of some States, such as the United States, adds another layer of complexity to compliance with treaty obligations. "[I]n some countries, while there is full compliance with the conventions at the national level, policies and measures at the state, provincial, and municipal level are not in line with the provisions of the convention."  

Raymond Yans, president of the INCB expressed the following concerns in the foreword of the organization's 2013 Annual Report issued in March 2014:

INCB is concerned about some initiatives aimed at the legalization of non-medical and non-scientific use of cannabis. Such initiatives, if pursued, would pose a grave danger to public health and well-being, the very thing the States, in designing the conventions intended to protect. INCB looks forward to maintaining an ongoing dialogue with all countries, including those where such misguided initiatives are being pursued, with a view to ensuring full implementation of the conventions and protecting public health.  

The Report goes on "to emphasize that the structure of all States parties (whether federal, state regional, or provincial) should contain, develop, and continually evaluate a comprehensive system of intergovernmental coordination procedures in order to ensure that drug control laws and policies are nationally consistent."  

Also singled out in the report is the current experience in the United States, "although the use, sale, and possession of cannabis remains illegal under federal law, an increasing number of states have approved laws attempting to decriminalize possession of cannabis for personal use and/or created exemptions for medical cannabis."  

F. Application of International Conventions to Developments in the United States  

The goal of the 1961 Convention is to use coordinated international efforts to combat drug abuse.  Congress considered its obligations under the 1961 Convention when it drafted the CSA as the following excerpt from the bill indicates:

The bill also specifically recognizes our international obligations under the Single Convention of 1961 and will allow the United States to immediately control, under the schedules of the bill, drugs hereafter included under schedules of the Single Convention upon the recommendation of the World Health Organization.
An issue arises as to the extent that the Convention will dictate federal and state treatment of marijuana. It is sometimes noted that, "treaties are unquestionably the 'supreme law of the land' and trump any contrary state statutes." What, then, is the impact, if any, of the Convention as state legalization efforts move forward? For the states and for the federal government the question to be considered is whether legalization might run afoul of existing treaties. For example, while medical use of marijuana has been permitted in a variety of states for many years, technically this is not in conformity with the Conventions because the Conventions require that marijuana for medicinal purposes be secured through a government agency at the wholesale level. To date, this lack of conformity has not resulted in any adverse international efforts in protest against this approach. It is therefore "possible that the route of turning a blind eye to the conflicts with international treaties may also be followed for the new schemes for legal markets in cannabis for pleasure." Early indicators illustrate, however, that the INCB is paying attention.

Less than two weeks after Colorado and Washington adopted the legislation that legalized recreational marijuana in November, 2012, the INCB President expressed "grave concern," stating, "these developments are in violation of the international drug control treaties, and pose a great threat to the public health and the well-being of society far beyond those states." When Eric Holder announced in December, 2012 that the Colorado and Washington laws had no bearing on the status of marijuana under federal law, the President of the INCB referred to these statements by Attorney General Holder as "good but not sufficient." In March 2014 the INCB issued its 2013 Annual Report recommending that "the Government of the United States...take necessary measures to ensure full compliance with the drug control treaties in its entire territory."

While an in-depth discussion of the interaction between the Conventions and US domestic marijuana policies is beyond the scope of this article and we do not seek to reproduce that debate here, it is important to keep in mind that not all scholars agree with the position of the INCB and instead maintain that a federal central authority is not required to supersede legislation enacted by states, provinces, or municipalities.

Is legalization of recreational marijuana inconsistent with the US obligations under the Conventions? What consequences, if any, will result, should more states and, possibly the federal government, move toward legalized possession, production, and distribution? Also of significance is what impact the US behavior in this regard may have on other nations. Given that the stance of the federal government is to tolerate state actions which are in contravention of federal law, and given that it seems likely that the number of states authorizing recreational marijuana is likely to increase in the years ahead, a federal task force should be convened to determine whether such actions violate the terms of the commitments of the United States under its international agreements. Answers to these questions should be part of any discussion of both the merits of and impediments to legalization efforts.

CONCLUSION

The steady stream of revenue flowing into the state and local coffers in Colorado and Washington from the burgeoning commercial market for recreational marijuana is not without cost. Since recreational sales in those states commenced in 2014, it is too soon to be able to adequately assess the extent of this cost. As a result, the most prudent course of action for those states seeking to follow the trail blazed by Colorado and Washington may be to put those plans
on hold and adopt a "wait and see" approach. The unknown variables of the extent of the revenue stream, the potential increase in the black market, and increased social costs make this difficult terrain to navigate. Adding to the mix is the dichotomy between federal and state law which causes confusion for the public and government officials alike. Such confusion is not limited to the domestic environment, as issues remain as to how the push toward legalization may impact America's commitments under international conventions, and therefore, America's standing in the global community.

1 Since 1991, National Weed Day has been celebrated on April 20 as a celebration of cannabis. See http://www.huffingtonpost.com/2010/04/20/420-meaning-the-true-stor_n_543854.html.
2 Of the seventeen, one state's (Maryland's) decriminalization law will not go into effect until October, 2014. The seventeen states include Alaska, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, and Vermont. See http://norml.org/aboutmarijuana/item/states-that-have-decriminalized (last visited August 1, 2014).
9 See, e.g., John Poltonowicz, Marijuana Sales in Colorado Reach $1 Billion, GUARDIAN LIBERTY VOICE (March 9, 2014), http://guardianlv.com/2014/03/marijuana-sales-in-colorado-to-reach-1-billion/ (last visited August 1, 2014).
17 For a general description of the processes used to conduct a valid empirical experiment, see
Consumption and Related Harms to 2006

1003 Estimates From 112 Studies

Reducing Teenage Smoking in the USA available at


Groovum, supra note 15.

Id.

Id.


Groovum, supra note 15.

Healy, supra note 10.

William F. Fox, Can State and Local Governments Rely on Alternative Tax Sources? FEDERAL RESERVE BANK OF ST. LOUIS REGIONAL ECONOMIC DEVELOPMENT, Vol. 6, Number 1, 89 (2010).

Id.

James R. Hines Jr., Taxing Consumption and Other Sins, 21 J. OF ECONOMIC PERSPECTIVES 49, 52 (2007).

Id. at 54.

Id.


Rachel Morse, Restisting the Path of Least Resistance: Why the Texas “Pole Tax” and the New Class of Modern Sin Taxes are Bad Policy, 29 BOSTON COLLEGE THIRD WORLD LAW JOURNAL 189, 206 (2009).


Richard Williams & Katelyn Christ, Taxing Sin, 55 MERCATUS ON POLICY 1, 2 (2009).


Melanie Wakefield and Frank Chaloupka, Effectiveness of Comprehensive Tobacco Control Programmes in Reducing Teenage Smoking in the USA, 9 TOBACCO CONTROL 177 (2000).

Id. at 177.

Id. at 184.


Id.


Id. at 187.


Id.


Id.

Morse, supra note 32, at 203.

Id. at 203-04.

Id. at 216.

Id.

Id. at 200, citing D. Dowd Muska, Sin Tax Error, NEV. J (1999), available at
http://nj.npri.org/nj99/05/feature2.htm.

54 Williams, supra note 34 at 3.
55 Morse, supra note 32 at 191-192.
56 Id. at 212.
62 Sullum, supra note 60.
64 Id.
67 Id.
68 See supra note 65.
69 Id.
72 Id. at 19.
73 Id. at 19.
74 Id at 19-20.
75 Id. at 20.
76 Id. at 20.
77 Id. at 20.
78 Id. at 20.
79 Id. at 20-21.
80 Id. at 22.
81 Id. at 22.
82 For example, The End Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013-14) seeks to remove marijuana from the Controlled Substances Act.
83 Schwartz, supra note 70, at 579.
87 Schwartz, supra note 69 at 570.
89 Schwartz, supra note 70 at 571.
90 Todd Grabarsky, Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism,
AND THE


http://abcnews.go.com/Politics/OTUS/president


Id.


Id. at 13.

99


Id. at 20.

102


103

City of Riverside v. Island Empire Patients Health and Wellness Center, Inc., et al., 56 Cal. 4th 729 (2013).

104

Id.

105

Id. at 762.

106


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Id. at 2 (Cole memo).

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111


112

Id at 3. The Memorandum outlines the following enforcement priorities:

- 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 state-authorized marijuana activity from being used as a cover or pretext for the 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 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.


115 Id.

116 United States General Accounting Office, GAO Report to the Chairman, Subcommittee on Criminal Justice,

148 Id. 355 (2007).

149 Id.

150 Id. at 389.


152 Id. (finding that 21 U.S.C. 885(d) provides state and local officers with immunity for such actions).


154 Id.

155 Id.


157 Id.

158 Id.

159 Id.

160 Id.


162 Id.

163 Id.


166 David Migoya, *IRS Fines Unbanked Pot Shops for Paying Federal Payroll Tax in Cash*, THE DENVER POST (July 2, 2014), available at http://www.denverpost.com/business/ci_26075425/irs-fines-unbanked-pot-shops-paying-federal-payroll. Internal IRS policies suggest that taxpayers without banking services send the money to the IRS through a third party but such actions may fall within the definition of money laundering.

167 Id.

168 Wyatt, supra note 131.

169 Id.

170 Id.

171 Id.

172 Id.

173 Id.

174 Id.

175 Id.


177 Id.

178 Id.

179 Id.

180 Id.

181 12 Little Known Consequences of a Marijuana Conviction or Arrest, WASHINGTON DRUG DEFENSE, available at http://washington-drug-defense.com/Marijuana_Conviction_or_Arrest (last visited August 1, 2014).

182 Id.

183 Id.

184 Id.

185 Id.

186 Id.

187 Id.

188 Id.

189 Id.

190 Id.

191 Id. at 174-175.
151 Id. at 164.
153 Id.
156 See, e.g., Kozel, supra note 154.
158 See, e.g., Lester Grinspoon, et. al., Marijuana Addiction, 277 SCIENCE 749 (August, 1977) for a lively exchange between health professionals on the addictive nature of marijuana.
161 See, e.g., Kozel, supra note 154.
163 Id.
165 In comparison to alcohol, for example, individuals may not be as aware of their limits and what the impact will be. An individual may know the impact drinking two shots of whiskey will have on her, but may not know the effect of a piece of candy with 20mg THC. The newly proposed regulations in Colorado governing edibles should help consumers learn to distinguish between THC levels and their effects.
167 Id.
169 For additional discussion of this point see, for example, The Epidemiology of Opiate Addiction in the United States, John C. BALL & CARL D. CHAMBERS, ED. (1970) (Part II contains five chapters on connection between marijuana and opiate addiction).
170 ONDCP, supra note 157.
171 Kozel, supra note 154, at 973.
175 Id.
176 ONDCP, supra note 157.
connect substance abuse and public spending.

178 Id. at 4.
180 Shereen Khatapoush and Denise Hallfors, Sending the Wrong Message: Did Medical Marijuana Legalization in California Change Attitudes About the Use of Marijuana? 34 JOURNAL OF DRUG ISSUES 751, 765 (2004).
181 Id.
182 Evie Blad, Students Views Shifting on Risks of Marijuana, EDUCATION WEEK 1, 10 (2014).
183 Id. at 10.
184 Id.
185 Id.
187 ONDCP, supra note 157.
189 Id.
190 MESSING WITH HEADS: MARIJUANA AND MENTAL ILLNESS, Films On Demand, (Film Media Group 2005).
191 Id.
192 Id.
194 MESSING WITH HEADS, supra note 190.
195 Id.
196 Id.
197 Id.
199 Id. The authors acknowledge that a variety of factors, such as predisposition to nonconformity, weak bonds with family or school, exposure to deviant family or peers, and not just marijuana use in isolation, can account for poor academic performance. Such a discussion is beyond the scope of this paper. For additional information on the multitude of factors that impact teenage drug use and poor academic performance or drop-out rate, see, e.g., Daniel McCaffrey et.al., Marijuana Use and High School Dropouts: The Influence of Unobservables, 19 HEALTH ECONOMICS 1281 (2010).
201 McCaffrey, supra note 199, at 1283.
203 ONDCP, supra note 157 (public health).
205 Williamson, supra note 204, at 300.
206 Peter Katel, Teen Drug Use, CQ RESEARCHER 481, 483 (2011).
A similar issue has come up in Vancouver, Canada. There the federal government sought to shut down a facility that was illegal under federal law, but the Supreme Court of Canada determined that the facility should be permitted to stay open indefinitely. This legislation did not move beyond its introduction in the House. H.R. 964, 113th Cong. (2013-14).


H.R. 499, 113th Cong. (2013-14). Also in 2013, Colorado Representative Diana DeGette introduced Respect States’ and Citizens’ Rights Act of 2013 to amend the CSA’s preemption provision to clarify that it is not the intent of Congress to preempt state marijuana laws. This legislation did not move beyond its introduction in the House. H.R. 964, 113th Cong. (2013-14).

Id. at 182-183.


Pudney, supra note 215, at 183.


United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Preamble.

Id.


Id. at 43.

Id. at 42. The INCB Report goes on to cite other countries facing similar issues such as Australia, where authorities in New South Wales have permitted the "drug injection rooms" to exist even though contrary to national policy. A similar issue has come up in Vancouver, Canada. There the federal government sought to shut down a drug injection site that was illegal under federal law, but the Supreme Court of Canada determined that the facility should be permitted to stay open indefinitely.


Id. at 25.


Id. at 346.

