UC DAVIS LAW REVIEW

VOL. 50, NO. 2 DECEMBER 2016

KEYNOTE SPEECH

The Surprising Collapse of Marijuana Prohibition: What Now?

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I'd very much like to thank my hosts — The *UC Davis Law Review* — for inviting me to participate in this important conference. California has been the center of gravity on marijuana law reform during the last couple of decades and it appears that important things are continuing to happen here. My assignment is to put the current debate in historical context.

It's been more than forty-four years since the National Commission on Marihuana and Drug Abuse ("the Commission") recommended decriminalization of marijuana.[1] My perspective on the topic is informed not only by my research on the origins of marijuana prohibition,[2] and my role as Associate Director of the Commission, but also by having been a participant-observer in what remains an unresolved and challenging policy problem. Needless to say, I have a point of view. Time will tell whether my historical observations are accurate when judged by people with a little bit more detachment, but I will do my best to give you a reasonably objective account of the history interwoven with occasional digressions into first-person recollections and opinions.

I first started thinking about this topic during the late 1960s, when the demography of marijuana use changed markedly and the growing pressure to change public policy was tied up with the culture conflicts of the day. The social and cultural context is evident in my early work on the subject with my colleague Charles Whitebread, now deceased. We published a lengthy article on the legal history of marijuana prohibition in the *Virginia Law Review* in 1970,[3] and a book review in *Science*[4] on *Marijuana – The New Prohibition* by John Kaplan,[5] a law professor at Stanford (also now deceased). Upon re-reading my earlier

[1] NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 151 (1972) [hereinafter NAT'L COMM'N ON MARIHUANA & DRUG ABUSE].

[2] *See generally* RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES (1974), *republished as* THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES (Lindesmith Ctr. 1999) [hereinafter THE MARIJUANA CONVICTION]. Note the change in spelling. Even though "marihuana" was the "official" spelling and the one most faithful to the legal and political history of marijuana prohibition, historically deviant spellings do not turn up in Internet searches for "marijuana."

[3] Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970).

[4] Richard J. Bonnie & Charles H. Whitebread II, *Laws and Morals*, 172 SCIENCE 703 (1971) (reviewing JOHN KAPLAN, MARIJUANA - THE NEW PROHIBITION (1970)).

[5] JOHN KAPLAN, MARIJUANA - THE NEW PROHIBITION (1970); *see also* John Kaplan, *The Role of the Law in Drug Control*, 1971 Duke L.J. 1065 (1972).

work today, I am struck by how prominently it features John Stuart Mill's justly famous essay "On Liberty."[6] I have a deep attachment to that extraordinary and compelling essay, and an instinctive preference for supporting what Mill characterizes as the "very simple principle" that the sole justification for interfering with a person's liberty is to prevent harm to others, and that the person's own good, either spiritual or moral, is not sufficient warrant.[7] Since 1970, I've devoted much of my career to thinking about the legal and ethical constraints on measures taken to protect the public health, including a recent casebook — and Mill's anti-paternalism principle is prominently featured in the book.[8]

I mention Mill now because, over the decades since 1970, I have progressively retreated from the strength of my commitment to the anti-paternalism principle, giving it only "presumptive" weight, as a strong preference for liberty, rather than the categorical protection that Mill himself seems to have envisioned. That has been partly because my extensive policy experience in the public health world has convinced me that the health of the population often cannot be protected without "interfering" with liberty, such as through taxation and regulatory restrictions on access and promotion that Mill himself opposed. These views took hold when I served as Associate Director of the Commission and set the normative context for my remarks today.

This talk has two parts. The first looks backward, describing the history of marijuana prohibition, and the second looks forward, offering my views about what should be done now.

I. LOOKING BACKWARD

The origins and intensification of marijuana prohibition span roughly seventy-five years from the late Nineteenth Century until the Commission report in 1972. Marijuana prohibition began to erode after the Commission recommended decriminalization and eleven states liberalized their laws between 1973 and 1978.[9] However, in a sudden shift of political momentum, marijuana prohibition was

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[6] JOHN STUART MILL, ON LIBERTY (1860).

[7] *Id.* at 17.

[8] RICHARD J. BONNIE & RUTH GAARE BERNHEIM, PUBLIC HEALTH LAW, ETHICS, AND POLICY 258-66 (2015).

[9] Richard J. Bonnie, *The Meaning of "Decriminalization": A Review of the Law*, 10 CONTEMP. DRUG PROBS. 277, 278-83 (1981) [hereinafter *The Meaning of "Decriminalization"*]. *See generally* Richard J. Bonnie, *Decriminalizing the Marijuana User: A Drafter's Guide*, 11 U. MICH. J.L. REFORM 3 (1977) [hereinafter *Decriminalizing the Marijuana User*].

temporarily reconsolidated over the next two decades (from roughly 1978–1996). After the voters of California passed Proposition 215, support for liberalization revived, initiating a period of ferment as states resumed decriminalization and legalized medical access. Now, in the aftermath of the November 2012 referenda in Colorado and Washington legalizing recreational use, the collapse of marijuana prohibition may be at hand.

A. The Evolution of Marijuana Prohibition

As described in my book, national marijuana prohibition evolved as a gradual pattern of local suppression as its users entered the country across the Mexican border and from the Caribbean. I assume that this is a well-known story by now, epitomized by the claims that marijuana use causes crime and insanity ("reefer madness") and the racialized and nativist prohibitions that were enacted during the first third of the twentieth century. This period of local suppression and exaggeration led to federal enactment of the Marihuana Tax Act in 1937 and was followed by an escalation of penalties for the so-called "narcotic" drugs (including marijuana) in the 1950s, characterized by the new claim that marijuana use is a "steppingstone" to use of heroin.

Two things about the origins of marijuana prohibition merit emphasis. First, one of the reasons why the myths about marijuana were able to take root is that there was really no constituency to question them. So marijuana policy and its factual basis never really received systematic attention, in this country at least, until the LaGuardia Report in 1944,[10] and even that wasn't very extensive. The first intensive national review was the Commission's own study in the 1970s. The second point to note about this early history is that the federal role is often overstated in the standard popular account. It is frequently assumed that Harry Anslinger and the Federal Bureau of Narcotics were largely responsible for promoting the myths about marijuana and securing passage of the Marihuana Tax Act in 1937.[11] But our research indicated that the prohibitions really emerged locally and at the state level. Pretty much the whole country was already covered by state drug prohibitions before the Marihuana Tax Act was enacted.[12] (Taking note of how the states are leading the way toward ending prohibition, we can

[10] MAYOR'S COMM. ON MARIHUANA, THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK: SOCIOLOGICAL, MEDICAL, PSYCHOLOGICAL AND PHARMACOLOGICAL STUDIES (1944).

[11] Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970).

[12] *See* THE MARIJUANA CONVICTION, *supra* note 2, at 51-52, 354 (asserting that 33 states had prohibited use of marijuana for nonmedical purposes by 1933).

see that there's been an intriguing interaction between the federal policy and state and local policy right from the very beginning in the history of marijuana prohibition.) In sum, marijuana prohibition took root in the states and was then reaffirmed — duplicated really — with the Marihuana Tax Act in 1937 and was then re-codified in the Controlled Substances Act in 1970 and the companion state versions of the Uniform Controlled Substances Act.[13]

B. The Erosion of Marijuana Prohibition

The gradual unraveling of marijuana prohibition began in the late 60s, but the signal event was the release of the Commission report in 1972 recommending the decriminalization of possession of up to an ounce and other consumption-related offenses.[14] Decriminalization quickly became a mainstream position after the issuance of the Commission report, which attracted editorial support across the country, spanning the ideological spectrum. Many professional organizations, including the American Bar Association, the American Medical Association, the American Public Health Association, and the National Education Association, endorsed decriminalization. Between 1973 and 1977, eleven states decriminalized marijuana in response to the Commission report.[15] When *The Marijuana Conviction* was published in 1974, it summarized the Commission's report and offered a coda at the end observing that our story "ends in the middle of a sentence"[16] and predicted that the collapse of marijuana prohibition was inevitable.[17]

Obviously this prediction turned out to be premature. It was interrupted by a clearly misguided set of policy initiatives reconsolidating marijuana prohibition on a national scale. I locate the end of this period of liberalization and the beginning of reconsolidation in about 1978. This period lasted until 1996 when the people of California enacted the Compassionate Use Act in Proposition 215,[18] signaling that the pendulum finally had reached its end point and switched back the other way.

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[13] *See* Controlled Substances Act, Pub. L. No. 91-513, § 100, 84 Stat. 1236, 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).

[14] *See* NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *supra* note 1, at 153-55.

[15] *See* Bonnie, *The Meaning of "Decriminalization"*, *supra* note 9 at 277, 278-83. *See generally* Bonnie, *Decriminalizing the Marijuana User*, *supra* note 9 at 3.

[16] THE MARIJUANA CONVICTION, *supra* note 2, at 292.

[17] *See id.* at 299.

[18] 1996 Cal. Legis. Serv. Prop. 215 (West 1996) (codified as amended at CAL. HEALTH & SAFETY CODE §§ 11362.5 et seq. (2009)).

Support for liberalization revived with California's Proposition 215,[19] initiating a period of ferment and eventually leading to legalized medical access across the country and the decriminalization of recreational use. Today, I think it may be fair to say that marijuana prohibition *is* on the brink of collapse. The critical moment was in November of 2012, when the people of Colorado and Washington directed their legislatures to legalize and regulate recreational use. This came as a huge surprise to me. Although I expected a pattern of decriminalized recreational use and continued proliferation of regulated medical use to take hold after 1996, I had not expected legalized recreational use in the absence of a prolonged period of intensive policy analysis and debate that had been invited by the Commission in 1972.

C. The Shafer Commission Reports

Having briefly summarized the history of marijuana policy in the United States, I now want to pick up in a few parts of the story in greater depth. First, a little additional background on the Commission and its report is useful. The Commission was established in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[20] which also included the Controlled Substances Act.[21] The Commission's members were two senators, two members of the House, and nine people appointed by President Richard Nixon. The Commission was directed to spend the first year studying marijuana and the second year addressing drug policy in general. Although federal anti-narcotics policy began in the early 20th century, and the nation had endured recurrent epidemics, there had never been a full policy review of drug policy. The marijuana report, *Marihuana: A Signal of Misunderstanding* was issued in March 1972 and the second report, on drug policy in general, was issued in April of 1973.[22]

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[19] *See id.*

[20] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 601, 84 Stat. 1236, 1280 (1970) (codified as amended at 21 U.S.C. §§ 801-971) (creating the Commission on Marihuana and Drug Abuse).

[21] Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).

[22] NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, A SIGNAL OF MISUNDERSTANDING, *supra* note 1; NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE (1973).

1. The Marijuana Report

The marijuana report referred to ethical and constitutional constraints on drug policy and its enforcement, including John Stuart Mill, but at the end of the day, the Commission's recommendations rested on a hard-headed cost-benefit analysis, concluding that the costs of maintaining the current prohibition were justified by its public health benefits while the costs of criminalizing *users* exceeded the incremental benefits of doing so. In taking this approach, the Commission paid close attention to the history of alcohol prohibition. We recognized that prohibiting alcohol had been accompanied by some public health gains, but that the benefits had been far outweighed by the huge social costs that we paid as a society for alcohol prohibition. We also emphasized that simple possession of alcohol in the home was not a crime in the great majority of states during Prohibition.

We sorted the basic policy options into three categories. The first was keeping the present policy intact while reallocating enforcement resources and prevention/treatment resources. The middle option was to decriminalize consumption-related behavior, including simple possession for personal use, but to leave the prohibition on commercial distribution intact. The third option was to legalize distribution and adopt a regulatory approach.

It may come as a surprise, but the Commission did actually consider legalization as an option and devoted a chapter in the report's appendix to the history and effects of alcohol prohibition, and the design and effects of the different post-prohibition statutes enacted by the states. Once the Volstead Act had been repealed, the states were given the primary responsibility for creating legal frameworks to deal with alcohol, which resulted in many interesting policy innovations and diverse regulatory approaches in the laboratory of federalism. Over the ensuing decades, all states have gravitated toward a much more liberalized approach, a trend that has accelerated since the Commission's 1972 report.[23] But in the immediate aftermath of Prohibition being repealed there were significant variations in state responses and the Commission studied them carefully. Additionally, we looked at the tobacco laws to study regulatory alternatives and

[23] I grew up in Virginia, a so-called "dry state," but it's not a dry state anymore. For decades, there were no bars and alcohol could not be sold "by the drink," even in restaurants. We still have state-operated liquor outlets, but initially they had restricted hours, limitations on number and convenience of outlets, and did not accept credit cards because the idea was to try to contain consumption and not promote it. Now, alcohol is available practically 24/7, and of course the ABC stores take credit cards.

took note of the utter absence of public health regulation aside from the weak package warnings required by Congress in 1965 and 1969.

To sum up, the Commission recommended decriminalization essentially for cost-benefit reasons. Although we did look at a regulatory approach, we concluded that regulation was not a viable policy option at that time for two reasons: first, the Commission concluded that we didn't know enough about the effects of marijuana use, especially heavy long-term use; second, the Commission emphasized that we didn't know enough about how to successfully implement a regulatory model in a way that would adequately protect the public health. All we knew was that the two currently available models (alcohol and tobacco) were both huge failures from the public health standpoint. In short, the Commission reasoned that until we knew more about the health effects of marijuana use, especially heavy use, and until we knew more about how you successfully implement a regulatory approach to an addictive, intoxicating drug, the nation was well-advised to take a precautionary stance to marijuana policy.

2. The Drug Policy Report

The Commission issued its second report, on drug policy more generally, a year later. Although coverage of that report ranges far beyond my present topic, several points should be noted. First, the report takes what we now would call a public health approach to drug policy — an emphasis on demand reduction (particularly the prevention and treatment of addiction). Obviously, the report included important points on improving enforcement, but in terms of relative balance, the report erred in the direction of prevention and treatment and emphasized the need to institutionalize a public health approach. Indeed, a key focus was on initiating public health surveillance mechanisms to enable policy-makers to monitor patterns of drug use.

We have all become accustomed to the annual national surveys of prevalence of drug use among both adults and adolescents that highlight whether use of this or that drug has gone up or down during the past year. Surveillance is an essential component of informed drug policy. It is instructive to point out that there were no such surveys before 1972 and 1973 when the Commission conducted the first ones. Within two years, the national government had assumed responsibility for putting those surveillance mechanisms in place. In a broader sense, a lot of things that we take for granted now, in terms of public health orientation to drug policy, were taking root in the early 1970s, largely because the Nixon administration created the Special Action Office for

Drug Abuse Prevention (SAODAP) in the White House,[24] appointed two leading experts in addiction treatment, both psychiatrists,[25] to lead it, and issued the first national strategies for drug policy. The Commission's work was on the same track as the White House leadership. Everything that was being done in the national government during the Nixon Administration and then, eventually, also in the Ford Administration, was very much in the direction of the public health approach and marked an enlightened period of drug policy that was unfortunately erased in the 1980s.

Another important feature of the Commission's 1973 drug policy report was an emphasis on the need for more nuances in drug policy. We said it was a policy mistake to treat use of illegal drugs as a single undifferentiated "drug problem." We urged policy makers to focus on the particular patterns of use of particular drugs and especially on the relative harms. The appropriate policy for marijuana use depends on the epidemiology of marijuana use, which may have little connection with other outbreaks or endemic problems with, say, heroin and cocaine or methamphetamines. Diversion of prescription drugs is a different challenge, one of increasing concern in the current epidemic of opioid addiction and the increase in overdose deaths. The tendency to lump marijuana use together with use of all of the other illegal drugs didn't make any sense and we were trying to call attention to the need for a differentiated policy response, including targeted prevention messages as well as focused enforcement strategies.

As you can see, I believe that the Commission's overall approach was quite enlightened. However, when I review the report from a contemporary perspective, one point that stands out is that we did not place as much emphasis as you would surely find today on adolescent vulnerability. We emphasized the need to discourage adolescent experimentation and risk-taking, while acknowledging its inevitability and the need to protect teenagers from exposure to addictive drugs, including nicotine, alcohol and marijuana. However, we know a lot more about adolescent development and the adolescent brain than we did four decades ago. In fact, much of what we now know about the

[24] *See* G. Larry Mays, *The Special Action Office for Drug Abuse Prevention: Drug Control During the Nixon Administration*, 3 INT'L J. PUB. ADMIN. 355, 358-60 (1981). The Special Action Office for Drug Abuse Prevention (SAODAP) was the forerunner of the Office of National Drug Control Policy (ONDCP). *See* David E. Smith, *San Francisco Roots: The Evolution of Addiction Medicine*, CAL. SOC'Y ADDICTION MED. (June 2010), http://www.csam-asam.org/csam-history.

[25] *See* Mays, *supra* note 24, at 358, 367-68 (noting that Jerome Jaffe was Director of the SAODAP from 1971 until he resigned in 1973, allowing Robert DuPont to assume the position).

neuroscience of addiction is largely traceable to path-breaking research funded during the 1970s by the National Institute on Drug Abuse ("NIDA") and the National Institute of Alcoholism and Alcohol Abuse ("NIAAA").

D. After the Commission: Lessons Learned

After the Commission issued its final report in 1973, I returned to the law faculty at the University of Virginia. I took stock of what I had learned from my two-year experience studying national drug policy — as both a policy practitioner and an amateur historian. I realized that I had learned two lessons (and these two lessons have guided my activities over the past forty years). On the one hand, I concluded that our nation's policies toward the "illegal drugs" had over-relied on criminalization, harsh penalties, and intrusive enforcement. We were expecting the criminal justice system to do all the work — sending a strong message of disapproval, reducing supply, deterring use, and leveraging treatment — essentially displacing the educative and behavior-shaping role of other important institutions of social control, especially for young people. Even if drugs are going to continue to be prohibited, it doesn't follow that you make everything illegal or that you lock people up for anything and everything that violates the law. It is important to be parsimonious and to think carefully about the potential costs and benefits of each feature of the penal law and its administration. On the other hand, I also concluded that our public policies toward the "legal drugs" (alcohol and tobacco) had under-relied on the potential public health benefits of legal regulation and that we needed to use the law more effectively to reduce harms associated with alcohol and tobacco consumption.

I have had the opportunity to pursue both of these agendas over the past forty years. Recounting a bit of my personal experience may be instructive in tracing the basic narrative line of this lecture — the unraveling of marijuana prohibition and the challenge of regulatory design after its now-inevitable collapse. After the Commission reports were issued, my initial policy activities were devoted single-mindedly to decriminalization of marijuana use. However, when the pendulum of drug policy swung back in the direction of a "drug war" in the 1980s, I shifted my attention to tobacco policy in a still-continuing effort to tighten up regulatory controls to protect the public health without making the drug illegal. I have also supported a public health approach toward alcohol, especially regarding underage drinking, but progress has been difficult to achieve.

E. Decriminalization Erased by Zero Tolerance

In the wake of the Commission's reports, I testified in a number of states in support of decriminalization between 1973 and 1977, and worked with the National Governor's Association to facilitate reform.[26] I had the opportunity to participate in writing a Ford Administration White Paper on drug policy in 1975 that specifically endorsed decriminalization and reflected the general perspective on drug policy that I have just described to you.[27] After Jimmy Carter assumed the presidency, he personally endorsed decriminalization. There still was little opposition to it at that point.

But progress came to a sudden halt at the end of the '70s. I was serving on the National Advisory Council on Drug Abuse, which was created in 1975. Among the stakeholders who appeared before us were representatives from new grassroots parent organizations who were very concerned about what appeared to be an increasing use of marijuana and other drugs among adolescents — a worrisome trend that they attributed to decriminalization. I want to make two points about this important development. First, I want to call your attention to the pivotal role played by the national surveys conducted by the Commission itself in 1972 and 1973 and by the surveys subsequently conducted by the National Institute of Drug Abuse ("NIDA") in 1977. Before these surveillance mechanisms were initiated, we would have had insufficient data to ascertain whether or not adolescent use had increased. Now we had annual data, and it looked like adolescent use had gone up, a genuine occasion for concern, and it was of heightened concern because the age of first use was dropping, so teens were beginning to use at lower and lower ages.[28] I was worried to see this. However, my second point is that the parents' assertion that this increase was attributable to decriminalization was unsupported and probably erroneous. Although the national survey indicated that teen use has increased among the nation's youth overall, there is no indication that use increased any more in decriminalized states than in neighboring states that had not changed their laws. What the surveys actually show is that patterns of experimentation and drug use rise

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[26] *See* NAT'L GOVERNORS' CONF. CTR. FOR POLICY RES. & ANALYSIS, MARIJUANA: A STUDY OF STATE POLICIES & PENALTIES, pt. 1, at xiii, pt. 2, at 53-98 (1977).

[27] *See* DOMESTIC COUNCIL DRUG ABUSE TASK FORCE, WHITE PAPER ON DRUG ABUSE 24-28 (1975).

[28] *See* Richard J. Bonnie, *Discouraging the Use of Alcohol, Tobacco and Other Drugs: The Effects of Legal Controls and Restrictions*, 2 ADVANCES IN SUBSTANCE ABUSE 145, 179 (1981); NAT'L INST. ON DRUG ABUSE, MARIJUANA RESEARCH FINDINGS: 1976 4-5 (Robert C. Peterson, Ph.D., ed., 1977).

and fall as the nation's youth culture changes and as attitudes and beliefs change, but ameliorating criminal penalties against using marijuana was not the operative factor.

It is instructive to ask why the parent groups blamed it on decriminalization. The essence of their claim pertained to the "declarative" effects of decriminalization on attitudes and beliefs. They argued that repealing criminal sanctions signaled approval of use and sent a message that marijuana use is not harmful. In the eyes of the parent groups there was no difference between legalization of marijuana (and allowing it to be lawfully sold) and decriminalization (under which sale remains illegal and the drug is still contraband and subject to seizure) because both reforms can be interpreted to send the same message — that "since it's not a crime to use the drug, it's OK."

As you can see, the parents' claims that decriminalization signaled approval of marijuana use was fundamentally incompatible with the Commission's effort to reduce a nation's overreliance on criminalization to achieve moral education and to discourage drug use by adolescents. The parents' perspective was that you have to make it illegal and enforce the law in order to send the message that "this is something that we don't want you to do." The Commission's argument was that parents, religious institutions, and health educators need to craft understandable messages of prevention that can be successfully communicated to young people, rather than just hiding behind the law. Sometimes prohibiting conduct and punishing young people for engaging in it is not the proper instrument for shaping social norms and even if it might have a salutary effect in depressing consumption, the costs of criminalizing young people are excessive in relation to those public health benefits.

Unfortunately, the parents' insistence on criminalization prevailed and marijuana law reform came to a halt. This perspective was later embraced by Nancy Reagan under the rubric of "just say no," and by school policies and workplace policies that supported routine drug testing, which expressed "zero tolerance" for any illegal drug use, including marijuana use. Eventually, an excessive and costly "drug war" was initiated during the Reagan period and intensified during the George H.W. Bush presidency.

Why did this happen? There are two reasons in my opinion. One, as I've already indicated, is the widespread and legitimate concern about adolescent drug use. Unfortunately, "zero tolerance" was a gross and costly overreaction, and made the very same mistake that the Commission had warned against in its first report. The second factor that led to the repressive drug war was the crack epidemic, and a

related increase in crime, and particularly gun crime, beginning in the mid-1980s and lasting into the early 1990s.[29] These worries were coupled with simultaneous concerns about the newly emergent HIV epidemic, and its interaction with intravenous drug use. All of these factors propelled the "War on Drugs" — waged by both the Bush and Clinton administrations — characterized by severe mandatory penalties. Drug policy entered a very dark and regressive period, for which we continue to pay a very heavy price.

F. Strengthening Regulation of Tobacco and Alcohol

Once zero tolerance took hold and the costly drug war began, I had nothing to contribute to drug policy. However, it was possible during this period to support more sensible regulatory policies toward alcohol and tobacco, and these developments contribute directly to the unfolding narrative about marijuana policy. During the 1970s and the 1980s, the nation's public health establishment, centered in the Department of Health, Education and Welfare, advanced a new focus on prevention of heart disease, cancer and other chronic diseases.[30] As we now recognize, behavior (and lifestyle) play a huge role in the development and successful management of these conditions. This perspective led to a major public health initiative on health promotion and disease prevention as a key component of nurturing a healthy, productive population and reducing health care costs. Although important tensions persist about the limits of the "nanny state," and the ethical constraints on public health to which I alluded earlier, the legitimacy of lifestyle modification as a public health policy, which took root during the 1970s, is now taken largely for granted.

When I served on the National Advisory Council on Drug Abuse from 1975 to 1980, one of the first things we did was to put nicotine on the agenda for NIDA research. HEW[31] also initiated a process of formulating "healthy people objectives" during the 1970s. The very first set of these public health goals included specific behavioral objectives regarding use of alcohol, illegal drugs, and tobacco drafted by a task force that I chaired. This was also when the National Institute on Alcoholism and Alcohol Abuse began to focus on the

[29] NAT'L RESEARCH COUNCIL, INFORMING AMERICA'S POLICY ON ILLEGAL DRUGS: WHAT WE DON'T KNOW KEEPS HURTING US 52 (2001).

[30] *See* Richard J. Bonnie, *Discouraging Unhealthy Personal Choices: Reflections on New Directions in Substance Abuse Policy*, 8 J. DRUG ISSUES 199, 207 (1978).

[31] The Department of Health, Education, and Welfare ("HEW") was renamed the Department of Health and Human Services ("HHS") in 1979.

potentially useful role of the law in preventing alcohol problems, including underage drinking. These activities gave me an opportunity to become more deeply involved in tobacco and alcohol control.

A few years later, I chaired a study for the Institute of Medicine ("IOM") focusing on the initiation of tobacco use among kids and highlighting the critical importance of preventing adolescents from starting to smoke.[32] If you can keep young people from starting to smoke when they are kids, then the chances they will start smoking at a later time are substantially reduced. Nearly ninety percent of adult smokers started to smoke (and were probably addicted) before they turned nineteen,[33] and nobody starts after age twenty-six. So if we can focus on that population, we can make a significant impact in reducing tobacco-related mortality and morbidity. It's not the only thing you can do, but it's important. That report, issued in 1994, also emphasized the importance of changing the legal structure of tobacco regulation and limiting advertising to black-and-white text only.[34] In short, it pointed the way toward a more aggressive regulatory approach to tobacco control — using the law to discourage tobacco consumption without enacting prohibition. A decade later, I chaired another IOM study on reducing underage drinking.[35] The whole idea of these two reports was to explore the regulatory space between what had become a laissez-faire approach to the legal drugs and a costly prohibition of illegal drugs. We were forgetting what had been learned in the wake of alcohol prohibition.

G. The Collapse of Marijuana Prohibition?

Now, with this bit of personal history in mind, I want to go back to the marijuana story. As the millennium approached, the drug war receded and the momentum for marijuana reform reemerged. What has happened and why?

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[32] INST. OF MED., GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS v-vii (Barbara Lynch & Richard J. Bonnie eds., 1994) [hereinafter GROWING UP TOBACCO FREE].

[33] *Id.* at 5-6; *see also* INST. OF MED., PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS S-2 (Richard J. Bonnie et al. eds., 2015).

[34] *See* INST. OF MED., GROWING UP TOBACCO FREE, *supra* note 32, at 132, 241.

[35] NAT'L RESEARCH COUNCIL & INST. OF MED., REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY, at xv-xvi (Richard J. Bonnie & Mary Ellen O'Connell eds., 2004).

1. What Happened?

In retrospect, I think there can be little doubt that the states' legalization of access to marijuana for medical use, starting with California's Compassionate Use Act in 1996, has played a critically important role in the impending collapse of the prohibition against recreational use. However, this was not an inevitable progression and could have been avoided, even if compassionate use is allowed. An important IOM report in 1999[36] acknowledged the scientific basis and legitimacy of allowing a lawful channel of access to smoked marijuana for compassionate use while not compromising or deviating from the rigorous process of approving drugs for ordinary medical use based on proof of safety and effectiveness. Basically, the IOM concluded, based on a strong body of anecdotal experience, that some regulatory leeway should be allowed for compassionate use until the ordinary processes of innovation, research and approval had yielded a non-combustible method of delivering cannabis for approved medical indications. That report obviously bolstered the political momentum for allowing medical use. But it is important to emphasize that the IOM did not support or applaud Proposition 215.

Medical use and recreational use present two different policy problems that are logically and empirically separable. We can certainly imagine adopting appropriate avenues for compassionate use that are tightly controlled, that don't spill over into recreational use, that don't divert the drug into those channels. It can be done. Unfortunately, California and Colorado chose to do it the other way, allowing retail licensees to provide regulated access for medical use based simply on a physician's recommendation. This loose arrangement proved to be a Trojan horse for legalization of recreational use.

If federal policymakers had been sensible, they would have facilitated lawful access for compassionate use in a tightly controlled system. However, the Bush Administration made a legally unsuccessful effort to subvert the states' defiance of federal law and the Obama Administration declared that it would not attempt to interfere if the states enforced their own laws and avoided spillover into neighboring states. By not doing anything, the federal government was complicit in the unraveling of marijuana prohibition. I think the history shows that legalization for medical use created political, social, and economic conditions that were conducive to legalization for recreational use. I

[36] *See* INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 13-15 (Janet E. Joy et al. eds., 1999) (summarizing and analyzing the medical uses of marijuana).

fault both the Clinton and Bush administrations and Congress for what happened. They should have worked together to create a lawful channel of access for compassionate use while disallowing the open spigot. By the time Obama was in the White House, there was no putting the genie back in the bottle.

The second important policy development was that support finally revived for decriminalization of recreational use. I'm still flabbergasted that it took forty years after decriminalization became a mainstream reform in the 1970s. The Commission said the costs were too high in 1970 when there were 200,000 arrests for marijuana possession. Beginning in 1991, the number escalated to 500,000 in 1995, and 750,000 in 2010.[37] So the failure to decriminalize marijuana use has been a costly public policy.

Now, legislatures finally are doing what they should have done 40 years ago. When that started to happen, I assumed that the nation was resuming the policy path that we expected to unfold after the Commission issued its report in the 1972. I expected that enactment of decriminalization would reopen a serious legalization debate, focused on the hard questions about regulatory design. But I expected this to take a while – if you had asked me in, say, 2010, I would have said it would take perhaps a decade. And then suddenly, in a way that I had not anticipated, Colorado and Washington changed the political landscape entirely, and of course, as we can see, the rest is history.

2. Why Did It Happen?

So why did that happen? The sudden turn to liberalization can be attributed to a gradual shift of public opinion over time. This is partially a function of demography, as Baby Boomers who grew up in the 1960s and 70s exert a growing political influence and as Millennials reach adulthood. I would also emphasize what I would characterize as a libertarian ascendancy, which I see as an important part of modern cultural history. Gay rights and guns rights are illustrative of this trend, although they attract different constituencies. Another factor is a widespread public reaction to excesses in criminal justice policy in general and the heavy costs of the drug war in particular, and the

[37] *See Crime, Arrests, and US Law Enforcement*, DRUG WAR FACTS, http://www.drugwarfacts.org/cms/Crime#Total (last visited Oct. 20, 2016) (compiling arrest information from the FBI's annual Uniform Crime Reports from the years 1980-2014, and estimating total number of arrests for marijuana possession by year); *Crime in the United States*, FED. BUREAU INVESTIGATION: UNIFORM CRIME REP., https://ucr.fbi.gov/ucr-publications (last visited September 25, 2016).

associated fiscal pressures on states and local governments. I also think America's understanding of federalism is being recalibrated, with a devolution of power to the states in many areas.

II. WHAT NOW?

Where do we go from here? I would start by referring you back to what the Commission said in 1972 and to its reasons for not recommending legalization at that time. The first reason the Commission gave for rejecting legalization in 1972 was a worry that prevalence and intensity of consumption would increase substantially together with the public health costs. The Commission was unable to quantify those costs because of continuing uncertainty about the long-term consequences of heavy use, particularly of the more potent preparations. As you will surely note, we are still uncertain about these things today. Uncertainty about prevalence, risk, and social harm was a perfectly sensible reason for taking a precautionary stance in 1972, and it remains so in 2016.

Second, as I said earlier, the Commission also emphasized that we also don't know enough about regulatory models to permit use of an addictive and intoxicating drug for non-medical purposes while protecting the public health. If you're going to regulate this drug effectively in a way that protects the public health, the Commission said, we have to learn more about alternative regulatory models since the only available models — those being used for tobacco and alcohol — are failures from a public health point of view.

Thus the Commission was uncertain about risk and harm, especially for young users, as well as about our ability to contain those risks and costs through regulation. These worries were magnified by the likely declarative effects of a sudden transition to legalization. At that juncture in history, the Commission observed, legalization would imply that marijuana use was harmless, would signify approval of use, and would encourage it, especially among adolescents — no matter how tight the regulatory design.[38] Of course, at some point, it might be possible to frame the message conveyed by legalization so that it is not equated with approval. Within the Commission's framework, it might be possible to say (as we did with alcohol in 1933) something along

[38] By way of reminder, the Commission argued that decriminalization does *not* send a message of approval and would not *encourage* use. The drug remains illegal to sell, and the clear message to young people is that "we don't want people like you to use it, but we don't think that punishing you is the right way to discourage you from doing so."

the following lines: "It is time to repeal prohibition since the costs of enforcing it have become too high, and we think we can protect the public health more successfully through careful and controlled regulation than through a highly porous and under-enforced prohibition." I think that we could have that conversation now, but you could not have had it in 1972.

A. The Need for Caution

Today, there remain reasons to be worried about the public health consequences of substantially increasing the prevalence of marijuana use, particularly when research has highlighted the developmental vulnerabilities of adolescents and young adults and when increasing numbers of users are using more potent preparations over longer periods of time. And there's also reason to worry about what appears to be an increasing prevalence of daily use among people who are regular users of marijuana, especially in Colorado, as well as marijuana-related emergency department visits and hospitalizations.[39] While caution is indicated, legalizing states are ignoring the lessons of history by creating a commercial market with vested interests in promoting increased consumption and aggressive advertising that inevitably encourages youthful use. This is the wrong path. A cautious approach would gradually open the regulatory spigot while carefully monitoring the consequences of doing so. Proper public health surveillance mechanisms must be in place from the beginning so that the effects of different regulatory choices can be measured. States would be well-advised to think about alternatives to a commercialized marijuana market while they still have that opportunity. The RAND report prepared for Vermont insightfully reviews the full range of regulatory models and it merits careful consideration by any state contemplating repeal of prohibition.[40] In short, if we are going to legalize, it needs to be done in a way that protects the public health.

[39] JACK K. REED, COLO. DEP'T OF PUB. SAFETY, MARIJUANA LEGALIZATION IN COLORADO: EARLY FINDINGS (2016); John Ingold, *Marijuana Use Increases in Colorado, According to New Federal Survey*, DENVER POST (Dec. 26, 2014), http://www.denverpost.com/2014/12/26/marijuana-use-increases-in-colorado-according-to-new-federal-survey/. *But see* SARRA L. HEDDEN ET AL., CTR. FOR BEHAVIORAL HEALTH STATISTICS & QUALITY, BEHAVIORAL HEALTH TRENDS IN THE UNITED STATES: RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH 4-5 (HHS Pub. No. SMA 15-4927, Series H-50, 2015), http://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf.

[40] JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 101-14 (2015).

The right starting point is not the alcohol model. It is a *non-commercialized "containment" model*.[41]

B. The Federal Role

If states are to experiment with different models of regulation, Congress must change federal law. The history of marijuana policy since 1996 reflects a befuddling abdication of responsibility by Congress. They have had two decades to address the problem. Congress should reschedule marijuana in its own schedule under the Controlled Substances Act and set minimum conditions for states to meet if they choose to set up regulatory regimes for medical and/or recreational use. Federal oversight is needed in both the Department of Justice and in the Department of Health and Human Services, most likely in the CDC. Unfortunately, given longstanding paralysis in Congress, the only available solution at the moment is executive action through enforcement guidance, but the DOJ has not been sufficiently aggressive.[42] At a minimum, the federal government should prescribe uniform measures for monitoring the effects of policy innovations. If we are going to be left with state-by-state experimentation in the shadow of federal law, the most apt historical analogue is post-Repeal alcohol regulation. States should be encouraged to develop and implement better public health models with federal scientific support and oversight.

C. Goals of Regulation

What should be the goals of contemporary marijuana regulation? Two questions are paramount. First, what is the underlying aim of the regulatory policy with regard to marijuana consumption at the individual level and at the population level? Is our goal to promote responsible use of marijuana by adults, while deterring and minimizing excessive or dangerous use (and its social consequences), as appears to be the aim of our nation's current alcohol policy? Or is our goal to reduce or contain the prevalence of marijuana use, as

[41] Although there are important differences between marijuana and tobacco, the emerging model of tobacco control may offer a useful lesson for regulation of marijuana. *See generally* INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION (Richard J. Bonnie et al. eds., 2007) (setting forth a two-pronged strategy to substantially reduce smoking, so that it is no longer a significant public health problem).

[42] *See* GOV'T ACCOUNTABILITY OFFICE, STATE MARIJUANA LEGALIZATION: DOJ SHOULD DOCUMENT ITS APPROACH TO MONITORING THE EFFECTS OF LEGALIZATION 38-39 (2015).

appears to be the nation's current goal for tobacco policy? Or is it something in between? Second, should advertising and promotion of marijuana products be permitted?

These two questions are related. If the legislature's objective in repealing prohibition is to set up a regulatory policy that allows recreational use (or medical use for that matter) while seeking to contain it, then it would be illogical to permit private sellers to promote and encourage consumption. In my opinion, once commercialization is permitted, the public health costs will be difficult to contain. As already indicated, I believe that Washington and Colorado are making a huge mistake by starting with a private commercial model for cultivation and distribution.

In my opinion, legislatures legalizing recreational use of marijuana should declare explicitly that the ultimate regulatory objective is to protect the public health, not to facilitate commerce in cannabis products (or to serve the economic interests of suppliers and retailers). Legalization should be designed to *accommodate* liberty, not to *celebrate* it. The policy aim should not be to promote or facilitate marijuana use (or even "responsible use"), but rather to manage lawful commerce in marijuana in a way that protects the public health.