Symposium

Approaches to Assessing the Effects of Marijuana Criminal Law Repeal in California

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I. INTRODUCTION

In almost passing Proposition 19, California came close to testing some important assumptions and predictions about the legal, political, and social effects of the repeal of a major criminal prohibition. Let me put these assumptions and predictions in a wider context. What would happen to crime and criminal justice if there were no longer criminal laws regarding marijuana? I will consider that question here in a sequence of speculations ranging from the utterly simplistic to the more reasonably realistic to the perhaps frustratingly complex and uncertain. In fact, the deliberately vague term “regarding” in my question itself raises problems, because it could cover anything from use, to mere possession, to possession with intent to use, to possession with intent to distribute, to distribution and so on. Worse yet, if marijuana were subject in theory only to civil regulation, but if that civil regulation, like many, involved ancillary criminal liability for certain administrative or taxing violations, we would get into more difficulty in narrowing the subject of the inquiry.

But to start at the most simplistic pole, assume that a legislature, following social dictates, chooses to remove all vestiges of criminal liability for certain conduct because no one thinks the conduct is actually or potentially harmful in any way. The ultimate null hypothesis here would be for a law that has gone unenforced in recent memory, falling into anachronistic desuetude. Popular news often contains humorous notes on absurd laws whose purpose no one remembers, and sometimes the legislature gets around to repealing them. Repeal of laws in full desuetude “reduces crime” only in the positivist sense that it legalizes things people were doing anyway without caring or realizing that they were crimes, and it affects criminal justice only in the vaguely speculative sense that if the law aligns better with social consensus, it better reinforces people’s respect for and adherence to the serious laws still on the books. The behavior that had been

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1. For an examination of that issue, along with many other legal contexts in which decriminalization must be examined, see the most important recent article on decriminalization, Michael Vitiello, Legalizing Marijuana: California’s Pot of Gold, 2009 WIS. L. REV. 1349, 1374, 1383 (2009).
2. See Stephanie Paul, Top Craziest Laws Still on the Books (Oct. 2007), http://www.legalzoom.com/us-law/more-us-law/top-craziest-laws-still (on file with the McGeorge Law Review) (detailing laws such as one in North Dakota which makes it illegal for a bar to serve beer and pretzels at the same time). The desuetude doctrine has been used to nullify laws that fall into disuse. See Desuetude, 119 HARV. L. REV. 2209 (2006).
condemned is not associated with (and so its legalization would not affect) any other illegal or harmful behavior. No state resources had been expended on the law, so there are none to be saved or reallocated, and since no investigative or prosecutorial tools had been used to ferret out this old crime, repeal would not jeopardize any secondary state benefits.

But more usefully, now move to a criminal law that is not obviously absurd or anachronistic, where pre-repeal enforcement had been quantitatively meaningful, and where the social consensus that the conduct does not merit condemnation is strong enough for repeal (or is associated with a constitutional argument for the law’s overruling) but is still the subject of some moral or political contestation. Can the repeal in this situation be wholly self-contained in terms of crime and criminal justice, with no wider systemic effects? What would this criterion of “self-containment” mean? Obviously, it cannot mean meeting the conditions mentioned above for an anachronistic law that has died in (or of) desuetude.

A realistic example might be helpful in elaborating this criterion, but it is no easy task to choose one. Some might suggest that the repeal of Prohibition provides an example. But alcohol regulation is a much more complicated case along many dimensions. However unpopular Prohibition, the social concern about the harm of alcohol has hardly disappeared, and in any event, even if Prohibition was overturned, the criminalization of many aspects of alcohol use and production has never abated. Perhaps no subtopic in the debate over legalization has produced so much writing as the aptness or inaptness of the marijuana/alcohol analogy.\(^3\)

Other more promising examples come to mind—laws on sexual conduct now declared unconstitutional?\(^4\)—but in an admittedly questionable experiment, I posit the repeal of criminal laws against abortion. And the hypothesis about the legislative or constitutional overruling of criminal laws against abortion (in the era leading up to Roe v. Wade\(^5\)) would run as follows: A significant amount of law enforcement, prosecutorial, and judicial resources would no longer be used against this conduct.\(^6\) The incidence of the conduct would probably increase. But

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3. In some ways alcohol is no longer “criminal” because moral tastes have changed and rational regulatory efficacy has to some extent won out. But the harm-based rationale for making alcohol a crime is still evident in underage drinking prohibitions and drunk driving laws, along with an incredibly vast taxation and regulatory apparatus that includes ancillary criminal sanctions.

The history and evaluation of Prohibition and its repeal is too vast for citation to be useful, but a superb review of this history appears in WIlliam J. Stuntz, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 178–91 (2011). Notably, Stuntz argues that Prohibition had far more beneficial social effects than it is credited for, and that its repeal is a very positive story of rational democratic reconsideration of its goals and effects—all this in sharp contrast to what Stuntz sees as the unfairness and hypocrisy of the modern drug regime. Id.


6. Actually, the example remains very impure, because enforcement of these laws in the mid-twentieth century was remarkably spotty and half-hearted, but prosecutions and convictions did occur. Moreover, the
neither repeal nor the increased incidence would affect the frequency or prosecution of other crimes. For one thing, abortion is a relatively isolated form of conduct—it is not part of any wider criminogenic pattern of behavior. Increased incidence of abortion would not increase the incidence of other types of crimes with which “abortion behavior” is associated, nor would the new legal access to abortion reduce the incidence of other forms of self-interested conduct that were mutually substitutable vis-à-vis abortion. Repeal would have no (or little?) effect on state officials’ investigation or prosecution of other crimes because methods that police had been using to uncover illegal abortions had no intended or manifest secondary benefits for the state, nor did the threat of prosecution for abortion affect state success in prosecuting any related crimes. These are all heroic assumptions about criminal abortion laws, or perhaps any other example one might find in this category, but assume the validity of the assumptions for current purposes.

Then the key question remains: what happens with the saved resources? The simplest outcome would be that a certain amount of state money spent on enforcement, adjudication, and corrections would now be saved to the taxpayers. The next simplest would be that the budgetary savings would be shifted to targeting other crimes more aggressively. This shift would occur because the police, prosecutorial, judicial, and correctional agencies lobby for maintaining their budgets to a degree independent of the crime demands on them or because of the realization that for the variety of crimes these agencies dealt with, they had been operating all along under a condition of scarcity and triage in comparison to an overwhelming amount of crime they were tasked to address—so that limitation on agency budgets had always been purely fiscal and not contingent on crime.

Were this picture applicable to marijuana repeal, certain simplistic calculations would come to mind. Most obviously, if repeal were national (both federal and state) and applied retroactively, about 30,000 Americans currently...
sitting in state or federal prison would be released, a larger number would be relieved of probation and parole status, and about several billion dollars of state and federal money would be saved from police, prosecution, judicial, and correctional budgets.  

I could forcibly simplify the picture by utterly ignoring all the perfectly respectable arguments that, regardless of any repeal that occurs, marijuana remains harmful. Increased marijuana use will lead to huge social costs of some form, especially to increases in conduct that remain criminal because of the behavioral relationship between marijuana and the still-criminal conduct. But even with this forcible artifice, trying to keep this picture simple is a challenge because we are immediately tempted to consider other questions. Most obviously, we would ask whether the savings would stay with the criminal law agencies (and thus affect the operations of criminal justice and the incidence of other crimes), go to other state agencies, or go back to the taxpayers. More broadly, in considering the people who no longer face criminal sanctions for marijuana and so would be freed of the economic and other costs of the old prohibition, we might ask whether those people would also be freed of the consequences of the still-enforceable criminal laws if, as is obvious to some extent, any conviction for any crime tilts the lives of some people in the direction of a pattern or a career of diverse crimes. Those consequences include the range of collateral costs associated with any record of criminal convictions, costs that spiral and reinforce because they hamper chances for employment, social status or benefits so as to increase the risk of more criminality. We would want to take into account the costs to both the person and the state that would be saved by avoiding such criminal convictions and sentences.  

A. Next Layer of Assessment  

What is still wrong with this picture? It is probably wrong even for the abortion legalization example. But it is patently wrong for any imminent legalization of marijuana. Because even with those caveats in the previous paragraph, it ignores (a) questions of the fungibility, the substitutability, and the elasticity of inclinations toward criminal behavior by the people whose conduct

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8. See Ryan S. King & Marc Mauer, The Sentencing Project, The War on Marijuana: The Transformation of the War on Drugs in the 1990s 27 (2005) (“[W]e estimate that there are 27,900 persons in state and federal prison serving a sentence for which a marijuana violation is the controlling (or more serious) offense.”).

9. Id. at 2, 28–31.


11. See Vitiello, supra note 1, at 1382–83 (“Criminal charges involve collateral consequences that offenders may carry with them for many years.”).
has suddenly become legal, much less the larger ecology of social behavior, and more broadly, this picture ignores (b) all the interactions, the hydraulic interdependencies, the endogeneities, and the positive and negative externalities that any criminal prohibition manifests as it sits within the larger system of criminal justice. Rather than attempt comprehensive and systematic mapping of these interactions, I offer here a suggestive sketch.

First, let us turn back to the interactions between marijuana and other criminal conduct, and start with just drug crimes. A preference for using marijuana (along with sale, distribution, and so on) correlates with preferences for other drugs that will remain illegal. One possibility is that other drug crimes will go down, because the psychic energy that will go into using marijuana will now be removed from related indulgences that are still subject to criminal sanction. So the good news is that so long as we do not fear social harm from increased marijuana use, we will see a significant reduction in drug crimes, and a concomitant resource saving. But that is a wildly simplistic (and probably wildly erroneous) picture of the fungibility of drug preferences as well as their elasticity. And of course, it assumes away, (a) as mentioned above, the partial post-repeal regulation of marijuana that will still involve ancillary criminal liability, and (b) the prospect of a noncriminal but regulated marijuana regime in which the price or quality of the black-market version makes it preferable.

Second, we turn to the association the illegality of marijuana has with other criminal harms—especially the violence associated with competition in the economic market for marijuana. Such violence and associated social degradation might decline as well, with concomitant savings, if the violence is very market-specific. It might not decline if either there was a continued black market in marijuana or if marijuana entrepreneurs will shift their talents to heroin, cocaine, or other still-illegal drugs.

More broadly, we face uncertainty about more-complex interactions between drug use and criminality. As with any drug, the relationship between marijuana and crime can take several causal forms: the drug can cause people to act like criminals; the desire for the drug can cause people to commit property or even violent crimes to obtain it; the use of the drug may simply involve the user in a social group that for other reasons encourages crime; someone might become a criminal ...

12. The great scholar of this subject was the late William Stuntz, whose first breakthrough article on this topic was The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1 (1997). There, he analyzed the complex and often mutually undermining relationships between substantive criminal law and criminal procedure and between doctrines of procedure, often finding a zero-sum game of tradeoffs among legal regimes. See id. Among Stuntz’s concerns were that most of the constitutional energy of the Supreme Court in the area focused on procedural rights, to the detriment of constitutional constraints on crime definition and sentencing, and that the Warren Court focused too much on Fourth and Fifth Amendment rights and not enough on the right to effective counsel that would have enhanced the ability of defendants’ winning not-guilty verdicts outright, without relying on ancillary procedural claims. Id. at 7–10, 16–20.

13. Vitiello, supra note 1, at 1369.
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criminal before using marijuana, enter this criminal group, and then use marijuana because others in the group do so; or certain individual proclivities independent of both crime and marijuana-use may be the intervening "third party force" that causes both. 14 So an increase in the use of marijuana will have unpredictable effects on the commitment of the user to a pattern or life of crime.

Then there is the question of whether the avoided criminality resulting from repeal of the marijuana prohibition will really even be avoided criminality in the legal sense. The charge of conviction is sometimes only an indirect marker of the criminal conduct that provoked the prosecution, because defendants often plead guilty to lesser charges that only faintly resemble the underlying crime. If some now-avoided marijuana crimes had previously shown up in the books because of these guilty pleas, then the post-repeal reduction in crime rates due to the elimination of marijuana charges might just be replaced in the statistics by some other crimes of conviction. 15 Elimination of one lesser offense from the menu of choices of plea bargaining in theory could help or hurt prosecution or defense equally, though I suspect it will net out in the prosecutor’s favor.

But prosecutorial discretion is not just a matter of stacking lesser charges under higher ones for plea purposes. Return to the question of cost savings from avoided marijuana crimes: what happens when a prosecutor can no longer charge a particular crime? The clean answer may be that the system will revert to its “proper” form; it will reset to a righteous equilibrium. There never should have been such a law, and so the state will now only use those resources needed to punish the remaining true crimes, and the savings will go elsewhere in government for other clearly specified purposes or will revert to the taxpayers. The default baseline will be a logical draw on funds needed for an altered set of criminal behavior. But there may be no such natural default baseline. Baselines are often contingent and shifting. Budgets for state authorities might not be reduced or their allocations adjusted upon repeal of the marijuana law, and prosecutors and police may turn their attention and funds elsewhere, so that by some measures, such as arrests and convictions, the amount of true crime may seem to go up. Indeed, one researcher has noted that a moderate cease-fire in the War on Drugs in the mid-1990s through 2006 may have led to an increase in prison populations because it encouraged prosecutors to turn their attention to more vigorous prosecution of violent crimes. 16

These questions about prosecutorial behavior lead us to the related but separate issue of multiple jurisdictions. The study of interactions among

15. Vitiello, supra note 1, at 1370–71.
jurisdictions in criminal law often focuses on the crime migration issue. Repeal a prohibition in one state and people will move there from their non-repeal states to engage in the conduct. But that prospect seems far less likely with marijuana than with other crimes (like abortion crimes before \textit{Roe}). Rather, the serious problem in predicting interaction among jurisdictions for marijuana repeal is the federal–state relation.

A general principle of the federalization of common crimes in the United States is that many acts violate both state and federal law, that federal sentences are generally much higher, and that state and federal authorities interact in various ways explicit and implicit. One result of this principle is that the potential for serious federal penalties may manifest itself chiefly in terms of easier convictions for state crimes because state prosecutors can use the “bad cop” of the threat of federal sanctions to scare defendants into quick guilty pleas.\textsuperscript{17} Conversely, some federal criminal statutes in the drug and drug-related areas of gangs, guns, money-laundering, and racketeering incorporate state law crimes in various ways, so that the presence of lower-level state crimes increases the arsenal of plausible federal charges.\textsuperscript{18} So in federal districts covering states that repeal their marijuana laws, it might be tricky to predict the effect of repeal on federal criminal prosecutions.

But the more immediate issue is about the more-direct effect repeal of state marijuana prohibitions would have on the federal government’s wielding of its own marijuana prohibition. It is far too soon to tell, but for a while under Proposition 215, the federal government was willing to overlook medical marijuana use in California out of a vague philosophical or political respect for state sovereignty and moral respect for narrowly defined medical use.\textsuperscript{19} But once California threatened to formally legalize such nonmedical marijuana use, the federal government thought this so direct an insult to the federal prohibition that it at least threatened a much tougher enforcement policy.\textsuperscript{20} Thus, the interactive effects of competing and overlapping jurisdictions will be complex.

\footnotesize{\textsuperscript{17} STUNTZ, supra note 3, at 306.\textsuperscript{18} E.g., Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68 (2000) (making a wide variety of state crimes predicates for federal racketeering charges); Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e) (2000) (requiring a minimum fifteen-year prison term for recidivists convicted of unlawful possession of a firearm if offender has three prior state or federal convictions for violent felonies or serious drug offenses).\textsuperscript{19} Vitiello, supra note 1, at 1377.\textsuperscript{20} See Memorandum from David Ogden, Deputy Att’y Gen., to selected United States Att’y’s, Memorandum for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (“Ogden Memo”) (Oct. 19, 2009), \textit{available at} http://usdoj.gov/blog/archives/192 (on file with the \textit{McGeorge Law Review}). The Ogden Memo has now been reaffirmed after inquiries from United States Attorneys around the nation as to whether continued movements toward legalization of medical marijuana in various states might affect DOJ policy. Memorandum James M. Cole, Deputy Att’y Gen., to United States Att’y’s, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), \textit{available at} http://safeaccessnow.org/downloads/James_Cole_memo_06_29 _2011.pdf (on file with the \textit{McGeorge Law Review}); see also Benjamin B. Wagner & Jared C. Dolan, \textit{Medical
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Next, there is the relationship between repeal and American incarceration. The greatest evil now imputed on the American criminal justice system is the phenomenon called “mass incarceration”—the international embarrassment that the world’s wealthiest democracy has, by some distance, the highest incarceration rate among all peer nations, and even most “nonpeer” nations.Obviously, one question about repeal is its effect on the population of prisons and jails. In mundane terms, the numbers suggest that it will have a small but nontrivial role in reducing state and federal prison populations, and perhaps a larger, but less predictable, effect on county jails. But if we look more ambitiously to the effect of repeal on mass incarcerations, a major social, economic, and political problem in the United States, we have to comprehend all the other interactive empirical questions described, because the ultimate inputs into our jails and prisons are so complex. As Professor Vitiello notes, the role of marijuana in the prison system is very hard to determine because of the embedding of marijuana crimes into the penal code more generally and into the system of probation and parole revocation more specifically. But assume very few marijuana criminals, however defined, go to state prison. If there is some salience to the distinction between state prison and county jail (as there obviously is for the current federal injunctions in the Plata and Coleman cases), that distinction, alas, is very blurry anyway. We have to assume that even if few marijuana criminals go to state prison, many go to county jails, but they may go there precisely because, in the case of “wobblers,” a judge who knows the prisons are stuffed may choose to make the sentence a year or less. The jails then become quite crowded, affecting the state prisons by thwarting the state’s current policy of “realignment” or “devolution,” whereby the state sends more


21. E.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6 (2010) (“The United States now has the highest rate of incarceration in the world, dwarfing the rates of nearly every developed country, even surpassing those in high repressive regimes like Russia, China, and Iran.”); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 11 (2006) (“By zealously punishing lawbreakers—including a large new class of nonviolent drug offenders—the criminal justice system at the end of the 1990s drew into its orbit families and whole communities.”).

22. Vitiello, supra note 1, at 1380–81.

23. Id. at 1380–83.


felony prisoners down to those counties where the jails may have some empty space. Eliminating a crime that usually sends defendants to jail (or probation) but could send them to prison will (like, alas, all else regarding repeal) have unpredictable effects. Those effects include a form of criminal sanction peculiar to probation and parole—the violation of conditions that leads to incarceration or reincarceration.

In California over the last decade, one of the largest—and surely the most controversial—inputs into the prison system has been parole revocations. And these revocations are sometimes for new true crimes and sometimes for “administrative violations” of conditions of parole, where the violating conduct is not itself a crime. In fact, the system is more complex and mysterious still, because sometimes even where the parolee commits a new true crime, the state will treat it as a violation because the adjudicative process is thereby greatly shortened and still results in at least some period of reincarceration. How would marijuana repeal affect this recycling of prisoners? Ironically, “recidivism” would go down because regardless of the original crime of conviction, parolees who now use marijuana would not be guilty of new crimes. On the other hand, because the conditions of parole need not be criminal, administrative violations might hold steady; marijuana use could still be a noncriminal violation of parole just like such behavioral violations as failure to attend rehabilitation sessions or leaving the county without the parole agent’s permission. If so, the stream of parolees re-swelling the state prisons would not abate much. In that regard, the huge controversies surrounding California’s overcrowded prisons, which have resulted in federal court injunctions that might lead to judicially mandated population reduction, might not be hugely affected by marijuana repeal.

The subtlest—but as I will discuss in the next section, possibly most important—of these systemic interactions involves the relationship between substantive criminal law and criminal procedure. To arrest and prosecute a person, the state needs at least probable cause, but the standard is even lower at

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26. I am focusing on parolees here but there will be analogies in the case of probationers, and some who violate probation may end up in prison, as opposed to jail.
28. Professor Vitiello notes that relatively few parolees return to prison based on marijuana violations. Vitiello, supra note 1, at 1381. On the other hand, it is hard to tell from the state figures whether some returns to prison are based on dirty drug tests for marijuana that are recorded as administrative violations of conditions of parole and not new marijuana crimes. See DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFORNIA PRISONERS AND PAROLEES 2007, at 3, 6 (2008), available at http://www.cdc.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2007.pdf (on file with the McGeorge Law Review).
29. The set of these injunctive cases is subsumed in the recent Supreme Court decision Brown v. Plata, 131 S. Ct. 1910.
30. See STUNTZ, supra note 3, at 216–43 (describing the Warren Court’s error in deploying Bill of Rights to govern procedural rights and not severity of substantive criminal law).
the stage at which police first exercise control over most suspects (at least those in poor urban areas)—the reasonable-cause-to-stop-and-frisk standard of *Terry v. Ohio*. Especially under this lower standard, it is not very hard for the police to discern some reason to seize, frisk, and then ultimately search a person or perhaps a place. And in any areas where marijuana use is prevalent and illegal, it may not take much incremental information about a person’s conduct or appearance to produce at least reasonable cause to believe that he possesses or is trying to obtain marijuana. Marijuana crimes are perhaps the major source of legal justification for street stops. This is one of the situations in which claims of racial discrimination (via “profiling”) are most often made and most often legitimate. Indeed, marijuana is very important in the other major context for racial profiling concerns—car stops. The police may not have reasonable or probable cause to believe a moving car contains marijuana, but once they stop a car for a minor traffic violation, it is most often the suspicion of marijuana that justifies a long detention and possibly a full search of the person or the car. Sometimes, the result of such a police intervention may be an interference with personal freedom that, because it does not produce any evidence to exclude, does not result in a constitutional challenge. Or the result might be the discovery in plain view of evidence of a much more serious crime—sometimes marijuana, or sometimes something more serious, like a heavier drug, a gun, or valuable stolen property. So the illegality of marijuana has effects well beyond the direct prosecution of people for marijuana crimes. What effect will the repeal of marijuana laws have here? It could reduce the opportunities for police to stop and frisk. If so, it could have the beneficial effect of making it more expensive to police downscale drug markets. And that in turn might enhance the perception of the fairness of the criminal justice system from the perspective of minorities. On the other hand, if legally legitimate but arguably pretextual police stop-and-frisks are a significant way of deterring crime or of ensuring the incapacitation of serious criminals, repeal of the marijuana laws and the resulting reduction in available justifications for seizures and searches could increase serious crime. But I will say more on this subject below in the section on New York City.

II. THE STATE OF THE NUMBERS

Having sketched out some of the complicated catalytic effects that repeal might have, I will offer some detail about the current empirical facts about the salience of marijuana in the criminal justice system now. This fairly simple
summary can then be a predicate for my next layer of more complicated analysis of interactions in the last two sections.

Marijuana use has so lost its stigma in American culture that many Americans probably think that, at least for individual users or small-scale or casual distributors, it does not play that much of a role in the criminal justice system, except for nuisance investigations and prosecutions. But the most remarkable thing about marijuana-based arrests in the United States is not just that they are numerous, but that they have dramatically increased in the last two decades. This is very far from any picture of desuetude or even from any resemblance to the state of abortion crimes before Roe.

Nationwide, state and federal marijuana arrests doubled between 1991 and 2008, with the major increase during the 1990s and a still sharply upward curve thereafter. For reasons to be noted below, it is useful to give somewhat separate emphasis to roughly the first half of that period. Between 1990 and 2002, there was a forty percent increase of arrests in drug cases generally (450,000 in absolute numbers), and eighty-two percent of this increase was in marijuana arrests, such that these arrests came to constitute perhaps half of total American drug arrests. In the same time period, marijuana arrests more than doubled—from 327,000 to 697,000, while other drug arrests went up ten percent and arrests for all crimes went down three percent.

Ironically, this pattern is quite opposite to what ensued in the earlier decade. Between 1982 and 1992, the proportion of drug arrests for marijuana went down drastically from seventy-two percent to twenty-eight percent, while those for cocaine went up dramatically from thirteen percent to fifty-five percent. But then a huge shift occurred. To some extent, the increased share of drug arrests for marijuana after 1990 was due to the decline in crack markets as the use of crack subsided. But the major explanation for marijuana’s increased share of drug arrests was the actual increase in marijuana arrests. This phenomenon varied in degree among the states, but it was quite widespread, applying to most of the larger counties in the United States (including an astounding increase in Seattle of 400 percent).

As for the severity of sanctions, the overwhelming majority of arrests were for misdemeanors—between 1990 and 2002, only six percent resulted in convictions for felonies. Of that small group of felonies, roughly one-third led to state or federal prison, one-third to jail, and one-third to probation.

34. King & Mauer, supra note 8, at 1.
35. Id. at 1, 3.
36. Id. at 6.
37. Id. at 13.
38. Id. at 1, 23.
For marijuana crimes across the board, it is difficult to sort out serious from not-so-serious offenders. Even though more-serious offenders may be designated as those guilty of some kind of trafficking offense, the common use of the charge of possession with intent to distribute makes it hard to distinguish minor possession cases from what are effectively trafficking cases. For those convicted of felonies, the sentence range, whether it leads to jail, prison, or probation, resembles the two-to-three-year range for aggravated assault. Overall, perhaps 30,000 marijuana convicts currently sit in prison—leading to perhaps a billion dollars in costs per year. Here we see the numbers weigh in favor of trafficking—roughly sixty percent of prisoners were convicted of a crime so described. On the other hand, among those prisoners, a surprisingly large minority are not there on the basis of prior violent crimes or violence associated with the marijuana charge. Moreover, if we use some rough self-report-based measures for distinguishing “high-level” from “low-level” nonviolent marijuana criminals (“high-level” being associated with importation, money laundering, manufacturing), it turns out that as many as a quarter of the prisoners are low-level.

There is nothing subtle at all about the racial numbers. Though surveys and other measures suggest there is no serious difference between whites and blacks in terms of marijuana use, between 1990 and 2002, blacks, who remained a steady thirteen percent of the American population, were thirty percent of marijuana arrestees. Moreover, the increase was not due to a greater incidence of, or focus on, serious trafficking. Marijuana trafficking arrests declined as a proportion of all drug arrests during this period (from six to five), while the proportion of all drug arrests represented by marijuana possession cases went from twenty-four to forty percent. In terms of costs at the federal level, domestic drug enforcement budgets doubled in that decade, and much of it probably went to marijuana, to the tune of about $2 billion a year of federal money. This is not a huge amount, only representing about 2.9 percent of the federal enforcement budget. Of this 2.9 percent, about a quarter was for trafficking and the rest for possession arrest. If we take on the more daunting task of estimating the total annual costs to all jurisdictions for the investigation, prosecution, supervision, and incarceration of

39. See id. at 24 (discussing the differences between the charges and the reason law enforcement officers choose one charge over another).
40. Id. at 23–24.
41. Id. at 23.
42. Id. at 27–28.
43. Id.
44. Id. at 9; GETTMAN, supra note 33, at 14.
45. KING & MAUER, supra note 8, at 4.
46. Id. at 10.
47. Id. at 10.
marijuana offenders, the numbers will be in the several billions, and possibly just slightly into the double-digit billions.  

But two simultaneous phenomena merit note. First, all this has happened in a period during which measurement of actual marijuana use in the nation has remained very flat. The increase in prosecutions seems to have been neither a reaction to nor the cause of any change in the rate of actual use and surely did not suppress the price of marijuana on the street. During the 1990s, the price of marijuana went down slightly and the strength of the product probably went up, while use by teenagers went up slightly. The great majority of arrests did not lead to serious incarceration—indeed the overwhelming picture was of a system filled with low-level “hassle” charges and dismissals—and needless to say, absurdly low “clearance” rates in terms of the chances of any marijuana offense being identified, much less charged, by the police. As a result, we had the odd combination of increasing low-level arrests that did not deter marijuana crimes but did lead to increased unpredictability of enforcement.

Second, for at least the first half of this period, the 1990s, the sharp uptick in marijuana arrests was simultaneous with the now-legendary crime drop, the most dramatic drop in serious crimes in the United States since records have been kept. Some economists purport to have found a huge opportunity cost in the allocation of state resources towards marijuana, namely that every marijuana arrest increases the incidence of more serious crimes. But those circumscribed studies are impossible to square with the simultaneity of the marijuana arrest spike and the crime drop.

So what sense can we make of these patterns? Consider two alternate hypotheses. One is that aggressive police and prosecutorial attacks on marijuana were a constructive new phase in the War on Drugs and contributed to the great crime drop. How could they do so? In very general terms, the best explanation would be that marijuana is at least indirectly associated with more serious crimes,

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48. See GETTMAN, supra note 33, at 3 (stating that by 2006, the total estimated cost was approaching $10 billion).
49. Id. at 2.
50. KING & MAUER, supra note 8, at 7–9.
51. Id. at 22–23.
52. GETTMAN, supra note 33, at 10–11.
53. Although there are many ways to measure the phenomenon, a rough gist of the matter is that serious and violent crime in the United States declined between twenty and thirty percent across the nation, most notably for the so-called “Index I crimes” compiled by the Department of Justice (murder, non-negligent manslaughter, rape, robbery, aggravated assault, burglary, major larceny, auto theft, and arson). See FRANKLIN ZIMRING, THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman eds., 2000) (giving major assessments); FRANKLIN ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007).
so interfering in marijuana markets headed off the more serious property and violent crimes for which marijuana distribution was a kind of triggering mechanism. Another explanation might be that aggressive street stops for marijuana, even if pretextual, were the mechanism by which police were able to haul in people who were guilty of more serious crimes, and once in custody, these people were available to be prosecuted for those more serious crimes, often on the basis of arrest warrants they had previously evaded. Thus, marijuana crimes worked with the loose rules of criminal procedure to enable the police to widen the net of law enforcement in general. Regardless of whether this approach had a deterrent effect, it certainly had an incapacitative effect: current or potential serial criminals were put away, and a huge number of crimes were avoided. An additional, related explanation focuses on so-called “broken windows” or “quality of life” policing. By this reckoning, all we need to know is that widespread marijuana use was part of a pattern of degradation of urban neighborhoods, and that degradation powerfully contributed to the decline of law-abidingness in the inner cities. Thus, stopping the marijuana trade was equivalent to cleaning up the neighborhood (or the subway cars) and thus led to the crime decline.

The alternative hypothesis is more skeptical of police intentions, if not downright cynical. It might acknowledge that some of the above explanations identify some possible intended goals of the police or might at least identify occasional side benefits of these arrests, but to a degree nowhere close to deserving credit for the crime decline; or it might refuse to even believe that these were the intended goals. Rather, marijuana arrests resulted from strong-armed instrumental and political actions by various jurisdictions, quite irrelevant to actual incidence of marijuana use or to any more-sophisticated plan to reduce serious crime.

By this reckoning, marijuana arrests would be a woefully inadequate explanation for the crime drop, which would have been the result of a cluster of other factors that are still the subject of major economic debate. Thus, the war on marijuana was a largely arbitrary policy, caused purely by the will of politicians, police, and prosecutors. They may have been motivated by a belief that drugs themselves, even low-level ones, were such a scourge that they merited huge new


resources out of the state and federal budgets. They may have been morally offended by the imagery of disorder in inner-city neighborhoods and thought small-time drug busts were the best way to restore social and moral order to America. The arbitrarily willful (not necessarily bigoted) explanations for the war on marijuana find support in some remarkable disparities among the states. In 2007, the rate of marijuana arrests per capita varied by a factor of six, with the lowest in Hawaii (119 per 100,000 people), the highest in the District of Columbia (677 per 100,000), and a national mean of 290. The remaining states and their subjurisdictions varied erratically within this range. Still more remarkably, there is little discernable association between the per capita rates of marijuana arrests and the per capita rates of marijuana use, with some the highest arrest rates in states with the lowest use rates, and vice-versa. It would take some heroic assumptions about, or belief in, the deterrent effect of marijuana arrests to find cause and effect in the latter figures.

Indeed, the war on marijuana is a set of widely varied acts purely of state will across the nation. This war’s effects on the criminal justice system were mostly self-defining: there were more marijuana prosecutions which could mean more marijuana crimes were avoided. However, that notion sits uncomfortably with the inconvenient fact that independent measures suggest marijuana use did not change—while, oddly enough, if we use arrests or convictions as a measure of the actual crime rate, marijuana crime might appear to have gone up.

But the cynics would say that even this trivial self-defining effect is misleading because of the very serious secondary effects the war on marijuana has had in the very neighborhoods where the arrests occurred. Greater police intervention had the perverse effect of sending large numbers of young inner-city males into the criminal justice system, and possibly into a spiral of lifetime involvement, thereby exacerbating the size and racial skewing of our incarcerated population. Additionally, this war has harmed the neighborhoods they came from by removing a large part of a generation from potentially useful local life, thereby also inducing huge distrust of the police in the neighborhoods the police were supposedly protecting.

57. GETTMAN, supra note 33, at 3.
58. Id.
59. Id. at 3, 19. Of course, states also vary widely in terms of their marijuana legislation, with big differences in sentences, as well as many states that have partly decriminalized marijuana by exempting certain degrees of use from criminal prohibition. Id. at 2, 17. However, sorting out arrest rates according to legislative criminal definitions and sentencing schemes would be very difficult. Moreover, even that would probably not tell us very much since state policy is always a mixture of legislative, executive, and judicial decisions. In any event, partial-decriminalization states still exhibit very high rates of marijuana arrests. Id. at 22.
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A. Final Layer: A New York Story

The most dramatic story is in New York, and it is a tempting one because New York is the extreme version of both the key empirical phenomena under discussion. No jurisdiction pursued marijuana busts with such aggressiveness. And no city enjoyed so dramatic a decline in serious and violent crime.

Between 1990 and 2002, there was an 882 percent increase in the frequency of marijuana arrests in the five boroughs of New York City, and a 2,461 percent increase in marijuana possession arrests.60 As New York marijuana arrests increased from 5,116 to 50,000, the portion of those arrests represented by possession offenses went from 34.5 percent to ninety percent.61 The New York figures are the national figures but on steroids: highly anomalous increases in marijuana busts of which an increasing percentage are for simple possession, a disproportionate focus on young male minorities with little or no criminal record, wildly disparate rates of arrest among New York neighborhoods, and a disproportionate number of arrests in poor and minority-dense places.62

New York’s appetite for these cases seemed infinite. Other cities were impressed enough to seek to emulate New York, and their police departments ratcheted up the rate of marijuana arrests.63 But in some of those cities, the District Attorneys frequently resisted this new practice because of the case overload in their offices and in the courts.64 Not so in New York, where the marijuana arrests, though not receiving all that much publicity in their own right, were associated with a menu of law enforcement practices that lent great fame to the police leaders and Mayor Rudolph Giuliani.

But within the last decade, New York’s continuing efforts in this regard exemplified civil rights concerns about stop-and-frisk policies and political, constitutional, and moral concerns about racial disproportion.65

At the same time, New York City’s crime-rate drop has well exceeded even the amazing national drop. The “New York difference,” as Franklin Zimring calls

60. K ING & MAUER, supra note 8, at 2.
63. K ING & MAUER, supra note 8, at 17–18.
64. Id.
65. Id. at 14–16.
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it, represents something on the order of a one-third greater percentage decrease for serious and violent crime rates than seen in major cities across the nation.

So in terms of the hypotheses discussed above, New York could be viewed in two polar-opposite ways (with quite a continuum in between). New York’s mother-of-all-wars-on-marijuana could be viewed as a perfectly rational and wildly successful policy or as a component of a larger set of policies that enabled New York’s amazing crime drop. Or other factors may better explain the New York crime drop: the New York difference, even if incremental, could be viewed as a misguided and effectively (if not intentionally) racist policy that gratuitously fired up racial resentment to no productive social effect—all of this masked by New York’s self-congratulation over its leadership in the great American crime decline.

So for a closing assessment on the relevance of the New York experience to the marijuana story, I turn to two of our wisest scholars of criminal justice, William Stuntz and Franklin Zimring. One of Stuntz’s most profound inquiries into the hydraulic interactions of the moving parts of the criminal justice system was his 1998 essay, Race, Class, and Drugs. Here, Stuntz addressed the question of the racially disproportionate effects of the War on Drugs, finding the notion of negligent or perhaps reckless indifference to the effects of race-neutral polices more plausible (and in some ways more depressing) than any notion of deliberate racial bias by the police. Stuntz’s analysis is different from—and really orthogonal to—the constructive and cynical hypotheses. And his hypothesis focuses far more on the intentions behind or explanations for the policies that lead to the disproportion, rather than on any assessment of the claims about the success of the policies in lowering serious and violent crime.

In Stuntz’s view, law-enforcement authorities are rational cost–benefit analysts, and it is rational for them to target their resources at “downscale” crime scenes, where unsophisticated criminals may lack the resources to hide their conduct, as opposed to “upscale” crime scenes, where the opportunity for criminal self-protection is ample. Stuntz explains that wealthier people can afford to keep their drug use and transactions relatively invisible and immune to prosecution by engaging in their retail transactions under the cover of planned secrecy and often even in their homes. This secret retail approach makes the cost of doing business higher to the seller, because she cannot achieve cheap and quick high-volume sales, but the cost can be passed on to the upscale buyer. And then criminal procedure enters to interact with these economics and logistics. The

67. Id.
68. See William J. Stuntz, Race, Class, and Drugs, 98 COLUM. L. REV. 1795 (1998).
69. Id. at 1804–13.
Fourth Amendment places its highest premium on entries into and searches of homes, and so the police’s legal and logistical costs of pursuing upscale deals are high. It takes great investigative efforts (including wiretaps) to discover these deals and great legal resources (including search warrants) to thwart them.

All the opposite is true for the downscale market. Sellers cannot pass on the costs of retail secrecy to poor buyers. Since these buyers can only afford low prices, sellers must engage in high-volume sales, which are necessarily more open and public, and which are disproportionately associated with general patterns of crime beyond the marijuana transactions themselves. These transactions cannot occur under cover of strong Fourth Amendment protections. High-volume retailers are vulnerable to “consensual encounters” between police and suspects or to aggressive stop-and-frisk maneuvers that find a safe home in the contours of Terry doctrine.

New York is the ultimate example here, and the political and moral controversies over New York street stops perfectly mirror Stuntz’s analysis. To the extent this is true, repeal of marijuana laws will at least somewhat mitigate the racial disproportions in the War on Drugs, might somewhat mitigate the distrust of the state that the War on Drugs has sown in inner-city neighborhoods, and might perhaps move at least a little in the direction of long-term mitigation of mass and racially disproportionate incarceration.

Conversely, to the extent that the state is not waging the war on marijuana arbitrarily, but is significantly contributing to a reduction of serious crime, an increase in serious crime might be the counterbalancing factor to these improvements, both in fact and in the perception of fairness in the criminal justice system. That notion of course demands that we learn more about just how much low-level drug arrests contributed to the great American crime decline. The latest wisdom on that subject comes from Franklin Zimring’s dramatic new book, The City That Became Safe.71

In his earlier book, The Great American Crime Decline, Zimring reviewed the various theories on the crime drop, including changes in the size of the at-risk young-male population,72 the effect of the legalization of abortion on the later “supply” of male criminals,73 changes in the nature of drug use—especially the rise and then fall of the crack trade74—the incapacitation effect of the continued increase in the imprisonment rate after 1990 and, most pointedly here, the effect of new policing techniques.75 In that book, Zimring very cautiously suggested

70. Id. at 1813–15.
72. Id. at 56–62.
73. Id. at 85–103.
74. Id. at 81–85.
these theories might deserve partial credit, but he was quite skeptical of all of them.\footnote{76}{See id. at 197–202.}

In his new book, Zimring returns to the scene of the crime drop, because he is still haunted by New York’s exceptionalism as measured against the very impressive national drop.\footnote{77}{ZIMRING, THE GREAT AMERICAN CRIME DECLINE, supra note 53.} He re-reviews the theories, suggesting that New York did not stand out on most of the dimensions by which the drop has been explained: the demographics of the city hardly changed at all, and if anything New York actually reduced its prison population, at least in the latter half of the decline period.\footnote{78}{Id.}

So the focus had to turn to policing, and here Zimring finds it crucial to sort out the various components of the Giuliani-era policing techniques. He straightforwardly rejects one oft-cited component—changes in the density of police citywide.\footnote{79}{Id.} Though many credit some of the national drop to an increase in police personnel—thanks in turn to federal spending in 1994—the New York difference continued long after the increase in police manpower and well into a period of force reduction.\footnote{80}{Id.}

More controversially, Zimring disbelieves that the quality-of-life-crimes theory can explain very much. Or at least he does not think it can be rigorously tested, for a simple reason: he disbelieves that the much-touted broken windows approach was ever really tried, because two other crimes that should have been part of this environmental approach, gambling and prostitution, actually received diminished attention from law enforcement during most of those years.\footnote{81}{Id. at 13–14.}

Conversely, Zimring thinks a fair amount of credit is due to two related but different components of New York policing. One is the set of practices known by the term “hot spot” or “Compstat” policing.\footnote{82}{ZIMRING, THE GREAT AMERICAN CRIME DECLINE, supra note 53, at 150–51.} Rather than continuing to rely on traditional, widely dispersed, and routine patrols, the NYPD focused attention on places that computer analysis showed to be zones of egregiously high crime-density. “Compstat” was the name of this high-tech program, and it was notable not just for the targeting of the crime zones but also for the management theory that backed it up.\footnote{83}{Id.} A tradition of considerable delegation and deference to local precinct chiefs changed to a very top-down management structure that demanded strict and up-to-date accountability from the local assistant chiefs. The other set of practices was aimed directly at drug crimes, but with a crucial tweak: The target was not the wide range of small-scale public transactions, but so-called
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open-air drug markets, the high-volume sales venues that not only accounted for a great share of the drug trade but also had the most degrading effect on the neighborhood. 84

As Zimring implies, it is not easy to keep these components separate for analytic empirical purposes. Such hot-spot policing and open-air-market targeting overlap with each other to some degree and both overlap with quality-of-life approaches. More important for current purposes, all of these may intersect somewhat with one-on-one street stops, which may be a byproduct not only of a focus on hot spots and open-air markets, but also of broken widows policing; after all, even if the police were foolish or even hypocritical in laying off prostitution and gambling, they still might have focused on small-time marijuana cases as a way of using petty-crime intervention to improve neighborhood quality of life. 85

Zimring operates according to a very exacting burden of proof. He is not skeptical at all of the hot-spot and open-air-market explanations. But he wishes there had been or could be better and more-sustained experiments. 86 Moreover, he remains very skeptical on the street-stop side of things, which means that he both greatly credits Stuntz’s concerns about the fairness of the drug war’s stop-and-frisk tactics and is unconvinced that it has benefits in reducing serious and violent crime that justify the costs Stuntz describes.

To the extent Zimring is right, repeal of marijuana crime laws just might improve American criminal justice in a number of ways, however small and speculative, and, in terms of the most worrisome crimes against people or property, not hurt us very much at all.

III. CONCLUSION: ON CALIFORNIA

If the New York story is such an extreme case of the recent war on marijuana, it is also may not be a representative case to consider the likely systemic effects of marijuana crime repeal. If we turn back to California, it presents a very mixed and somewhat closer-to-average picture. California’s rate of marijuana arrests is much closer to the national average than New York’s—indeed, it is well below the national average. 87 On the other hand, in such a huge and diverse state, we unsurprisingly find wide variations in county, city, and state-wide arrest rates. A number of city and county rates suggest a racial

84. Id. at 82–84 (The high-volume sales venues of open air drug markets not only accounted for a great share of the drug trade but also had the most degrading effect on the neighborhood).
85. Id.
86. Id. at 196–208.
87. See United States Marijuana Arrests by State, DRUGSCIENCE.ORG (2007) http://www.drugsence.org/States/US/US_1a.htm (on file with the McGeorge Law Review) (reporting that in 2007, California had 200 arrests for possession and sales per population of 100,000, New York had approximately 480, and the national average was 290).
disproportion greater than what is observed in New York, even when looking at cities and counties where the per capita arrest rates are relatively low. At the same time, California is in great legal and political flux about legalizing marijuana in whole or in part. As noted above, the picture is even more mixed because of the unpredictable dynamics between the state’s actions and the federal government’s reactions thereto. All we can say for now is that marijuana prosecution is a complex machine that is part of a tremendously larger and more complex machine of criminal justice overall. The repeal of marijuana crimes will solve neither America’s nor California’s budget problems, nor will it solve the American mass-incarceration problem or play a great role in solving California’s prison overcrowding. But with those caveats, the effects of repeal on our criminal justice system—and indeed on the sheer degree of justice we have or perceive to have—may be very large, and are certainly . . . uncertain.