Abstract:

Marijuana policy analyses typically focus on the relative costs and benefits of present policy and its feasible alternatives. This essay addresses a prior, threshold issue: whether marijuana criminal laws abridge fundamental individual rights, and if so, whether there are grounds that justify doing so.

Over 700,000 people are arrested annually for simple marijuana possession, a small but significant proportion of the one hundred million Americans who have committed the same crime. In this essay, we present a civil libertarian case for repealing marijuana possession crimes. We put forward two arguments, corresponding to the two distinct liberty concerns implicated by laws that both ban marijuana use and punish its users. The first argument opposes criminalization, demonstrating that marijuana use does not constitute the kind of wrongful conduct that is a prerequisite for just punishment. The second argument demonstrates that even in the absence of criminal penalties, prohibition of marijuana use violates a moral right to exercise autonomy in personal matters – a corollary to Mill’s harm principle in the utilitarian tradition, or, in the non-consequentialist tradition, to the respect for personhood that was well described by the Supreme Court in its recent Lawrence v. Texas opinion. Both arguments are based on principles of justice that are uncontroversial in other contexts.

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Introduction

The federal government and thirty seven states make possession of marijuana a criminal offense punishable by imprisonment. Federal law categorizes marijuana as among the most dangerous of illicit drugs, and the Office of National Drug Control has generally treated marijuana control at the top of its list of priorities. In recent years, federal and state laws have resulted in the arrest of more than 700,000 Americans annually for marijuana possession, a crime that almost 100 million Americans have committed.

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2 Under the federal drug laws, marijuana is designated a Schedule I controlled substance, reserved for the drugs with the most serious potential for abuse, no medical benefit, and no safe method of use. 21 U.S.C. § 812 (2007), detailed infra at n.---. This status places marijuana on a par with heroin, and in a graver category than cocaine and oxycontin, which are included in Schedule II.

3 Sally Satel, A Whiff of 'Reefer Madness' in U.S. Drug Policy, New York Times Aug. 16, 2005 (reporting ONDCP resistance to putting as much emphasis on metamphetamines as marijuana, its “main target,” on grounds that marijuana is a gateway to more dangerous drugs); Ryan King and Marc Mauer, The War on Marijuana: The transformation of the war on drugs in the 1990s, 3 Harm Reduction Journal (No. 6, 2006), available at www.harmreductionjournal.com/content/3/1/6 (stating that “since 1990, the primary focus of the war on drugs has shifted to low-level marijuana offenses”); Ben Wallace-Wells, How America Lost the War on Drugs, Rolling Stone 107, 110 (December 13, 2007). The author claims that drug czars Barry McCaffrey and John Walters invested heavily in advertising against marijuana, which they saw as the key to winning the war on drugs. Whether this policy, prevalent in the Clinton and Bush years, continues under the Obama Administration remains to be seen.

4 In 2006, there were 742,900 arrests for possession of marijuana, constituting 39.1% of the 1.9 million drug arrests. 80% of all drug arrests are for possession, not sale or manufacture. FBI Uniform Crime Reports (2006), at Table 29. In 2005 there were almost 787,000 marijuana arrests, 700,000 of them for marijuana possession. FBI Uniform Crime Reports (2005).

There are good reasons to believe that these laws have been counterproductive, as many critics have charged. Arguably, marijuana prohibition diverts resources from more pressing drug- or crime-control agendas, encourages discriminatory enforcement, stymies ameliorative regulation, and consigns users to deal with criminal drug traffickers if not lawyers, courts and jails. There are many others who dispute these claims. But both proponents and opponents of marijuana prohibition generally argue in pragmatic terms: what will work best to achieve either “a drug free America” (in the government’s rendition) or a reduction of harm to users (in the reformer’s rendition)?

Such debates are crucial elements in any examination of marijuana law and policy, but they ignore the deeper level of justification that may be required by restraints on individual liberty, of which marijuana criminalization is arguably an instance. Restraints on religious practice, for example, cannot properly be evaluated by merely calculating the utilitarian costs and benefits; something of greater moral weight is required to override the fundamental right to free exercise of religion. A key threshold issue regarding the prohibition and criminalization of marijuana use is whether such laws implicate fundamental individual rights, and if so what kind of grounds are required to justify doing so.

In this essay, we argue that these laws do unjustifiably infringe fundamental moral rights. We present a non-consequentialist, civil libertarian case against marijuana prohibition and criminalization, based on the requirements of liberty and just punishment. Our focus is on an individual’s moral rights – the kind of human rights that should be reflected in law, whether they are or not. We recognize that courts are unlikely to revisit precedents generally upholding marijuana crimes against constitutional challenges, at least in the near

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term. Our concern here, however, is what the law should be, not whether existing law satisfies the constitutional minimum, and in making that determination, legislators no less than judges should attend to the claims of liberty and human rights when they may be at stake.

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At the outset, note that prevailing marijuana possession laws contain two components: the ban on marijuana use (call this “prohibition”), and the criminal punishment imposed on its users. Prohibition need not include criminal penalties for possession; alcohol prohibition did not, and the decriminalization movement seeks the same for marijuana.

These two measures – prohibiting use and punishing users – each implicate individual liberty, but they do so in different ways that raise very different concerns. Prohibition in itself targets only access to the drug and the freedoms that are lost by its unavailability, and raises the question of whether individuals have a moral right to use marijuana. By contrast, criminally punishing the user may confiscate his freedom altogether, inflicts moral censure, and is justifiable only if the offender deserves it. It is not enough that the citizenry will benefit from punishing marijuana users, for example by deterring the drug

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We can, however, envision a different result in the future if attitudes towards marijuana change, or if the Supreme Court’s recent libertarian interpretation of the right to privacy takes root. See discussion infra at pp. ---.

8 U.S. Const. amend. XVIII (prohibiting manufacture, sale and transportation of alcohol; repealed by U. S. Const. amend. XI); Lloyd C. Anderson, Direct Shipment of Wine, the Commerce Clause and the Twenty-first Amendment: A Call for Legislative Reform, 37 AKRON L. REV. 1 (2004)(possession and consumption of alcohol remained legal during prohibition).
trade; the offender must have engaged in some blameworthy, wrongful conduct that can underwrite moral and legal guilt. As C. S. Lewis put it, “desert is the only connecting link between punishment and justice.”

Are these necessary conditions satisfied in the case of our marijuana laws? We consider whether criminal sanctions can be

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9 On the retributive principle, punishment may not be inflicted on the innocent, or on the guilty beyond their desert, even if it will achieve a greater good for others. Desert is usually taken to be a function of the gravity of the crime and the blameworthiness of the criminal. That is why it is not acceptable to punish the mother of a suicide bomber, even if it is the only way to deter future bombings. Nor can desert be based on the mere fact that the defendant freely chose to violate a duly passed law. Otherwise, any criminal law regime would be self-justifying, so that criminalizing singing would justify punishing a yodeler. What is missing from both of these cases is blameworthy conduct that can underwrite moral guilt.

Although some strict liability laws exist in a dwindling number of jurisdictions, and arguably punish blameless conduct for utilitarian reasons, such laws are disfavored and courts take pains to infer a mens rea requirement where penalties include incarceration. The Model Penal Code and some states have abolished strict liability offenses on grounds of justice. See, e.g., MPC secs. 2.02(1) and 2.05; NJSA 2C:2-3e (New Jersey law requiring foreseeability tantamount to negligence for criminal liability). Felony murder does dispense with a moral proportionality requirement but still requires wrongful blameworthy conduct via the predicate felony, and although this rule survives in many American jurisdictions, it has been severely limited in many of them by blameworthiness proxies (see, e.g., People v. Washington, 62 Cal. 2d 777, 44 Cal. Rptr. 442 (1965)(agency limitation); People v. Patterson, 262 Cal. Rptr. 195, 49 Cal. 3d 615 (1989) (inherently dangerous limitation); State v. Martin, 573 A.2d 1359 (1990)(New Jersey Supreme Court ruling requiring more stringent causation element).

The retributive principle most centrally embodies respect for the right of autonomous individuals to determine their futures. For extended treatment of the principle as applied to criminal law, see IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (1965)(propounding the “formula of humanity”); Sanford H. Kadish, Why Substantive Criminal Law—A Dialogue, 29 CLEV. ST. L. REV. 1, 10 (1980) ("It is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy."); JOEL FEINBERG, DOING AND DESERVING (1980); HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); Herbert Morris, Persons and Punishment, 52 (MONIST 475 (1968); JOHN KLEINIG, PUNISHMENT AND DESERT (1973). There are a few theorists, however, who defend punishing the innocent if sufficient benefits would result. See, e.g., J. C. C. Smart, An Outline of a System of Utilitarian Ethics, in J. C. C. SMART AND BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST, 69-72 (1973); M. Bagaric & K. Amarasekara, The Errors of Retributivism, 24 MELBOURNE U.L.R. 1, 1-66 (2000).

10 C. S. Lewis, The Humanitarian Theory of Punishment, in PHILOSOPHY AND CONTEMPORARY ISSUES 71, 72 (John Burr and Milton Goldinger, eds., 1972). Lewis adds that when we do otherwise, “instead of a person, a subject of rights, we now have a mere object, a patient, a ‘case.’” Id.
justified first, and then turn to prohibition laws that simply put marijuana beyond reach.

1. Punishing users

Is marijuana possession -- or the marijuana use for which it is a proxy -- the kind of wrongful conduct that is a prerequisite for criminal punishment of its users? At its most expansive, the indictment against marijuana use puts forward four types of putative moral wrongs inflicted by the marijuana use to justify criminalizing its users:

- that it inflicts harm on others
- that it inflicts harm on the user himself
- that it makes users unproductive members of society, and
- that marijuana use is immoral in itself.

But two questions must be asked of each claim: does marijuana use actually perpetrate the wrong alleged, and is that kind of wrong sufficient to justify criminal penalties? We consider each claim in turn.

It is uncontroversial that acts that seriously and wrongfully injure others, or seriously risk injury to others, can be criminalized. Such an act, coupled with mens rea, is the paradigm case warranting criminal penalties. The problem here is not one of principle but of fact: does marijuana use wrongfully injure others?

No one claims that the private use of marijuana at home inflicts harm to others in itself, the way a battery does. The claim must be that the use of marijuana has further effects that do so. One way this might be so is if marijuana regularly lead users to engage in subsequent criminal activity. If marijuana were addictive and expensive enough to lead users to crime to finance their habit, or stimulated aggression in its users, one might treat marijuana possession as an inchoate crime, much like reckless driving, possession of burglarious implements with intent, and other acts which threaten imminent and serious harm. But no one argues that marijuana generally causes its users to act this way, and plenty of research shows that it does not.11

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The inchoate crime argument comes closer to the mark applied to heroin and crack cocaine, but even use of these drugs would be difficult to fit into existing doctrine.
The alternative that drug war proponents invoke is downstream, non-criminal harm allegedly caused by marijuana use. James Q. Wilson justifies criminalization of some drugs because they result in “more accidents, higher insurance premiums, bigger welfare costs, and less effective classrooms.” We accept that marijuana use cannot be described as wholly self-regarding because, like almost everything else we do, it has an impact. But such downstream effects, even bad ones, cannot justify criminal punishment alone, or we would be punishing people for eating fatty foods and drinking alcohol.

There are at least three reasons why such indirect harms are neither wrongful nor blameworthy in the way just punishment requires. First, the user will surely lack the intent to cause “increased welfare costs” or “higher insurance premiums,” and it is standard that a crime is committed only when there is a union of proscribed conduct and criminal intent. Second, the chain of causation from an individual’s marijuana use to Wilson’s litany of harms is so distended that no concept of proximate causation used in criminal law could encompass it. And finally, causing damage to another – even with intent to do so – is not enough to justify the criminal sanction; it must result from a wrongful act that invades some moral right of another.

Cases holding that the inchoate act is sufficient to constitute a criminal attempt do so on the basis that it is a “substantial step” toward the crime, or in some states has sufficient proximity to it; and was done with specific intent to commit the subsequent crime. In the case of heroin or cocaine, because neither will be true most of the time, it would be hard to justify punishing all who use the drug rather than only those who commit subsequent criminal acts. In an earlier era Mill took this position regarding laws against drunkenness: if an intoxicated person assaults another, punish him for assault, not for intoxication, he argued. John Stuart Mill, On Liberty (1859).

James Q. Wilson, Drugs and Crime, in Drugs and Crime 524 (Michael Tonry and James Q. Wilson, eds., 1990). As Drug Czar, William Bennett shared Wilson’s view, stating that “drug users make inattentive parents, bad neighbors, poor students, and unreliable employees – quite apart from their common involvement in criminal activity.” William Bennett, National Drug Control Strategy 7 (1989). Nancy Reagan conveyed the same idea in more hyperbolic form when she described all casual drug users as “accomplices to murder.” Stephen Chapman, Nancy Reagan and the Real Villains in the Drug War, in Boaz, Crisis in Drug Prohibition 105 (1991). Of course the criminalization that leaves drug production to organized crime would make the government an “accomplice to murder” by the same theory.

See Feinberg, supra n. ---; Mill, supra n. ---. Mill wrote that, on social contract grounds, we must “observe a certain line of conduct towards the rest.” On the side of the line subject to state compulsion are (1) the burdens required for mutual protection and (2) not injuring certain interests of others, “which, either by express legal provision or tacit understanding, ought to be considered as rights.” On the other side of the line, exempt from state compulsion, are the “acts of an individual [that are] hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of the constituted rights.” Id. at ---.
John Kennedy may have destroyed the haberdashery industry by refusing to wear a hat throughout his presidency, but not by invading any right. The student who Wilson thinks will perform poorly in school invades no one’s right by doing so.

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The Office of National Drug Control Policy (ONDCP) and other marijuana criminalization defenders claim one or more other grounds for maintaining strict criminal penalties on marijuana possession. But the consensus that supports criminal penalties for acts that inflict harm on others breaks down in the absence of such victimization. A great number of Americans probably would subscribe to Mill’s “harm principle,” which holds that “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is...to prevent harm to others....Over himself, over his own body and mind, the individual is sovereign.”

Those who disagree believe criminalization is warranted on at least one of the following grounds:

*Sins of omission.* Someone who fails a friend in need, or contributes nothing to his community, damages them by omission. If marijuana users are in a haze, or fall prey to the so-called “amotivational syndrome,” they may damage society by their absence – by failing to contribute to it.

Some people may describe making these contributions as morally virtuous but not morally required. Others might deem them moral duties and the failure to perform them morally wrong. In any case, it is clear that failing to contribute to one’s society is not a moral wrong to the extent required to justify criminalization. As all criminal law students are taught, criminalizing omissions is alien to our criminal law tradition absent a legal duty between the actor and the person in need (such as that between parent and child, for example).

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14 *Id.* at ----. For modern elaborations of the harm principle, see JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, VOL. I (1984); supra n. ----; H. L. A. HART, LAW, LIBERTY, AND MORALITY (1963); and Dennis Baker, *Constitutionalizing the Harm Principle*, 27 CRIM. J. ETHICS 3 (no. 2, 2008)(arguing that wrongful harm to others provides the only moral justification for sending people to jail).


17 Law textbooks continue to use the famous cases of Jones v. United States, 308 F.2d 307 (D. C. Cir., 1962)(reversing involuntary manslaughter conviction based on failure to feed baby) and Pace v. Indiana, 248 Ind. 146, 224 N.E.2d 312
Even your failure to save someone choking at the next table with your expert Heimlich maneuver is not a criminal act. And there are good reasons for limiting an individual's responsibility to acts of commission, and excluding sins of omission, having to do with respect for a rational, self-directing person's right to control the essential shape of her own life.\(^{18}\)

If failures to rescue a person in dire straits are inappropriate for criminal sanctions as a rule, failures to contribute to society cannot be, \textit{a fortiori}; and if these are not crimes, how can it be a crime to use a drug which, by hypothesis, just makes such a failure somewhat more likely?

The other, alternative ground for rejecting this claim is that its application to marijuana use is not well supported empirically. Recent research casts doubt on the amotivational syndrome claim,\(^{19}\) and numerous other activities including video games and television may well have a greater demobilizing influence than marijuana. There are too many counterexamples of cultural icons who used marijuana regularly during highly fertile periods – people like Robert Altman, the Beatles, Ken Kesey, Charles Baudelaire, Steven Jay Gould, Alan Ginsberg, Aldous Huxley, Jack Kerouac, Norman Mailer, Robert Parrish, Carl Sagan, and Rick Steves – and too many political candidates for high office who have admitted to use for anyone to be confident that the typical marijuana user is destined to lead an unproductive existence.

\textit{Morality alone}: How one lives one’s life raises fundamental questions of value; what constitutes a life worth living has been a central ethical question for millenia. But answering that question for oneself is one thing; jailing those whose answers differ from the government’s, as Bush Administration Drug Czar John Walters suggests, is a far different one. Walters argues that marijuana “destroys the soul,” and that the extreme “moral poverty” of its users requires “stiff and certain punishment.”\(^{20}\)

\(^{18}\) If one’s obligations extended beyond that point, there would be no end to the obligations regarding strangers, and no space for the special responsibilities one should feel to family, friends, community, and one’s own life. The deontological distinctions that limit the scope of our obligations -- between acts and omissions, and between intended and unintended consequences -- place us in control of our own lives; and most of the time, they correspond to our everyday intuitions about moral requirements.


Can incarceration of marijuana users be justified on this basis? Or on the perceived immorality of living a self-indulgent life, or substituting an artificial paradise for one’s natural, god-given lot? The criminal law has sometimes been used to enforce morality for morality’s sake, as with the criminalization of homosexual acts, but rarely anymore. There are two problems. First, too many people now doubt that conduct can be immoral if it neither risks nor produces harmful effects; the views of natural law theorists in an earlier era that entirely private conduct such as masturbation is immoral mystifies them. Second, multicultural societies now see too clearly the illegitimacy of enforcing the morality of some on others who disagree with it in the absence of harm to others. They now know that one era’s condemnation of certain victimless behavior as immoral often looks like sheer prejudice against a minority group in a later one. Perhaps that is why the Supreme Court renounced its previous decision upholding the criminalization of homosexual sex a mere 16 years later. Finding constitutional protection in Lawrence v. Kansas, the Supreme Court wrote, “the fact that the governing majority in a

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21 Joel Feinberg takes this position in his seminal work THE MORAL LIMITS OF THE CRIMINAL LAW IV (1988). He subscribes to a modified version of Mill’s harm principle, where “harm” refers to “those states of set-back interest that are the consequence of wrongful acts or omissions by others.” Id., Vol. I at 215. Two who famously disagree, and who argue that private consensual conduct not affecting others that are deemed immoral may be criminalized, are Justice Antonin Scalia and Lord Devlin. Justice Scalia dissented in the Lawrence v. Texas anti-sodomy case, decrying the “effective end” of all morals legislation, explicitly including laws against masturbation. Lawrence v. Texas, 539 U.S. 558, 586 (2003). For him, immorality is a sufficient, and constitutional, ground for criminalization. Lord Devlin’s argument is quite different. In response to Britain’s Wolfenden Report (which recommended eliminating criminalization of homosexuality) Lord Devlin wrote a celebrated essay justifying the continued criminalization of conduct deemed immoral, not because it was so, but because looking the other way in the face of popular outrage would lead to social breakdown. Baron Patrick Devlin, The Enforcement of Morals (Oxford U. Press., 1965). As such, his argument was a peculiar species of the harm-to-others argument, and perhaps a precursor of theories propounded in recent years by “broken windows” social scientists and others who view law as a way felicitous norms that control populations can be created or maintained.

See also James Q. Wilson, Against the Legalization of Drugs, 89 COMMENTARY 21, 26 (FEB., 1990). Wilson argues against decriminalization of cocaine on the grounds that “dependency on certain mind-altering drugs is a moral issue and that their illegality rests in part on their immorality....” We treat cocaine differently than nicotine, he writes, because “nicotine does not destroy the user’s essential humanity. Tobacco shortens one’s life; cocaine debases it. Nicotine alters one’s habits, cocaine alters one’s soul...” Id. But he notes that marijuana presents a different problem from cocaine or heroin and takes no position on its decriminalization. Id. At 23.
State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.\textsuperscript{22}

\textit{Harming one’s own welfare:} Is the case any stronger if the supposed immorality has the effect of harming one’s own welfare? (Whether marijuana in fact does harm its users is disputed.\textsuperscript{23}) Harms to oneself may warrant state intervention, and even civil laws prohibiting use, in certain circumstances – we take up that question momentarily – but even in those cases, harm to oneself cannot be seen as the type of moral wrong that should be \textit{punished criminally}. An act harmful to self interest smacks not of a bad will but of a weak one, or of poor judgment rather than criminal intent. It is difficult to fit self-inflicted harms into the idea of desert, which ethicist James Rachels defines as the principle that “people deserve to be treated in the same way that they have (voluntarily) treated others.”\textsuperscript{24}

The other problem is one of the equal respect government owes to all its citizens. Few believe that marijuana is more harmful to its user than presently legal but regulated substances such as nicotine and alcohol.\textsuperscript{25} If this is so, throwing only some into the maw of the criminal justice system while leaving others free to indulge their no-more-important pleasures cannot be justified on grounds of its danger to the user alone.

None of the four reasons put forward for punishing marijuana users establish that the offender has committed the kind wrongful, blameworthy conduct that deserves criminal punishment. To quote C.


\textsuperscript{23} Some research studies have concluded that the casual use of marijuana is not harmful to most users. See., e.g., First Report of the National Commission on Marijuana and Drug Abuse, Marijuana: A Signal of Misunderstanding 132 (1972) (finding that “experimental” or “intermittent use” resulted in little danger of physical and psychological harm) ; Report of the British Advisory Council on the Misuse of Drugs, The Classification of Cannabis Under the Misuse of Drugs Act 1971 (March 2002)(in which the British government’s scientific advisory council on drug abuse reports that even heavy use of marijuana “is not associated with major health problems for the individual or society”). Other studies have found marijuana detrimental to physical and mental health. See, e.g., Patton, G.C. et al., Cannabis Use and Mental Health in Young People: Cohort Study, 325 British Med. J. 1195-1198, (2002); and studies cited in National Institute on Drug Abuse, InfoFacts: Marijuana, available at www.drugabuse.gov/Infofacts/marijuana.html.

\textsuperscript{24} James Rachels, Punishment and Desert, in ETHICS IN PRACTICE 470, 473 (Hugh LaFollette, ed., 1997).

\textsuperscript{25} See Editorial, Dangerous Habits, 352 THE LANCET no. 9140 (1998)(summarizing study finding cannabis less of a threat than alcohol or tobacco, and that moderate indulgence in cannabis has little ill effect on health).
S. Lewis once more, “take away desert and the whole morality of the punishment disappears.”

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Defenders of the present marijuana laws must argue not only that criminalization is justifiable, but also that the punishment fits the crime. That too is a difficult case to make. It is true that only a small minority of first offenders receive sentences of incarceration. But those who do not are still likely to suffer disproportionate suffering if arrested for their use. These other unlucky users, between 700,000 and 800,000 annually, will still lose their liberty through arrest and/or detention for some period of time before trial, and have their lives centered around lawyers, trial courts, legal fees and probation officers for the following year or more. The long-term legally imposed disabilities for those who are convicted may include ineligibility for government grants and contracts, public housing, and depending on the state, driver’s licenses.

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26 C. S. Lewis, supra n. ---, at 74.
27 See MacCoun and Reuter, supra n. ---, at 344, reporting in 2001 that annually 4,000 received federal prison sentences for marijuana offenses and approximately 11,000 annually received state sentences. How many of these offenders were convicted of offenses involving sale is not reported.
29 Grants, licenses, contracts, and some other federal benefits are restricted as to drug offenders under 21 U.S.C. § 862 (2002). Under section (b), at the discretion of the court, individuals convicted of a first federal or state drug possession offense may be rendered ineligible for all federal benefits for up to one year, and second offenders for up to five years; third offenders are mandatorily permanently ineligible. Id. Section (b) sanctions may be waived if a person declares himself to be an addict and undergoes treatment or is declared rehabilitated. Id.
30 The Supreme Court has even upheld the eviction of a drug user's parents on the basis of their child’s use of drugs, even if it took place outside of the home and the parents knew nothing about it. Dep’t of Hous. & Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002) (interpreting 42 U.S.C. § 1437d(l)(5) (1994), redesignated in 1998 as d(l)(6)). See also 42 U.S.C. § 13661(a) (1998) (providing that a person previously evicted from federally-assisted housing by reason of drug related criminal activity is ineligible for admission to any federally-assisted housing for three years).
licenses,32 and voting.33 They may even include losing one’s own land, house or bank account, pursuant to forfeiture laws that transfer drug “instrumentalities” or “proceeds” to the government, ultimately landing primarily in the budget of the agency that seized them.34 For college students, federal law will strip them of their college loans for even a first marijuana possession offense;35 for high school students, there is the risk of mandatory expulsion under zero tolerance drug

32 18 U.S.C. secs. 3563(b)(6), 3583(d), 5F1.5(a)(authorizing sentencing court to place occupational restrictions as conditions of probation); 21 U.S.C. sec. 862(d), sec. 5F1.6 (limitations on federal licenses to drug offenders). See also 29 U.S.C. secs. 504, 1111 (ineligibility from listed positions in labor unions or employee benefit plans); Kathleen M. Olivares et al., The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later, 60 FED. PROBATION 10 (1996) (noting that twenty-five states restrict felons from public office).

33 As of 2003, thirty-six states permitted all felons to vote after prison release or sentence completion; another seven states permitted some felons to vote after sentence completion; in the other seven states the right to vote can be restored only after executive or legislative clemency. See ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons (2004).

34 21 USC § 881(a). Seizures accomplished exclusively by state or local agencies may be “adopted” by the federal government whenever the conduct giving rise to the seizure is in violation of federal law. Directive 90-5, The Attorney-General’s Guidelines on Seized and Forfeited Property (July 1990), in DOJ Asset Forfeiture Manual at B-545 (Prentice Hall 1994). When the federal government has “adopted” a state forfeiture case, 80 percent of judicially or administratively forfeited assets are allocated to the state or local agencies for law enforcement purposes, and 20 percent remain with the federal government. In joint seizures, the share is allocated on a case-by-case determination based on the amount of work each agency performed. 21 USC § 881(e)(3); A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies 7-8 (DOJ Mar 1994). See also Eric Blumenson and Eva Nilsen, Policing for Profit: The Drug War’s Hidden Economic Agenda, 65 U. CHI. L. REV. 35 (1998).

35 20 U.S.C. § 1091(r) (2002). This 1998 law suspends or forever terminates a drug offender’s eligibility for federal college loans and grants. Initially the law applied to anyone with a conviction at any time, but a recent amendment excludes convictions prior to college. The periods of ineligibility vary, depending upon the number of convictions and whether they were for possession or distribution of drugs—from a year of ineligibility for a single possession conviction, to permanent ineligibility for a second distribution or third possession conviction. This law and its constitutional and legal infirmities is discussed in detail in Eric Blumenson & Eva Nilsen, How to Construct an Underclass, Or How the War on Drugs Became a War on Education, 6 J. Gender Race & Just. 61 (2002).

Tom Angell, a spokesman for Students for Sensible Drug Policy, reports that more than 200,000 college students have lost financial aid in the past 10 years because of drug convictions, Jason Millman, As Frank Prepares Marijuana Bill, States Make Own Efforts, South Coast Today, April 6, 2008, available at www.SouthCoastToday.com.
policies in an estimated 88% of public schools;\textsuperscript{36} for some immigrants, the risk that a conviction may result in deportation;\textsuperscript{37} for a parent, the risk of children lost to custody battles or child protection agencies; for the unemployed, job application forms eliciting their criminal records; and for all offenders, a significant risk of time in prison for violating probation or under state sentencing laws if caught again. And in any event there is still the criminal conviction, a public mark of societal condemnation that is itself no small thing.\textsuperscript{38}

One must juxtapose lives turned upside down in these ways with the nature of the offense, no different than the activities of millions of other Americans who use intoxicating substances for similar reasons. Such grossly disproportional punishments can hardly be said to fit the offender’s crime.

2. Preventing use

As we noted, even in the absence of criminal penalties, outlawing the use of marijuana raise separate liberty concerns. How that putative liberty should be described is a significant question, and one which may dictate the answer; recall that the Supreme Court’s found no “right to engage in sodomy” in Bowers v. Hardwick\textsuperscript{39} but later reversed itself in finding a “right to autonomy in intimate relations.”\textsuperscript{40} Similarly, some may dismiss the issue here as merely a question of whether there exists a “right to smoke marijuana”, while others might describe it, with Justice Brandeis, as the “right to be left alone” absent good reason, or with Kant, as a “right to self-rule.” There are other


\textsuperscript{38} See Lawrence v. Texas, 539 U. S. 558 (2003) (“The stigma this criminal statute imposes...is not trivial... [I]t remains a criminal offense with all that imports for the dignity of the persons charged...”).

\textsuperscript{39} Bowers v. Hardwick, 478 U. S. 186, 190 (1986)

\textsuperscript{40} Lawrence v. Texas, 539 U. S. 558 (2003). In Lawrence, the Court noted that it had previously misapprehended the issue as “simply the right to engage in certain sexual conduct,” which demeaned “the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.” Id. at 559.
moral rights arguably at stake, including the rights to control one’s body, to freedom of thought, to privacy in one’s home, and to the pursuit of happiness. If such individual rights are involved, preventing marijuana use still needs more justification than a collective cost-benefit analysis alone.

The idea common to all these descriptions is that each person has certain fundamental interests that must be immune from state interference and under the individual’s exclusive control. The Supreme Court has expressed that idea using the rubric of a constitutional right to privacy (and the Alaska Supreme Court has found private marijuana use in one’s home protected under its state version of the right41). In the Lawrence opinion noted earlier, striking down Texas’ law criminalizing homosexual sex, the Court described that right in the following terms:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. ....At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. . . .The petitioners are entitled to respect for their private lives.42

Obviously, one’s right to privacy, or what we might more affirmatively describe as a right to self-ownership or self-rule, is limited. According to Mill, it is limited only by the harm principle: we are free to choose for ourselves up to the point we would harm or risk harm to others. Justice Kennedy’s opinion can be read as adding a second condition, one which doesn’t rule out paternalism in some areas that are removed from the reasons for respecting individual autonomy. In Kennedy’s opinion for the court, self-rule protects the realm most closely related to the essential attributes of personhood. Requiring drivers to use seatbelts does not interfere with these attributes, but denying individuals the freedom of thought and

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expression, or the freedom to choose their intimate relations, clearly does.

In assessing where marijuana falls on this spectrum, one must attend to the reasons individuals offer for using it, whatever one’s own views of the drug might be. These reasons are almost completely absent from drug policy analyses. 43 Here is naturalist Michael Pollan’s description:

All those who write about cannabis’ effect on consciousness speak of the changes in perception they experience...[T]hese people invariably report seeing, and hearing, and tasting things with a new keenness, as if with fresh eyes and ears and taste buds....It is by temporarily mislaying much of what we already know (or think we know) that cannabis restores a kind of innocence to our perceptions of the world....There is another word for this extremist noticing – this sense of first sight unencumbered by knowingness, by the already-been-there’s and seen that’s of the adult mind – and that word, of course, is wonder.44

Pollan finds marijuana edifying for the thoughts, insights, and experiences it gives him access to. Rick Steves, the PBS travel guru, says that much of his outlook and writing have been sharpened by using marijuana.45 Some other users say that temporarily changing the way they perceive and experience the world increases their self-awareness, or frees up some creative potential within them, or opens them up to more spiritual feelings.46 In the past year, the Italian Court of Cassation reversed a marijuana conviction on such grounds, where the Rastafarian defendant found marijuana the means to a

“psychophysical state connected to contemplative prayer.” On the other hand, many former users and other critics will find these self-assessments to be delusional. Law Professor Michael Moore considers most such claims to be “grandiose descriptions of what in fact is a pretty pathetic condition,” and writes that “[o]ne has to be high on [drugs] already in order to be able to judge the states induced as any kind of path to profundity or ‘authenticity.’”

One need not resolve this dispute concerning marijuana’s value to recognize that at least for its users, banning marijuana does implicate their freedom of thought and sometimes even the “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” That is one reason why a ban on marijuana really cuts very close to core aspects of personhood — to the freedom of thought and religion that are necessary to respect an autonomous being’s ability to choose what to think and to construct an identity for himself. That such thoughts, and such an identity, are not esteemed by a majority of Americans and their government is really beside the point; the very idea of this liberty is to recognize each individual as sovereign in this realm. Yet according to President Nixon’s National Commission on Marijuana, the war against marijuana then beginning in earnest was fueled by fear that the drug caused users to reject the “established value system.”

There is also a more quotidian moral right, perhaps less exalted but no less important, which is recognized in the Declaration of Independence as “the pursuit of happiness.” This right should protect those who seek affective rather than cognitive benefits from marijuana — users for whom it serves as a relaxant, a social lubricant, an anti-depressant, or a palliative. The right to pursue happiness in one’s own way is worthy of respect, and we disdain countries like Iran partly because they do not respect it. There, certain music and dress is deemed decadent and banned. Here, the default position is that people should be free to pursue their individual and idiosyncratic tastes in recreation, even risky ones like boxing and mountain

47 Peter Popham, While a shepherd watched his flock by night...”, THE INDEPENDENT (March 20, 2009), available at www.independent.co.uk/lifestyle/health-and-wellbeing/health-news/while-a-shepherd-watched-his-flock-by-night-1650377.html. In a second possession case, the Court reversed the conviction of a shepherd, finding the defendant justified in using it to help him endure a “long and solitary period....in the countryside and the mountains.” Id.

48 Moore, supra n. 7---, at 101.

49 National Commission on Marihuana and Drug Abuse, Marijuana, A Signal of Misunderstanding (1972), at Ch. 1, ‘Perceived Threats’.

50 See e.g. ANDREW WEIL, CHOCOLATE TO MORPHINE: EVERYTHING YOU NEED TO KNOW ABOUT MIND ALTERING DRUGS 129 (1998).
climbing. Only in a few cases does the majority presume to control the personal pleasures of a minority; marijuana is one of them. (That marijuana use often takes place in the privacy of one’s home greatly compounds the violation. 51)

This is not to say that the state should be unconcerned, because there are risks to health and safety, and both state and federal governments have important roles to play in eliminating or reducing them. In liberal societies such as ours, where the presumption is that individuals have the right to decide how to live their lives themselves, the government safeguards us not by making the decisions for us, but by helping us to make wise decisions with full knowledge. The government does not legislate weight, but labels food and advises on its health effects. The political philosopher William Talbott sees this stance as expressing the fundamental idea underlying human rights: “that all adult human beings with normal cognitive, emotional, and behavioral capacities should be guaranteed what is necessary to be able to make their own judgments about what is good for them [and] to be able to give effect to those judgments in living their lives....” 52

Certainly there are exceptions to this principle, where the government properly places something beyond the reach of its citizens for good reason. Many would include among them instances where (1) the dangers of a trivial activity are very great; (2) a safer alternative can equally satisfy the consumer; (3) the individual is a child or lacks rationality; (4) collective action is able to accomplish things impossible by individual choice; or (5) the activity would result in an addiction so powerfully destructive of autonomy as to amount to a form of slavery, which may be true of certain drugs. 53 Liberty rights can be overcome by sufficiently compelling grounds, and may justify banning the use of some drugs. 54 But marijuana does not present any

51 As the Alaska Supreme Court stated in finding that the state constitutional right privacy extended to the use marijuana in one’s home, “If there is any area of human activity to which a right to privacy pertains more than any other, it is the home.” It also noted the special rights afforded to conduct at home in the U. S. Supreme Court’s privacy jurisprudence. Ravin v. State, 537 P.2d 494 (1975).

52 WILLIAM TALBOTT, WHICH RIGHTS SHOULD BE UNIVERSAL 11 (2005).

53 Mill’s view was that “the principle of freedom cannot require [that a person] should be free not to be free.” John Stuart Mill, On Liberty (1859). Even if the activity had the effect of reducing autonomy in a minority of people, it is a further question whether to sacrifice the freedom of many because of abuse of a few, as we recognize in the case of alcohol.

54 The case we make for for marijuana legalization neither precludes nor supports similar arguments about other drugs. We may indeed have reason to reform laws governing other substances, but any such reform must be predicated on careful study of the real harms, costs, and benefits of the particular drug at issue, and whether they constitute the kind of exception listed above.
such reason. As Pollan writes, “the war on drugs” as in reality “a war on some drugs, their enemy status the result of historical accident, cultural prejudice, and institutional imperative.”

Conclusion

The case for revisiting marijuana laws has special salience today, because for the first time in decades serious marijuana law reform appears to be achievable. Reform bills or ballot initiatives have recently been approved in a number of jurisdictions, President Obama and his new drug czar have suggested treating rather than jailing non-violent drug offenders, and Attorney General Holder has

55 Michael Pollan, Opium Made Easy: One Gardener’s Encounter with the War on Drugs, Harper’s Magazine (April 1, 1997), available at www.michaelpollan.com/article.php?id=24. Bakalar and Grinspoon agree that drug prohibition has been generated by history, not reason. They argue that Prohibition was repealed not because of “scandals, inefficiencies and nasty side effects (these were never considered good reasons to repeal other drug laws)” but because the middle class became less puritanical and wanted to drink alcohol. “Unlike opium and cocaine, alcohol was not an exotic substance with powers that were frightening because mysterious. It was too familiar to be branded with the narcotic stigma and too closely associated with innocent fun in many respectable people’s minds to be purely a drug menace. Penalties for purchase and possession of alcohol were never imposed, much less enforced. Alcohol use was never reduced to the categories of medicine and vice.” James Bakalar and Lester Grinspoon, Drug Control in a Free Society 85-88 (1988).

56 Successful marijuana ballot initiative efforts in the past year include Massachusetts ballot initiative Question 2, codified as 94C M.G.L. 32L (2008), in which voters decriminalized possession of less than one ounce of marijuana, substituting a $100 civil fine, by a margin of 65%-35%; Michigan Proposition 1, codified as MCLS § 333.26421 (2008), in which voters changed the law to allow for medicinal use of marijuana on a doctor’s recommendation by a margin of 63%-37%; and local ballot initiatives in Hawaii County, Hawaii, Fayetteville, Ark., and several Massachusetts towns, where voters made enforcement of adult marijuana possession laws the lowest law enforcement priority, in each case by substantial majorities. See Marijuana Policy Project, 2008 Ballot Initiatives, available at http://www.mpp.org/library/2008-ballot-initiatives.html. However, California’s Proposition 5, which sought to enhance a successful 2002 drug reform initiative by changing marijuana possession from a criminal misdemeanor to a civil infraction, and substituting treatment for incarceration for many non-violent offenders, went down to defeat 60%-40%. Id. More than a dozen legislatures have taken up measures to either reduce penalties for marijuana use or allow its use for treatment purposes. Jesse McKinley, Marijuana Advocates Point to Signs of Change, New York Times, April 20, 2009.

ordered a stop to federal prosecutions of medical marijuana use in states that permit it.58 Governor Schwarzenegger has proposed consideration of the legalization and taxation of marijuana,59 and Rep. Barney Frank has introduced a decriminalization bill for the first time in Congress because, he said, the public is now ready to support it.60

Given the destructive and inhumane consequences of marijuana laws and policies (which we have catalogued elsewhere61), any ameliorative reform effort should be embraced. Worthy reform proposals include the removal of marijuana from federal Schedule 1 into an appropriate lesser category, which would foster both scientific study of the drug and its medicinal use where appropriate,62 state and

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60 Act to Remove Federal Penalties for the Personal Use of Marijuana by Responsible Adults, H.R. 5843, 110th Cong. (submitted April, 2008). Rep. Frank’s bill would decriminalize possession of up to 100 grams (or 3.5 ounces) of marijuana and also remove criminal penalties from users who share marijuana with others so long as they don’t sell it. Frank announced his intention to file the bill on Bill Maher’s television program, stating that caution had prevented his doing so for decades but that it was now time for politicians to “catch up with the public.” See Real Time, 3/22/08, available at http://www.citizensugar.com/1138194. Regarding popular support for change, see infra n. ---.


62 According to current knowledge, marijuana satisfies none of the three Schedule 1 requirements: it (1) has a low potential for harm and abuse; (2) appears to have therapeutic benefit, as the government itself claimed in its successful patent application, see infra n. ---; and (3) according to the American College of Physicians, may be used safely under appropriate conditions. Position paper by the American College of Physicians, Supporting Research into the Therapeutic Role of Marijuana, (2008), available at www.acponline.org/acp_news/medmarinews.htm. In this paper, the ACP “urges review of marijuana’s status as a schedule I controlled
federal laws permitting the medical use of marijuana;\(^{63}\) decriminalization of use and possession (as currently exists in thirteen states\(^{64}\)), which would put an end to some of the worst excesses afflicting users; and legalization, which would most fully respect individual liberty while also allowing the government to control and regulate the marijuana market in harm-reducing ways. If there is to be progress, reformers should welcome whatever incremental steps may be possible, notwithstanding the stronger deontological requirements associated with liberty claims. But whatever the political dynamics, we should remember that fundamental moral rights are also at stake – rights that respect an individual’s personhood by guaranteeing a sphere of autonomy in personal matters, and limiting prosecutions according to the principles of just punishment. These civil libertarian concerns, well-recognized in other contexts, should inform legislators and policy-makers as marijuana law reform efforts move forward.

substance and its reclassification into a more appropriate schedule, given the scientific evidence regarding marijuana's safety and efficacy in some clinical conditions.”

\(^{63}\) As of December, 2008, the United States government continued to oppose medical marijuana as useless, despite having patented the medicinal benefits of marijuana in an application asserting cannabinoids’ usefulness in preventing or treating diseases including stroke, trauma, auto-immune disorders, Parkinson's, Alzheimer's and HIV dementia. Patent # 6,630,507, available at www.patentstorm.us/patents/6630507.html

\(^{64}\) States that have decriminalized at least some kinds of marijuana possession offenses are Alaska (see Schedule III(A), AS § 11.71.160; Possession AS § 11.71.010 – 0); California (see Schedule I, Health and Safety § 11054; Schedule I, Possession: West's Ann. Cal. Health & Safety Code § 11357); Colorado,(see Schedule 1, C.R.S.A. § 18-18-203 and § 18-18-406); Maine (see Schedule Z: 17-A M.R.S.A. § 1102 Schedules W, X, Y and Z: 17-A M.R.S.A. § 1107-A); Massachusetts, 94C M.G.L. §32L (2008); Minnesota (see Schedule 1, M.S.A. § 152.02, M.S.A. § 152.027); Mississippi (see Schedule 1, Miss. Code Ann. § 41-29-113 and Miss. Code Ann. § 41-29-139); Nebraska (see Schedule 1, Neb. Rev. St. § 28-405 and Neb. Rev. St. § 28-416); Nevada (see N.R.S. 453.336); New York (see Schedule 1, McKinney's Public Health Law § 3306 and McKinney's Penal Law § 221.05); North Carolina (see Schedule VI, N.C.G.S.A. § 90-94 and N.C.G.S.A. § 90-95); Ohio (see Schedule 1, R.C. § 3719.41 and R.C. § 3719.99); Oregon (see O.R.S. § 475.864).