
Marijuana Legalization and Pretextual Stops

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INTRODUCTION

Ever since California legalized medical marijuana in 1996,¹ judges, lawmakers, and researchers have been contending with a wide range of difficult legal problems.² Today, with medical marijuana legal in

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¹ CAL. HEALTH & SAFETY CODE § 11362.5 (2016).

² See, e.g., *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489 (2001) (holding medical marijuana distributors could not rely on the medical necessity defense); *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002) (holding that revoking a physician's license to prescribe controlled substances based on the physician's professional recommendation of marijuana would violate the First Amendment); Nicole Dogwill, *The Burning Question: How Will the United States Deal with the Medical-Marijuana Debate*, 1998 DET. C.L. MICH. ST. U. L. REV. 247, 275

more than half of all states³ and legalized for all adult use in at least seven more,⁴ the list of marijuana-related legal and policy challenges only continues to expand. Not long ago, marijuana policy was almost exclusively the domain of criminal law and public health specialists; now it touches on nearly every area of the law. The federal ban on marijuana means that state-legal businesses face unique challenges on a host of issues, from trademarks⁵ to taxes.⁶ The state-federal conflict also continues to raise tricky constitutional problems. Although the Supreme Court has held that the commerce power allows the federal government to criminalize state-legal marijuana possession and cultivation,⁷ it has not yet addressed whether federal prohibition might preempt state marijuana reforms.⁸

(discussing some of the legal questions raised by California's medical marijuana law).

³ See AMS. FOR SAFE ACCESS, MEDICAL MARIJUANA ACCESS IN THE UNITED STATES: A PATIENT-FOCUSED ANALYSIS OF THE PATCHWORK OF STATE LAWS 4 (2016) ("Since 1996, forty states and the District of Columbia have passed laws that grant their residents the right to possess, cultivate, and/or obtain cannabis (marijuana) or cannabis-based products under the care of their physician."). There is some disagreement about which state laws are robust enough to truly qualify as a medical marijuana legalization law. *Id.* at 9. Specifically, a number of state laws "only allow the possession of certain cannabis oil extracts rich in cannabidiol (CBD), one of the many active compounds in medical cannabis." *Id.* at 9. Some do not "count those states that have adopted CBD-only laws as medical cannabis states because the protections offered extend only to a small set of patients using a certain type of medicine that may or may not be available at some point in the future." *Id.*

⁴ Colorado and Washington passed legalization laws in 2012, with Oregon and Alaska following suit in 2014. COLO. CONST. art. XVIII, § 16; ALASKA STAT. § 17.38.060 (2015) (codifying Ballot Measure No. 2); Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, 78th Leg. Assemb., Reg. Sess. (Or. 2015) (codified as amended in scattered chapters of Or. Rev. Stat.); Initiative Measure No. 502 — Marijuana — Legalization and Regulation, 63d Leg., Reg. Sess. (Wash. 2013) (codified as amended in scattered chapters of Wash. Rev. Code §§ 69, 46). Washington, D.C. has legalized the possession and personal cultivation, but not the commercial distribution, of marijuana. Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014, 62 D.C. Reg. 880 (Feb. 26, 2015) (codified as amended at D.C. CODE § 48-904.01 (2016)). California, Massachusetts and Nevada all passed ballot measures in November legalizing recreational marijuana; another in Maine passed by a narrow margin and is subject to a recount. *State Marijuana Laws in 2016 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Nov. 29, 2016).

⁵ Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217 (2016).

⁶ See Benjamin M. Leff, *Tax Benefits of Government-Owned Marijuana Stores*, 50 UC DAVIS L. REV. 659, 661 (2016).

⁷ *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

⁸ For a concise discussion of the arguments for and against federal preemption of state marijuana reform, see Brianne Gorod, *Marijuana Legalization and Horizontal*

Even as business and federalism-based marijuana law issues have multiplied, marijuana policy remains primarily a criminal justice concern for now. In 2014, there were 620,000 arrests for marijuana possession alone⁹ — well off the high-water mark of approximately 775,000 arrests in 2007,¹⁰ but still a little under half of all drug possession arrests nationwide.¹¹ One of the main arguments in favor of marijuana legalization, of course, is that arresting so many marijuana offenders is a poor use of law enforcement resources.¹² Not surprisingly, in the states that have legalized marijuana, marijuana arrests have plummeted.¹³ The immediate impact of this is clear: criminal justice resources previously devoted to catching and processing marijuana offenders can be put to different uses. But is it possible that removing marijuana from the criminal justice system will also affect policing *tactics*?

The impact of the drug war on Fourth Amendment doctrine has been well documented.¹⁴ The war on drugs led to the proliferation of

Federalism, 50 UC DAVIS L. REV. 595, 601-05 (2016).

⁹ This number is calculated by taking the percent of marijuana drug arrests from the FBI main page from the total number of drug arrests found in Table 29 on the crime statistics page of the FBI website. See *2014 Crime in the United States*, FBI (2014), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-29> (multiplying the percentage of marijuana possession arrests and the total number of drug arrests to calculate total number of marijuana possession arrests in 2014).

¹⁰ See *2007 Crime in the United States*, FBI (2007), <https://ucr.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2007> (multiplying the percentage of marijuana possession arrests and the total number of drug arrests to calculate total number of marijuana possession arrests in 2007); see also Nick Wing, *Police Arrested Someone for Weed Possession Every 51 Seconds in 2014*, HUFFINGTON POST (Sep. 28, 2015), http://www.huffingtonpost.com/entry/marijuana-arrests-2014_us_560978a7e4b0768126fe6506 (noting that marijuana possession arrests reached an all-time high in 2007 with 775,137 arrests).

¹¹ See *2014 Crime in the United States*, *supra* note 9.

¹² Michael Vitiello, *Legalizing Marijuana: California's Pot of Gold?*, 2009 WIS. L. REV. 1349, 1366 (observing that marijuana legalization proponents often “focus on prison savings and better allocation of law-enforcement resources”).

¹³ E.g., DRUG POLICY ALL., STATUS REPORT: MARIJUANA LEGALIZATION IN WASHINGTON AFTER 1 YEAR OF RETAIL SALES AND 2.5 YEARS OF LEGAL POSSESSION 1 (2015), https://www.drugpolicy.org/sites/default/files/Drug_Policy_Alliance_Status_Report_Marijuana_Legalization_in_Washington_July2015.pdf; Christopher Ingraham, *After Legalization, Colorado Pot Arrests Plunge*, WASH. POST WONKBLOG (Mar. 26, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/26/after-legalization-colorado-pot-arrests-plunge/>.

¹⁴ E.g., Paul Finkelman, *The Second Casualty of the War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1410-30 (1993) (arguing “the war on drugs has led to new interpretations of the Fourth Amendment and the rules for search and seizure”); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 758-68 (2002)

drug-sniffing dogs¹⁵ and the rise of “pretextual stops,” in which the police stop someone ostensibly to issue a traffic ticket but with the ulterior motive of fishing for drugs.¹⁶ Some courts and commentators have even questioned whether there is an unspoken “drug exception” to the Fourth Amendment.¹⁷ This paper asks how marijuana legalization might influence search and seizure doctrine and practice. If the drug war gave rise to a new era of invasive policing, is it possible that marijuana legalization will have the opposite effect? Specifically, could legalization take away some of the legal tools and policing incentives that fuel pretextual stops? To date, the relationship between state marijuana legalization and the Fourth Amendment has received little attention in comparison to issues like federalism or taxes. A few commentators have considered the impact of legalization on a particular search and seizure doctrine, such as the application of dog sniff jurisprudence in medical marijuana states.¹⁸ But scholars have almost completely overlooked the question of how marijuana legalization might impact day-to-day policing practice.¹⁹

(discussing the impact of the drug war on the Fourth Amendment); Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment*, 48 U. PITT. L. REV. 14 (1986) (arguing that “courts throughout the United States . . . have been turning their backs on fundamental constitutional principles, particularly fourth amendment principles, in order to aid the war against illicit drugs”).

¹⁵ Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 BUFF. L. REV. 81, 135-37 (2013) (providing a history of the use of drug detector dogs).

¹⁶ E.g., David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 249 (1994) (describing the use of pretextual stops in drug policing).

¹⁷ E.g., Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889, 891, 910-11, 926 (1987).

¹⁸ E.g., Jared Willis, *Place Doesn’t Apply to My Place; the California Home Is Sui Generis Because Medical Marijuana Is Not Contraband and Indiscriminate Residential Dog Sniffs Invade a Patient’s Legitimate Expectation of Privacy*, 39 W. ST. U. L. REV. 187, 199 (2012).

¹⁹ There has been some recent, and very insightful, work on the impact of decriminalization laws on both policing and the criminal justice system. But these articles have not analyzed the potential impact of marijuana legalization laws on policing practice in any detail. See, e.g., Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism’s Limits*, 24 CORNELL J.L. & PUB. POL’Y 319, 351 (2014) (analyzing the impact of marijuana decriminalization laws on policing and pretextual stops and concluding that “[i]t could be that nothing short of legalization is required for a true wind down to take place”); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) [hereinafter *Misdemeanor*] (analyzing the impact of “misdemeanor decriminalization” laws, including marijuana decriminalization laws, throughout the criminal justice system); Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 682-83 (2015) (analyzing the impact of traffic offense decriminalization on policing

This essay begins to fill this gap by examining the how marijuana legalization laws might impact pretextual stops. Section I provides an overview of how drug prohibition in general, and marijuana prohibition in particular, incentivizes pretextual stops. This section also discusses why racial disparities are so prevalent in pretextual police stops. Section II considers the relationship between state-level marijuana reform and the legal and practical incentives that help to drive pretextual stops.

I. HOW PROHIBITION INCENTIVIZES PRETEXTUAL STOPS
AND PROFILING

A. *The Drug War and Pretextual Stops*

One of the defining features of the war on drugs has been the use of especially intrusive investigative tactics.²⁰ During the 1980s, political enthusiasm for the drug war led police departments across the country to make drug enforcement a top priority.²¹ But traditional investigative methods are not especially effective for policing consensual transactions and personal possession. This is in contrast to most other offenses. A rape or robbery investigation begins when the victim reports the crime to the police.²² Other than occasional efforts to encourage crime victims to come forward,²³ police departments do not generally need to devise investigative methods for ferreting out *whether* a rape, homicide, or robbery has occurred. A police officer's

and evaluating “the extent of the problems that emerge from the gap between decriminalization and police authority”). As I argue below, marijuana legalization laws are much more likely than decriminalization laws to reduce the use of pretextual stops because of their potential impact on both Fourth Amendment doctrine and policing incentives.

²⁰ Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11, 26 (“Because drug use takes place in private and drug users and sellers conspire to keep their activities away from the prying eyes of the police, law enforcement surveillance [techniques] must be extremely intrusive to be effective.”).

²¹ E.g., Alex Kreit, *Drug Truce*, 77 OHIO ST. L.J. (forthcoming 2016) [hereinafter *Drug Truce*] (discussing how political support for the drug war led the federal government to adopt programs to encourage state and local police departments to focus on drug enforcement).

²² Barnett, *supra* note 20, at 23-26 (comparing a typical robbery investigation, which begins with a complaining witness, to drug investigations, which do not typically have a complaining witness).

²³ See, e.g., Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1194 (2002) (describing governmental efforts to encourage victims to report domestic violence crimes).

task when it comes to offenses that have a direct victim is to try to catch the perpetrator when a crime is reported. By contrast, the police cannot rely on a complaining witness to report a consensual drug transaction that occurs in private.²⁴ As a result, as one text for law enforcement officers on drug enforcement techniques explains, “[f]requently . . . drug enforcement agents must *initiate their own cases* with few initial leads.”²⁵

This dynamic requires the police to rely more heavily on unusually intrusive investigative methods — from wiretaps²⁶ to informants²⁷ — in order to detect drug crimes.²⁸ While wiretaps and informants are helpful tools for investigating drug sellers, to catch drug users or couriers, patrol officers often employ controversial search and surveillance techniques that can “stretch the outer boundaries” of what the Fourth Amendment allows.²⁹ The crime of drug possession is usually confined to the perpetrator’s pants pocket, glove compartment, or bedside table. Asking the police to uncover this sort of conduct — as the drug war demands — has helped to make pretextual stops and overaggressive stop and frisk policies a recurring part of modern policing.³⁰

In a pretextual stop, the “police use traffic violation stops as a way to gain consent, plain view, or other justification for a search or

²⁴ Luna, *supra* note 14, at 768-69 (“[D]rug violations will typically lack an injured party or complaining witness, someone who can set a criminal investigation in motion and provide relevant information that furthers the police inquiry.”).

²⁵ MICHAEL D. LYMAN, *PRACTICAL DRUG ENFORCEMENT* 2 (3d ed. 2007) (emphasis added).

²⁶ The Administrative Office of the United States Courts reports that, in 2010, 84 percent of the 2,675 domestic wiretap applications that year cited illegal drugs as the most serious offense under investigation. JAMES C. DUFF, *REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE, ORAL OR ELECTRONIC COMMUNICATIONS* 8 (2011).

²⁷ LYMAN, *supra* note 25, at 88 (“The informant is most typically used in cases in which there is no complainant, such as drug trafficking cases.”); *see also* Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 *CARDOZO L. REV.* 965, 992 (2008) (discussing the use of informants in drug investigations).

²⁸ *See, e.g.*, Barnett, *supra* note 20, at 26 (discussing why drug policing requires invasive investigative tactics).

²⁹ *Id.* at 28.

³⁰ Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 *MICH. L. REV.* 651, 671 (2002) (“Starting in the early 1980s, police departments around the country have been systematically using their virtually unrestricted power to stop cars as a tool to hunt for illegal drugs.”).

seizure.”³¹ In the context of most other crimes, this would be a strange investigative tactic. It is very unlikely that a police officer would pull someone over at random for speeding and ask for his consent to search in the hope of finding a murder weapon. Indeed, it is almost absurd to imagine a police officer doing this; why would she waste her time on this kind of fishing expedition? But, of course, this is an everyday feature of drug enforcement.³²

To understand why, consider the dynamics of policing drug possession. The police know that a not-insignificant percentage of citizens are walking the streets and driving the highways while in possession of drugs. In fact, drug possession is common enough that a completely random suspicionless search might well turn up drugs.³³ In order to stop a person solely for the purpose of a drug investigation, however, an officer needs a “‘particularized and objective basis’ for suspecting” that the person has drugs — a “mere ‘hunch’ is insufficient . . .”³⁴ This makes policing drug possession and transportation quite challenging. Because drug possession is hidden and rarely reported to the police,³⁵ it is very difficult for a police officer to develop reasonable suspicion or probable cause that a particular person is in possession of drugs in advance of stopping them.

Without an easy way to reliably distinguish the cars that contain drugs from the cars that do not, pretextual stops can seem effective relative to the other, quite limited, investigative options.³⁶ If an officer

³¹ Rudovsky, *supra* note 16, at 249.

³² Wayne R. LaFare, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1844 (2004) (“[A]s anyone not on a trip to Mars over the past decade or so is surely aware, the renewed interest of the police in traffic enforcement is attributable to a federally sponsored initiative related to the ‘war on drugs.’”).

³³ *City of Indianapolis v. Edmond*, 531 U.S. 32, 35, 47-48 (2000) (reporting that a roadside checkpoint at which cars were subjected to a drug sniffing dog at random resulted in a 4.74% (55 of 1161) drug-related arrest rate and holding that the program was unconstitutional).

³⁴ *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002) (citations omitted).

³⁵ Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 858 (2001) (“[I]tems possessed come in all shapes and sizes (especially drugs) and can be hidden in the smallest cavity, bodily or not.”).

³⁶ See Gross & Barnes, *supra* note 30, at 660 (“There is a clear explanation for this practice: racial profiling seems to increase the probability of finding large hauls of drugs.”). While racially motivated pretextual stops yield contraband often enough for the practice to have become widespread, a number of studies have shown that “stops and searches of whites are more successful at yielding evidence of criminal activity than stops of blacks . . .” L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037-38 (2011). Racial profiling explains this

spots a driver who she has a hunch might be carrying drugs, pretextual stops provide an avenue for investigation. Instead of having to try and develop reasonable suspicion that there are drugs in the car in advance of pulling it over, the officer can stop the car for a traffic violation with the ulterior motive of questioning the driver about drugs. As a result, relying on a gut feeling or a drug courier profile to check for drugs under the guise of a minor traffic violation — an incredibly inefficient method for investigating almost any other crime — became an encouraged drug war tactic in the 1980s and 1990s.³⁷ The Drug Enforcement Administration (“DEA”) went so far as to develop a training program that teaches state and local law enforcement how to use pretextual stops to interdict drugs.³⁸ In the DEA’s training program — Operation Pipeline — state and local “[o]fficers learn how to lengthen a routine traffic stop and leverage it into a search for drugs by extorting consent or manufacturing probable cause.”³⁹ Law enforcement enthusiasm for pretextual stops is such that the International Association of Chiefs of Police has created an annual award for it: the “Looking Beyond the License Plate award . . . [is] awarded to officers who have gone beyond the ‘routine’ traffic stop, resulting in the apprehension of dangerous criminals.”⁴⁰

In addition to resulting in drug arrests, pretextual stops can also put money into police coffers through asset forfeiture. In 1984, the same year the DEA established Operation Pipeline,⁴¹ Congress revised federal asset forfeiture laws to “allow[] the direct transfer of seized assets from drug dealers to the law enforcement agencies that seized the assets”⁴² Asset forfeiture gives law enforcement a profit

disconnect. Investigations based on reasonable suspicion or probable cause are naturally more likely to pan out than those based on a hunch. And, with blacks disproportionately subjected to pretextual stops and searches, it is likely that a larger percentage of stops and searches of blacks are done without reasonable suspicion or probable cause than stops and searches of whites.

³⁷ See Rudovsky, *supra* note 16, at 249 (“Highway officers are encouraged to stop cars on alleged traffic or motor vehicle offenses to establish the requisite cause to search for drugs.”).

³⁸ See Gross & Barnes, *supra* note 30, at 671.

³⁹ Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 761 (2007). For an overview of Operation Pipeline and its acceptance in court, see generally *id.* at 761-69.

⁴⁰ Daniel R. Sekely, *The Routine Traffic Stop: How Officers Have Used License Plate Violations to Solve Crimes*, POLICE CHIEF (Aug. 2015), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=3820&issue_id=82015.

⁴¹ Bascuas, *supra* note 39, at 761.

⁴² Sandra Guerra, *Reconciling Asset Forfeitures and Drug Offense Sentencing*, 78 MINN. L. REV. 805, 825 (1994). The most immediate impact of this revision was to encourage state

incentive to police drug crimes more heavily than they would otherwise.⁴³ This profit incentive has also been a key contributor to the use of pretextual stops.⁴⁴ A 2013 *New Yorker* investigation, for example, described how the small town of Tenaha, Texas (population 1,170) “amassed . . . \$1.3 million in seized profits” within six months of implementing a highway drug interdiction program that “made heavy use of ‘pretextual stops,’ focusing on out-of-state . . . cars.”⁴⁵ The case of Tenaha is far from an outlier. A 2014 *Washington Post* investigation found that “[h]undreds of state and local departments and drug task forces appear to rely on seized cash” and that, since September 11, 2001, there have been “61,998 cash seizures made on highways and elsewhere . . . without search warrants or indictments” through the federal equitable sharing program⁴⁶ alone.⁴⁷ The *Post* report also described how, behind the rise in forfeitures, “is a little-

and local law enforcement agencies to participate in multi-jurisdictional task forces with the DEA. *Id.* at 824-25. In states with stricter asset forfeiture laws, however, state and local police can use so-called adoptive forfeitures to take advantage of the federal forfeiture law’s provisions. See DICK M. CARPENTER II ET. AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 25-26 (2d ed. 2015), <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> (discussing adoptive forfeiture). In 2015, then-Attorney General Eric Holder issued an order limiting the use of adoptive forfeitures, although its long-term impact remains to be seen. ERIC H. HOLDER, ATTORNEY GEN., U.S. DEP’T OF JUSTICE, *PROHIBITION ON CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES* (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf.

⁴³ See Katherine Baiker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007) (“When police are really allowed to keep the assets they seize, they increase anti-drug policing.”); Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 301-03 (2000) (estimating that laws that let the police keep seized assets are likely to increase drug arrest rates by 18%).

⁴⁴ E.g., Bascuas, *supra* note 39, at 762 (describing how some small towns located near highways have profited by using pretextual stops to look for drugs and seize assets); Carol M. Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49, 49-50 (1994) (discussing the use of pretextual stops to seize assets in Florida).

⁴⁵ Sarah Stillman, *Taken*, NEW YORKER, Aug. 12, 2013, at 48; see also Mary Murphy, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. ON C.L. & C.R. 77, 78-79 (2010) (describing the use of pretextual stops and asset forfeiture in Tenaha).

⁴⁶ This number does not include forfeitures done entirely under state law. For an overview of the federal equitable sharing program, see, for example, U.S. DEP’T OF JUSTICE, *GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES* (2009), <https://www.justice.gov/sites/default/files/usao-ri/legacy/2012/03/26/esguidelines.pdf>.

⁴⁷ Michael Sallah, Robert O’Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sl/investigative/2014/09/06/stop-and-seize/>.

known cottage industry of private-police training firms that teach the techniques of ‘highway interdiction’ to departments across the country.”⁴⁸

Pretextual stops are also perfectly legal. In the 1996 case *Whren v. United States*, two plainclothes police officers on patrol in an unmarked car in Washington, D.C. became suspicious “when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right.”⁴⁹ Although the officers did not have reasonable suspicion that the “youthful occupants” were in possession of drugs, they decided to pull the Pathfinder over after it “turned suddenly to its right, without signaling, and sped off at an ‘unreasonable’ speed.”⁵⁰ During the stop, the officers spotted illegal drugs inside of the truck.⁵¹ The United States Supreme Court held that the officer’s pretextual stop did not violate the Fourth Amendment.⁵² The Court reasoned that the police had sufficient cause to stop the truck for a traffic infraction.⁵³ And while the stop may have been conducted with the ulterior motive of investigating for drugs, the Court held that an officer’s “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”⁵⁴

B. *Marijuana Prohibition and Pretextual Stops*

Invasive policing practices like pretextual stops are widespread in drug enforcement generally. But they are especially closely linked to marijuana enforcement.⁵⁵

First, marijuana is by far the most widely used drug. In 2013, 19.8 million Americans (7.5 percent of people over the age of twelve) were current marijuana users, defined by the government as people who used marijuana sometime within the past month.⁵⁶ Of these, 8.1

⁴⁸ *Id.*

⁴⁹ *Whren v. United States*, 517 U.S. 806, 808 (1996).

⁵⁰ *Id.*

⁵¹ *Id.* at 809.

⁵² *Id.* at 819.

⁵³ *Id.*

⁵⁴ *Id.* at 813.

⁵⁵ For an insightful treatment of how marijuana criminalization may have impacted the development of Fourth Amendment doctrine, see Susan F. Mandiberg, *Marijuana Prohibition and the Shrinking Fourth Amendment*, 43 MCGEORGE L. REV. 23 (2012).

⁵⁶ U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 1 (2014),

million were daily or near-daily marijuana users.⁵⁷ By comparison, there were only 1.5 million current cocaine users and 681,000 past-year heroin users in 2013.⁵⁸ This means that there are more than five times as many near-daily marijuana users as there are past-month cocaine users.

This fact is significant to pretextual stops because searching motorists and pedestrians on a hunch only makes sense for the police if there is a realistic chance it will turn up contraband. Central to the appeal of pretextual stops in the service of drug enforcement is that they result in enough arrests and forfeitures for police departments to consider the practice worthwhile. This is why the idea of conducting a pretextual stop in the hopes of finding a murder weapon seems so absurd. The odds of discovering a murder weapon in the absence of at least some articulable individualized suspicion are too low to justify spending time conducting pretextual stops.

Because marijuana is so widely used, its criminalization helps to make pretextual stops worthwhile by significantly increasing the chances that a stop will result in an arrest or a forfeiture. A little less than half of all drug arrests in the United States are for marijuana.⁵⁹ Indeed, some researchers argue that, beginning in the 1990s, the war on drugs largely became a war on marijuana, with marijuana possession responsible for 78.7% of the 450,000 additional drug arrests made between 1990 and 2002.⁶⁰ Not surprisingly, data suggests marijuana is also the most likely drug that officers will discover during a pretextual stop. A study of five years of data⁶¹ on Maryland State Police stops on the I-95 corridor, for example, reported that 28.4% of all searches yielded marijuana.⁶² The next closest drug was cocaine, which officers discovered in only 7.4% of all I-95 corridor searches.⁶³ With respect to asset forfeiture, the mere *scent* of marijuana may even be enough to justify a seizure, even if officers do not find contraband.⁶⁴

<http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See 2014 *Crime in the United States*, FBI (2014), <https://ucr.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/main>.

⁶⁰ Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, 3:6 HARM REDUCTION J. 3 (2006).

⁶¹ Gross & Barnes, *supra* note 30, at 658.

⁶² *Id.* at 668 tbl.7.

⁶³ *Id.*

⁶⁴ E.g., Stillman, *supra* note 45 (reporting on a case in which the Tenaha police

Second, marijuana's distinct odor gives unscrupulous officers an easy way to justify a search during a pretextual stop — namely, falsely claiming to smell the odor of marijuana.⁶⁵ It is surprisingly common to see cases involving an officer who conducted a search after “smelling marijuana” only to find a weapon or a drug other than marijuana, but no actual marijuana.⁶⁶ While there is no way to know how often this occurs, anecdotal reports suggest this happens regularly.⁶⁷ As the Tenth Circuit once observed, there are only a few possible “rational explanations” for the “incongruous facts” in these cases: (1) marijuana that had previously been in the car left a lingering odor that the officer smelled; (2) the officer “thought he smelled marijuana but was mistaken”; or (3) the officer “fabricated his testimony that he detected the smell of marijuana.”⁶⁸ Whatever the explanation in any particular case, the ability to search a car based on the odor of marijuana further increases the likelihood that a pretextual stop will turn up contraband by giving the police an easy way to manufacture the legal justification to conduct a search. If a driver who has been stopped refuses to

seized \$3,900 in cash from a driver who had been stopped for “driving too close to the white line” based on the “odor of burnt marijuana,” although no contraband was found”).

⁶⁵ Cf. Gross & Barnes, *supra* note 30, at 673 (reporting in a study of Maryland car searches that “[t]ypical bases for probable cause . . . include: drugs in plain view; the odor of burnt marijuana; and occasionally a ‘K-9 alert’ by a police dog trained to detect illegal drugs”).

⁶⁶ See, e.g., *United States v. Snyder*, 793 F.3d 1241, 1242-45 (10th Cir. 2015) (officer found a firearm and no marijuana in a search based on “the smell of burnt marijuana”); *United States v. Reed*, 882 F.2d 147, 149 (5th Cir. 1989) (finding that, in a search prompted by Agent detecting “the distinct odor of burnt marihuana,” that “[i]t is not controlling that the substance eventually discovered in the vehicle was cocaine, and that no marihuana was ever found”); *United States v. Ushery*, 526 F. Supp. 2d 497, 504 (M.D. Pa. 2007) (search based on the odor of marijuana uncovered crack cocaine and no marijuana); *United States v. Nelson*, Criminal Action No. 06-240, 2006 WL 2711743, at *1 (E.D. Pa. Sept. 19, 2006) (trooper “smelled marijuana” but found crack cocaine in the trunk and no marijuana); *United States v. Pittman*, No. 97-40015-01-RDR, 1997 WL 375734, at *1 (D. Kan. June 9, 1997) (“In spite of the fact that no marijuana was discovered, the court believes Officer Youse’s testimony that he smelled a strong odor of marijuana when he stopped defendant’s car . . .”); *K.K. v. Indiana*, 40 N.E.3d 488, 495 (Ind. Ct. App. 2015) (police smelled the burnt odor of marijuana but car search uncovered a handgun and no marijuana).

⁶⁷ Cf. Mandiberg, *supra* note 55, at 41-42 (“People evidently often smoke marijuana while driving, or have it in the car, or use it shortly before driving, and thus many cases involve police detecting the odor after stopping a vehicle for other reasons.”).

⁶⁸ See, e.g., *United States v. Nielsen*, 9 F.3d 1487, 1489 (10th Cir. 1993).

consent to a search, the police can develop the probable cause they need to look inside simply by claiming to smell marijuana.⁶⁹

Third, police officers can use marijuana discovery itself as a pretext for hunting for other, more serious contraband. New York City's focus on marijuana enforcement during the 1990s provides perhaps the clearest example of this. Beginning in 1991, misdemeanor marijuana arrests in New York City skyrocketed.⁷⁰ Misdemeanor marijuana arrests went from 774 in 1991 to nearly 18,000 in 1997 to more than 50,000 by the year 2000.⁷¹ As a comparison point, during that same time, prostitution arrests fell from 10,451 to 8,822.⁷² Why the sudden interest in marijuana enforcement? The NYPD's focus on marijuana appears to have been largely aimed at finding other non-marijuana contraband, namely illegally possessed weapons.⁷³ Jeffrey Bellin has succinctly explained the logistics of using marijuana arrests as a pretext for finding other contraband: The police "begin by accosting a pedestrian with the goal of conducting a search. If during the encounter, the officer learns that the person was smoking marijuana (or committing some other crime), the officer can make an arrest and conduct a lawful search for weapons incident to that arrest."⁷⁴ Amanda Geller and Jeffrey Fagan found empirical support for this explanation of the NYPD's decision to focus so heavily on marijuana enforcement.⁷⁵ In an analysis of data from 2.2 million stops and arrests between 2004 and 2008, Geller and Fagan found that "[m]arijuana enforcement activity is most active in precincts where overall enforcement is most focused on weapons detection, but with little connection to crime or disorder conditions in those places."⁷⁶ They

⁶⁹ See Mandiberg, *supra* note 55, at 42-43 ("[T]he smell of marijuana on clothing or in a room might provide probable cause for a more extensive search than originally contemplated. The searches leading to these arrests — and thus the arrests themselves — would not occur if marijuana were legal.").

⁷⁰ Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1511 (2014).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1512 ("The mindset of the NYPD does not appear to have been maintaining order or, given the low rate of misdemeanor convictions, cracking down on marijuana; but rather the NYPD more broadly, like the SCU, believed it was 'hunting armed men.'").

⁷⁴ *Id.* at 1513.

⁷⁵ Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 591 (2010).

⁷⁶ *Id.* at 614.

concluded that the “pattern raises unsettling concerns that officers use marijuana enforcement as a pretext for searching for weapons.”⁷⁷

In sum, marijuana prohibition helps to fuel pretextual stops through a combination of its effect on policing incentives and legal doctrine. Criminalizing such a widely used and possessed item makes pretextual stops more worthwhile for the police. With marijuana illegal, the odds of making an arrest or seizing assets are much higher than they would be otherwise. Marijuana prohibition also gives the police legal authority to conduct more searches than they could otherwise. Because it is against the law to possess marijuana, its scent gives the police probable cause to search a car during a stop. Similarly, police officers can use an arrest for marijuana — a higher volume and more easily detected crime because the drug is so widely used and its odor is so distinctive — to fish for evidence of more serious offenses by searching marijuana arrestees.

C. Racial Disparities and Pretextual Stops

If pretextual stops were nothing more than an effective law enforcement tool, there might be little reason to want their use curtailed. Though constitutional, critics argue that the practice of pretextual stops gives the police nearly limitless power to pull drivers over for investigative purposes.⁷⁸ This is because, given the wide range of traffic regulations, “no driver can avoid violating some traffic law during a short drive, even with the most careful attention.”⁷⁹ The result is the potential for widespread infringement on civil liberties.⁸⁰ Even more troubling is the relationship between pretextual stops and racial disparities.

⁷⁷ *Id.*

⁷⁸ Diana Roberto Donahoe, “Could Have,” “Would Have:” *What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1199 (1997) (“[T]he intrusive nature of the stop is heightened in *Whren* because of the very real possibility of unfettered police discretion used to single out minorities.”); e.g., Lewis R. Katz, “Lonesome Road”: *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1413 (2013) (arguing *Whren* and other cases have given the police “virtually unchecked discretion about which cars to stop for the myriad of traffic offenses contained in state statutes and municipal ordinances”); Margaret M. Lawton, *The Road to Whren and Beyond: Does the “Would Have” Test Work?*, 57 DEPAUL L. REV. 917, 917 (“Most scholarly criticism of *Whren* has claimed that it allows unfettered police discretion.”).

⁷⁹ David A. Harris, “*Driving While Black*” and All Other Traffic Offenses: *The Supreme Court and Pretextual Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997) (emphasis omitted).

⁸⁰ See e.g., Bascuas, *supra* note 39, at 761-63.

Race has been closely linked to drug prohibition in the United States going back to the very first anti-opium laws, some of which were passed with the stated purpose of discriminating against Chinese immigrants.⁸¹ Though overt racism has mostly vanished from drug laws, a sharp racial disparity in drug enforcement persists. Blacks and whites use drugs at about the same rate.⁸² But blacks are significantly more likely to be arrested for drugs than whites, with blacks accounting for 12.6% of the population⁸³ and 30.4% of drug arrestees.⁸⁴ Drug enforcement disparities result from a number of systemic causes, “including demographics, the extent of community complaints, police allocation of resources, racial profiling, and the relative ease of making drug arrests.”⁸⁵ While the practice of pretextual stops is unrelated to most of these causes, it goes hand-in-hand with racial profiling.⁸⁶

When an officer has reasonable suspicion to stop a car, then the car stop is not pretextual. The purpose of requiring reasonable suspicion or probable cause for a seizure or a search is to prevent against arbitrary enforcement by ensuring intrusions on privacy are based on evidence.⁸⁷ A pretextual stop, of course, is one where an officer who lacks reasonable suspicion of criminal activity uses a minor traffic

⁸¹ See, e.g., *Ex parte Yung Jon*, 28 F. 308, 312 (D. Or. 1886) (observing that an opium den ban may have been enacted “more from a desire to vex and annoy the ‘Heathen Chinese’ . . . than to protect the people from the evil habit”).

⁸² See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 261-67 (2009) (reviewing drug use data by race and observing that “blacks account for 13% of the total who have ever used an illicit drug”).

⁸³ KAREN R. HUMES, NICHOLAS A. JONES, & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

⁸⁴ *Crime in the United States 2013*, FBI tbl.43 (2014), <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/persons-arrested>; see also AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 17-20 (2013), <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf> (reporting on racial disparities in marijuana enforcement); Fellner, *supra* note 82, at 272-73 (reviewing drug arrest rates by race from 1980 to 2007).

⁸⁵ Fellner, *supra* note 82, at 270 (2009); see also Alex Kreit, *Drug Truce*, *supra* note 21 (arguing that because drug enforcement disparities are caused by forces like differences in enforcement from one jurisdiction to another, they are especially difficult to combat).

⁸⁶ See, e.g., Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1047-48 (2010).

⁸⁷ *Samson v. California*, 547 U.S. 843, 866 (2006) (Stevens, J., dissenting) (“The requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment.”).

violation as a pretext for conducting a stop and fishing for drugs or other contraband. By definition then, when making pretextual stops, officers rely on little more than intuition⁸⁸ or a DEA-created profile⁸⁹ to decide which cars to pull over and investigate.⁹⁰ All too often, driver ethnicity consciously or unconsciously factors into an officer's hunch or a drug offender profile.⁹¹

Beginning in the 1990s, a series of studies found that the police were more likely to pull over people of color than whites.⁹² On the New Jersey Turnpike, for example, data showed that 35% of drivers stopped for alleged traffic violations between 1988 and 1991 were black even though "only 15% of observed traffic violators were black . . ."⁹³ The disparities have persisted.⁹⁴ In 2015, the *New York Times* looked at data from seven states with the most robust requirements for collecting and reporting data from traffic stops. The *Times* reported that in all seven states, "the data show police officers are more likely to pull over black drivers than white ones, given their share of the local driving-age population."⁹⁵ The data also reveal that the disparities persist in the treatment of drivers who have been stopped. "In the four states that track the results of consent searches," the *Times* reported, "officers were more likely to conduct them when the driver was black . . ."⁹⁶ One especially striking study of traffic stops in Kansas City separated stops for minor violations done for purposes of investigation from stops for more significant traffic violations, where the purpose of the stop was to enforce the traffic laws. The results showed "that investigatory stops are the site of pervasive racially

⁸⁸ E.g., Gary Webb, *Driving While Black: Tracking Unspoken Law-Enforcement Racism*, *ESQUIRE*, Apr. 1, 1999, at 118, 122-23 (reporting on officer intuition in deciding who to stop and describing one officer as being of the "belie[f] he can spot drug traffickers from the general cut of their jib").

⁸⁹ See Rudovsky, *supra* note 16, at 243-46 (describing drug courier profiles).

⁹⁰ This is because if an officer has reasonable suspicion to stop a car, then the car stop is not pretextual. When making a pretextual stop, an officer who lacks reasonable suspicion of criminal activity uses a minor traffic violation as a pretext for conducting a stop and fishing for drugs or other contraband.

⁹¹ See Harris, *supra* note 79, at 560-69.

⁹² Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, 79 *LAW & CONTEMP. PROBS.* 199, 208 (2016) (summarizing the 1990s studies).

⁹³ Sean Hecker, *Race and Pretextual Stops: An Expanded Role for Civilian Review Board*, 28 *COLUM. HUM. RTS. L. REV.* 551, 564-65 (1997).

⁹⁴ See Selmi, *supra* note 92, at 208-10 (describing recent studies that revealed disparities in traffic enforcement).

⁹⁵ Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, *N.Y. TIMES*, Oct. 24, 2015, at A1.

⁹⁶ *Id.*

biased policing, whereas traffic-safety stops generally involve unbiased policing.⁹⁷ Specifically, the study found blacks were twice as likely as whites to be subjected to a pretextual traffic stop done for purposes of investigation.⁹⁸ In the case of traffic safety stops, by contrast, there was no racial disparity in who was stopped.⁹⁹

It is very difficult to combat the problem of racial disparities in pretextual stops in court. Under the Supreme Court's decision in *Whren*, of course, an officer's subjective intent in making a stop is irrelevant to the Fourth Amendment analysis. This includes cases in which race may have played a role in the officer's decision to stop a suspect.¹⁰⁰ Although the Equal Protection Clause forbids purposeful racial profiling,¹⁰¹ it provides no protection against profiling animated by unconscious bias.¹⁰² And, even on the rare occasion where an officer has intentionally engaged in racial profiling and is willing to admit to it, the remedy for a violation in any individual case is "toothless."¹⁰³ As a result, racial disparity in pretextual stops continues to be widespread, despite widespread concern about the problem.

II. THE POTENTIAL IMPACT OF MARIJUANA LEGALIZATION ON PRETEXTUAL STOPS

Drug enforcement in general and marijuana enforcement in particular have been key factors in the rise of racially disproportionate pretextual stops.¹⁰⁴ To what extent might marijuana legalization lead police departments and officers to dial back their use of this tactic? This section argues that marijuana legalization will reduce some of the incentives to engage in pretextual stops. Whether this translates into a significant reduction in the use of pretextual stops is more difficult to

⁹⁷ CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 110 (2014).

⁹⁸ *Id.* at 64-65.

⁹⁹ *Id.*

¹⁰⁰ *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

¹⁰¹ *See id.*

¹⁰² Brando Simeo Starkey, *A Failure of the Fourth Amendment & Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131, 136-40 (2012) (arguing that because an Equal Protection violation requires proof of discriminatory intent it has not proved to be effective at combating disparate impacts in the use of stop and frisk policing).

¹⁰³ *See Johnson*, *supra* note 86, at 1063-64, 1066.

¹⁰⁴ *See supra* Parts I.A, I.B.

predict, however. Even if pretextual stops would not have become as prevalent as they are today in the absence of marijuana prohibition, it may be that they are so ingrained in modern policing that legalization will do little to reduce their use. Similarly, even though marijuana legalization will undoubtedly reduce the percent of pretextual stops that result in an arrest or an asset forfeiture, it is possible that the odds of discovering contraband during a stop will still be high enough that this will not translate into a reduction in pretextual stops. On the other hand, it may be that marijuana legalization decreases the value of pretextual stops to the police enough to result in a noticeable — perhaps even substantial — decrease in their use, particularly over time.

Before taking up marijuana legalization laws, this section considers the relationship between pretextual stops and two more well-established alternatives to marijuana prohibition: medical marijuana and marijuana decriminalization laws. As discussed more below, in a few states, medical marijuana and marijuana decriminalization laws have impacted police power to search or arrest. For the most part, however, medical marijuana and decriminalization laws have not significantly impacted the legal authority and practical incentives that contribute to pretextual stops. Understanding why this is highlights why marijuana legalization is more likely to affect policing practices than more modest marijuana law reforms.

To evaluate the impact of different types of marijuana reforms on pretextual stops, it is helpful to first briefly revisit a few basic principles of Fourth Amendment doctrine. Individualized suspicion is, of course, at the heart of the Fourth Amendment.¹⁰⁵ Aside from a few specific exceptions — drunk driving checkpoints, for example¹⁰⁶ — the police need individualized suspicion of wrongdoing to conduct any search or seizure.¹⁰⁷ To stop and investigate someone on the street or in a car, the police need reasonable suspicion that criminal activity is afoot.¹⁰⁸ In order to get a search warrant, the police need probable cause to believe they will find contraband or evidence of crime.¹⁰⁹

¹⁰⁵ See Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 810-11 (2011) (observing that “individualized suspicion . . . lies at the heart of Fourth Amendment jurisprudence” but arguing that this position “should be abandoned”).

¹⁰⁶ See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

¹⁰⁷ *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”).

¹⁰⁸ See *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

¹⁰⁹ U.S. CONST. amend. IV (“[N]o Warrants shall issue but upon probable cause.”).

As discussed above,¹¹⁰ the police can effectively sidestep the reasonable suspicion requirement for investigative stops by engaging in a pretextual stop. So long as the police have sufficient evidence of a traffic violation to issue a ticket, they can pull a car over with the ulterior motive of hunting for drugs.¹¹¹ But the power to pull a car over is not the same as the power to search it. Often, the police are able to search a car by getting the driver to consent.¹¹² Without the driver's consent to a search, however, the police will need to develop probable cause to search a car.¹¹³ As discussed above, one way for an officer to generate probable cause to search a car is by smelling (or claiming to smell) marijuana.¹¹⁴ Another common investigative tactic when a suspect refuses to consent to a search during a pretextual stop is the use of drug-sniffing dogs. If a driver does not grant consent to a search of her vehicle, the police can circle a drug-sniffing dog around the car while the citation is being issued.¹¹⁵ If the dog "alerts," this will give the police probable cause to look inside the car.¹¹⁶ Of course, if the police search a car either with consent or probable cause, they will only be able to make an arrest if they find something that gives them probable cause to think a crime has been committed.¹¹⁷

Under a prohibition regime, there is rarely anything exceptional about applying these basic Fourth Amendment principles to marijuana investigations.¹¹⁸ If the police pull a car over and become suspicious

¹¹⁰ See *supra* Part I.A.

¹¹¹ See *Whren v. United States*, 517 U.S. 806, 812-13 (1996).

¹¹² For a discussion of consent and pretextual stops, see Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug War Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 2 (2001).

¹¹³ Gross & Barnes, *supra* note 30, at 672 ("If a trooper decides to search a car she has stopped, she needs one of two possible legal justifications: consent or probable cause.").

¹¹⁴ See *supra* Part I.B.

¹¹⁵ See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). However, in the absence of a driver's consent, the police cannot *extend* a traffic stop in order to use a drug sniffing dog. *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015) (holding that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures").

¹¹⁶ See *Florida v. Harris*, 133 S. Ct. 1050, 1057 (2013) (holding that a well-trained drug dog's alert is usually sufficient to give the police probable cause to believe contraband is present).

¹¹⁷ See *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.").

¹¹⁸ Mandiberg, *supra* note 55, at 24 ("Marijuana . . . [is] not so unique as to have a direct effect on Fourth Amendment doctrine.").

that contraband is inside, the probable cause analysis for determining whether they can search will not change based on whether the officer suspects marijuana or an illegally possessed gun is in the car.¹¹⁹ Things become more complicated, however, if the suspected “contraband” is not legally considered contraband in all circumstances. As a result, reforms that stop short of marijuana legalization — namely, medical marijuana and decriminalization laws — have raised some interesting doctrinal problems for the Fourth Amendment. By and large, however, these reforms have not significantly impacted the legal rules or practical incentives on which pretextual stops are based.

A. Medical Marijuana

In states with medical marijuana laws, possessing the drug is not necessarily a crime. Patients with a doctor’s recommendation are allowed to possess marijuana, at least in small quantities and sometimes after meeting other requirements such as obtaining a state-issued identification.¹²⁰ Have medical marijuana laws impacted the legal and practical incentives behind pretextual stops?

The most litigated question on the intersection between medical marijuana laws and the Fourth Amendment has been the impact of these laws on probable cause. Where marijuana is prohibited for all uses, if an officer has probable cause to think marijuana is in someone’s car (or home or pocket), that fact alone typically means she has probable cause to believe a crime has been committed. Is the same true in medical marijuana states, where possessing marijuana is only *sometimes* a crime?

As an initial matter, it is worth recalling that there is nothing unusual about finding probable cause under the Fourth Amendment based on conduct that is not inherently criminal. The Supreme Court has gone so far as to say that “innocent behavior *frequently* will provide the basis for . . . probable cause.”¹²¹ This is because the Fourth Amendment’s probable cause standard “requires only a probability or substantial chance of criminal activity, not an actual showing of such

¹¹⁹ See Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 91 IOWA L. REV. 1, 48 (2011) (describing how the Supreme Court has declined to incorporate crime-severity into Fourth Amendment doctrine and arguing that crime-severity should be incorporated into search and seizure jurisprudence).

¹²⁰ See Claire Frezza, *Medical Marijuana: A Drug Without a Medical Model*, 101 GEO. L.J. 1117, 1121-22 (2013) (providing an overview of the different standards for patient qualification in medical marijuana states).

¹²¹ *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983) (emphasis added).

activity.”¹²² (The quantum of evidence required for reasonable suspicion is, of course, even lower.¹²³) The Supreme Court has never translated the probable cause and reasonable suspicion standards into percentages. Is probable cause a 1/3 chance or 2/5 chance that evidence of a crime will be found? The Court has expressly declined to say, on the grounds that probable cause and reasonable suspicion are “fluid concept[s]”¹²⁴ and “incapable of precise definition or quantification into percentages”¹²⁵ Although the Fourth Amendment may not trade in numbers, it undeniably “deals with probabilities.”¹²⁶ Specifically, the probable cause and reasonable suspicion standards call on courts to measure the probability that a search or seizure will turn up contraband or evidence of crime.¹²⁷

Most courts in medical marijuana states have concluded that the probability that marijuana is being possessed illegally is still large enough to give an officer probable cause to believe a crime has been committed.¹²⁸ Decisions finding that the scent of marijuana continues to give rise to probable cause in medical marijuana states focus on the fact that marijuana is only legal to possess if certain conditions are met. The Supreme Court of Arizona, for example, emphasized the fact that its medical marijuana law “did not decriminalize the possession or use of marijuana generally” and instead “makes marijuana legal in only limited circumstances.”¹²⁹ In reaching the same conclusion, the Michigan Court of Appeals noted that its state’s medical marijuana law was a “very limited, highly restricted exception to the statutory proscription against the manufacture and use of marijuana in Michigan.”¹³⁰ In New Jersey, an appeals court reasoned “the

¹²² *Id.*

¹²³ *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

¹²⁴ *Gates*, 462 U.S. at 232.

¹²⁵ *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *see also Ornelas v. United States*, 517 U.S. 690, 695-96 (1996) (explaining that “[a]rticulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible” because reasonable suspicion and probable cause are “fluid concepts”).

¹²⁶ *Pringle*, 540 U.S. at 371.

¹²⁷ Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 792 (2013) (discussing quantification of the probable cause standard).

¹²⁸ *See* Matthew P. Hoxsie, *Probable Cause: Is the “Plain-Smell” Doctrine Still Valid in Arizona After the AMMA?*, 57 ARIZ. L. REV. 1139, 1146-51 (2015) (collecting cases).

¹²⁹ *State v. Sisco*, 373 P.3d 549, 553 (Ariz. 2016).

¹³⁰ *People v. Brown*, 825 N.W.2d 91, 94 (Mich. Ct. App. 2012).

possession, consumption, and sale of marijuana remains illegal except in the instance of a registered qualifying patient”¹³¹

Of course, medical marijuana is not the only item that is legal for some individuals to possess but not others.¹³² For example, a firearm that is illegal for a felon to possess may be legal for a non-felon to possess.¹³³ Despite the prohibition against felons possessing firearms, however, in general, “the possession of firearms does not give rise to any presumption of criminality.”¹³⁴ It is the ratio of illegal to legal users that seems to make medical marijuana different. The Vermont Supreme Court, for example, found the odds that the “odor of fresh marijuana” may be coming from legally possessed medical marijuana to be a “small possibility,” insufficient to “negate the State’s probable cause to search”¹³⁵

Not all courts agree that the odor of marijuana, standing alone, provides probable cause to think a crime has been committed in medical marijuana states. A few courts have held the scent of marijuana, standing alone, to be insufficient to establish probable cause to believe a crime has been committed. These decisions focus on the fact that medical marijuana laws “expressly contemplate[] the lawful possession, cultivation, and distribution of marijuana for medical purposes” to conclude that “facts that simply establish probable cause to believe [someone is in possession of or] is growing marijuana . . . without more, is insufficient to establish probable cause

¹³¹ State v. Myers, 122 A.3d 994, 1002-03 (N.J. Super. Ct. App. Div. 2015).

¹³² See Robert Leider, *May I See Your License?: Terry Stops and License Verification*, 31 QUINNIPIAC L. REV. 387, 387 (2013) (noting that people need a license to carry concealed weapons and defining “license” as having the ability to do something that otherwise would be unlawful).

¹³³ 18 U.S.C. § 922(g)(1) (2012) (making it a crime for a person who has been convicted of a “crime punishable by imprisonment for a term exceeding one year” to possess a firearm).

¹³⁴ STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 8:8 (2015).

¹³⁵ State v. Senna, 79 A.3d 45, 50 (Vt. 2013); cf. People v. Strasburg, 56 Cal. Rptr. 3d 306, 311 (Cal. Ct. App. 2007) (finding probable cause for the search even though the defendant had a medical marijuana recommendation on the grounds that marijuana possession remains illegal for those who do not meet the requirements of California’s medical marijuana laws and so “the officer is entitled to continue to search and investigate, and determine whether the subject of the investigation is in fact possessing the marijuana for personal medical needs”); Myers, 122 A.3d at 1002-03 (finding probable cause and comparing marijuana, which “remains illegal except in the instance of a registered qualifying patient who obtains medical marijuana from one of the limited number of” authorized outlets to alcohol which “is an entirely ‘lawful product’”).

to believe that the suspected [activity] is a crime.”¹³⁶ An Arizona appellate decision that was later reversed by the state Supreme Court cited its concern that a contrary result could leave medical marijuana users with limited protection against intrusions into their privacy.¹³⁷ “Were we to adopt the state’s suggestion that scent [of marijuana] alone furnishes probable cause of a crime,” the appeals court wrote in its later-overturned decision, “medical marijuana patients would become second-class citizens, losing their rights to privacy and security, including privacy within their own homes. Any patient with a detectable amount of marijuana would be subject to a search.”¹³⁸

From the perspective of Fourth Amendment doctrine, the question of probable cause based on facts suggesting marijuana possession in medical marijuana states calls on courts to reconcile the role of probability and the need for *individualized* suspicion. As Erica Goldberg has discussed, “[p]art of the reason that courts are loathe to attach rules or numbers to the probable cause inquiry is a concern that” doing so might “penalize people based on group attributes instead of individual characteristics.”¹³⁹ In the case of probable cause in medical marijuana states, the question becomes whether the high probability that marijuana is illegally possessed — based on the assumption that there are many more illegal than legal users (a safe assumption, perhaps, but one that only empirical evidence can confirm or disconfirm)¹⁴⁰ — carries the day. Or, whether relying on that probability alone veers too close to “statistics that measure the likelihood of criminality within a certain group,” something that is “usually insufficient to satisfy probable cause.”¹⁴¹ The friction between probability and individual suspicion presents an interesting and increasingly important Fourth Amendment challenge, both because the police are using more investigative tools (such as drug detector dogs) in which “the likelihood of criminal activity can be

¹³⁶ *Commonwealth v. Canning*, 28 N.E.3d 1156, 1165 (Mass. 2015).

¹³⁷ *State v. Sisco*, 359 P.3d 1, 10 (Ariz. Ct. App. 2015), *vacated*, 373 P.3d 549 (Ariz. 2016).

¹³⁸ *Id.*

¹³⁹ Goldberg, *supra* note 127, at 805-06.

¹⁴⁰ Although the numbers may vary from state to state, recent empirical evidence supports this assumption. *See, e.g.*, Rosalie L. Pacula, Mireille Jacobson & Ervant J. Maksabedian, *In the Weeds: A Baseline View of Cannabis Use Among Legalizing States and Their Neighbours*, 111 *ADDICTION* 973, 975 (2016) (surveying marijuana use patterns in Colorado, Washington, Oregon, and New Mexico and finding that recreational marijuana use is higher than medical marijuana use in all four states).

¹⁴¹ Goldberg, *supra* note 127, at 807.

quantified”¹⁴² and because changes in state laws around guns and marijuana mean that there are widely used and possessed items that are legal to possess in public for some but not others.

For present purposes, the more important question is what these cases mean for the incentives that drive pretextual stops and profiling in medical marijuana states. In jurisdictions that follow the present majority position, the legal rules for probable cause remain unchanged. As a result, the police have the same legal authority to search based on the scent of marijuana as they do in non-medical marijuana states. Even under the minority approach, however, the prospect of marijuana arrests and forfeitures may give the police nearly as strong an incentive to conduct pretextual stops as before. This is because the police only need probable cause if a suspect refuses to grant consent to search.¹⁴³ And, when police ask for permission to search a car, most people give it.¹⁴⁴ In most medical marijuana states, it is likely that a large segment of users are not legally recognized patients.¹⁴⁵ As a result, even in jurisdictions where the scent of marijuana does not give the police probable cause, a medical marijuana law may not have much impact on the odds that a pretextual stop will bear fruit in the form of a marijuana arrest or a marijuana-based asset forfeiture. To be sure, in these minority jurisdictions, the police cannot use the purported smell of marijuana as a pretext to gain access to the interior of a car that they have stopped.¹⁴⁶ But, if an officer gains consent to search and finds marijuana and there is no evidence that the person in possession is a legally recognized patient, he will still be able to make an arrest.

B. Decriminalization

In addition to states with medical marijuana laws, a number of states have decriminalized marijuana.¹⁴⁷ In most of these states, however, decriminalization is something of a misnomer. In fact, as Wayne A. Logan explores in an insightful recent article on marijuana

¹⁴² *Id.* at 791.

¹⁴³ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”).

¹⁴⁴ See *Gross & Barnes*, *supra* note 30, at 672; see also *Woods*, *supra* note 19, at 728-34 (discussing consent searches during traffic stops).

¹⁴⁵ See *Pacula et al.*, *supra* note 140, at 975.

¹⁴⁶ See *supra* text accompanying notes 136–38.

¹⁴⁷ Logan, *supra* note 19, at 324-27 (discussing state marijuana decriminalization laws).

decriminalization and policing, “several states adopting [marijuana] decriminalization boast among the nation’s highest per capita arrest rates for possession”¹⁴⁸ This is in large part because the “decriminalization” label has been applied to a fairly wide range of laws.¹⁴⁹ Typically, “decriminalization” laws do not remove all penalties for marijuana possession; instead, they “impos[e] a fine and lessen[] or deny the possibility of incarceration or creation of a criminal record, yet leav[e] intact police power to execute arrests and carry out searches.”¹⁵⁰ As a result, with a few exceptions, state marijuana decriminalization laws have not impacted the legal authority and incentives that contribute to pretextual stops.

In California, for example, the state legislature “decriminalized” marijuana in 2010.¹⁵¹ The law reduced possession of 28.5 grams or less of marijuana from a misdemeanor to an infraction, punishable by a maximum \$100 fine (along with court fees, which can often be much more than \$100).¹⁵² Despite this change, California courts have held that the scent of marijuana continues to provide probable cause for a search.¹⁵³ Although the California legislature “has reduced the penalty associated with possession of up to an ounce of marijuana,” one appeals decision reasoned, “[o]ther than certain quantities of medical marijuana, possession of any amount of marijuana — even an amount within the limit of [the infraction law] — is illegal in California and therefore ‘contraband.’”¹⁵⁴ Similarly, the police can still make a custodial arrest for possession of less than an ounce of marijuana in California.¹⁵⁵ As in California, most state marijuana

¹⁴⁸ *Id.* at 321.

¹⁴⁹ See Natapoff, *Misdemeanor*, *supra* note 19, at 1065-69 (discussing the difference between legalization and decriminalization in the criminal law context); see, e.g., Woods, *supra* note 19, at 675 (“There is no consensus about the meaning of ‘decriminalization.’”).

¹⁵⁰ Logan, *supra* note 19, at 322; see also Natapoff, *Misdemeanor*, *supra* note 19, at 1057 (“Decriminalization takes a wide array of forms that carry different labels and punishment — from the creation of fine-only ‘civil infractions’ to ‘nonjailable misdemeanors.’”).

¹⁵¹ Patrick McGreevy, *Schwarzenegger Approves Bill Downgrading Marijuana Possession of Ounce or Less to an Infraction*, L.A. TIMES, Oct. 2, 2010, at AA.3.

¹⁵² CAL. HEALTH & SAFETY CODE § 11357(b) (2016); see also AM. CIV. LIBERTIES UNION, MARIJUANA ENFORCEMENT DISPARITIES IN CALIFORNIA: A RACIAL INJUSTICE (2016), https://www.acluca.org/wp-content/uploads/2016/05/CA_Marijuana_Infractions_FINAL.2016.05.pdf (“[T]he offense is still punishable by up to a \$100 fine *plus fees*, making the actual cost of an infraction much higher.”)

¹⁵³ *People v. Waxler*, 168 Cal. Rptr. 3d 822, 828 (2014).

¹⁵⁴ *Id.* (alteration in original).

¹⁵⁵ Natapoff, *Misdemeanor*, *supra* note 19, at 1112 & n.286 (collecting cases).

“decriminalization” laws continue to treat possession of even small amounts of the drug as a punishable offense.¹⁵⁶ This means most marijuana decriminalization laws have not affected police power in marijuana investigations.¹⁵⁷

Marijuana decriminalization laws can curtail police investigative authority in some cases.¹⁵⁸ In Massachusetts, for example, voters passed a 2008 ballot measure that “changed the status of the possession of one ounce or less of marijuana from a criminal to a civil offense.”¹⁵⁹ The state Supreme Court has held that the law means evidence of marijuana possession alone no longer gives the police the reasonable suspicion or probable cause necessary to make stops or arrests or to conduct searches.¹⁶⁰ The unusually broad scope of the Massachusetts decriminalization law has been key to this outcome. As the state Supreme Court explained in holding the odor of burnt marijuana did not give the police probable cause to search a car, “[n]ot only has the penalty scheme for possession of one ounce or less of marijuana changed, as the Commonwealth concedes, but the status

¹⁵⁶ Logan, *supra* note 19, at 322, 340.

¹⁵⁷ In some states, courts have held that the police may only make a custodial arrest for a criminal amount of marijuana but do not need specific facts suggesting a criminal amount of marijuana for an automobile search. *See* Logan, *supra* note 19, at 339-40 (“[J]urisdictions that otherwise deny the police the right to arrest or search an individual absent probable cause to believe the individual possesses a criminal amount of marijuana, such as Minnesota, permit auto searches under such circumstances.”); *see, e.g.*, *United States v. Perdoma*, 621 F.3d 745, 749-50 (8th Cir. 2010) (finding that the Fourth Amendment permitted the police to arrest even though “possession of less than an ounce of marijuana was merely an ‘infraction’ under Nebraska law”); *United States v. Pugh*, 223 F. Supp. 2d 325, 330 (D. Me. 2002) (“Under Maine law, marijuana, even in an amount that would only give rise to a civil violation, can be the legitimate object of a search warrant”); *State v. Smalley*, 225 P.3d 844, 848 (Or. Ct. App. 2010) (holding that a warrantless search based on the scent of marijuana was justified despite state decriminalization law because marijuana was still contraband). *See generally* Logan, *supra* note 19, at 322 (noting police’s continued power to execute arrests and carry out searches).

¹⁵⁸ *See* Natapoff, *Misdemeanor*, *supra* note 19, at 1111 & nn.284–85 (discussing marijuana decriminalization laws in Maryland and the District of Columbia which have been interpreted to preclude arrest for marijuana possession).

¹⁵⁹ *Commonwealth v. Cruz*, 945 N.E.2d 899, 905 (Mass. 2011).

¹⁶⁰ *Id.* at 908; *see also*, *Commonwealth v. Sheridan*, 25 N.E.3d 875, 880-81 (Mass. 2015) (“Absent articulable facts supporting a belief that the vehicle contained an additional, criminal quantity of marijuana, the officers lacked probable cause to believe that a crime was being committed, and the search was impermissible.”); *Commonwealth v. Jackson*, 985 N.E.2d 853, 859 (Mass. 2013) (“[W]e conclude that the observation by police of several individuals using and sharing marijuana in a social setting does not provide the police with justification to conduct a warrantless search.”).

of this conduct has changed as well. By mandating that possession of such a small quantity of marijuana become a civil violation, not a crime, the voters intended to treat offenders who possess one ounce or less of marijuana differently from perpetrators of drug crimes.”¹⁶¹ Although marijuana in any amount is still “contraband” following the decriminalization law in Massachusetts, Massachusetts courts have held this is not enough to trigger the automobile exception to the warrant requirement where “no facts were articulated to support probable cause to believe that a *criminal* amount of contraband was present in the car.”¹⁶²

As Massachusetts shows, it is possible to construct a marijuana decriminalization law that limits police investigative authority and not just sanction severity.¹⁶³ But, to date, most decriminalization laws have had little to no impact on police investigative power over marijuana offenses.¹⁶⁴ To be sure, even where police authority has not been diminished, decriminalization laws have sometimes led to sizeable reductions in marijuana arrests. In California, for example, juvenile marijuana arrests dropped forty-seven percent following decriminalization.¹⁶⁵ Similarly, in Philadelphia, a city ordinance decriminalizing marijuana by allowing officers to issue a code violation at their discretion in response to marijuana possession led to an eighty-eight percent decrease in overall marijuana arrests.¹⁶⁶ But in other jurisdictions, marijuana decriminalization has been followed by increases in marijuana possession arrests.¹⁶⁷ This may be due in part to the fact that decriminalization laws can often reduce the cost to the system of processing cases, while generating revenue in the form of fines — producing a net-widening effect.¹⁶⁸

¹⁶¹ Cruz, 945 N.E.2d at 909-10.

¹⁶² *Id.* at 913 (emphasis in original).

¹⁶³ See, e.g., Natapoff, *Misdemeanor*, *supra* note 19, at 1111 & nn.284–285. For a discussion of the impact of decriminalization on sanctioning and other stages of the criminal process, see Woods, *supra* note 19, at 677 (“Sanction-focused approaches to decriminalization fail to capture the harms to civilians and to the state that formal institutions of social control impose at earlier stages of the criminal justice process.”).

¹⁶⁴ Logan, *supra* note 19, at 322.

¹⁶⁵ Natapoff, *Misdemeanor*, *supra* note 19, at 1111.

¹⁶⁶ Chris Goldstein, *Philly 420: Marijuana Arrests Plummet in Philly After Decriminalization*, INQUIRER DAILY NEWS (Jan. 28, 2015), http://www.philly.com/philly/columnists/philly420/Marijuana_arrests_plummet_in_Philly_after_decrim.html.

¹⁶⁷ Natapoff, *Misdemeanor*, *supra* note 19, at 1111 (noting that arrest rates in Nevada increased by ninety-six percent in the decade following decriminalization).

¹⁶⁸ *Id.* at 1077 (“Although decriminalization scales back certain aspects of the criminal process, its net-widening effects ironically can expand the overall reach of the penal state.”).

The phenomenon of custodial arrests in decriminalization states that treat marijuana possession as an infraction is particularly noteworthy as it suggests the use of marijuana arrests as a pretext to allow for further investigation. A custodial arrest gives the police a number of investigative tools that a ticket or summons do not, including the authority to conduct a search incident to the arrest and “to collect valuable identifying data, including biometric information such as fingerprints, mug shots, and DNA, which can be retained for later investigative use.”¹⁶⁹ This investigative authority may explain why an officer would choose to make an arrest for marijuana, instead of simply issuing a ticket, in a state where marijuana possession has been made an infraction.

C. Legalization

As the discussion so far shows, the legal rules and incentives that make marijuana an attractive basis for pretextual stops have been mostly unchanged in medical marijuana and decriminalization states. With a handful of notable exceptions, most courts in these states have held that facts that give the police probable cause to think marijuana is present in a car, a home, or on someone’s person also give them probable cause under the Fourth Amendment.¹⁷⁰ In addition, in medical marijuana states it is likely most people who possess marijuana are not legally recognized medical marijuana patients.¹⁷¹ And, in decriminalization states, although sanctions for marijuana offenses have been reduced, the police can still fine and, very often, make an arrest when they discover marijuana.¹⁷²

In this section, I argue that marijuana legalization is likely to significantly affect the legal rules and incentives that helped give rise to policing practices like pretextual stops. The more difficult question is whether this will have a noticeable impact on the ground.

In states that legalize marijuana, it is very unlikely that evidence of marijuana possession will give the police probable cause or reasonable suspicion of criminal activity. After all, once it is legal to possess marijuana, there is no reason for the police to think that someone in

¹⁶⁹ Logan, *supra* note 19, at 334.

¹⁷⁰ See *supra* Parts II.A, II.B.

¹⁷¹ See Pacula et. al., *supra* note 140, at 977 fig.1.

¹⁷² See generally Logan, *supra* note 19, at 335-39 (discussing arrest authority and decriminalization); Natapoff, *Misdemeanor*, *supra* note 19, at 1110-12 (explaining that “[p]olice often have discretion under state law over whether to arrest or issue a summons” for “[d]ecriminalized offenses).

possession of marijuana is committing a crime. A potential caveat is that in the states that have legalized marijuana, not every form of marijuana possession is legal. To date, states with marijuana legalization laws generally limit personal possession to an ounce or less of marijuana; possession of more than one ounce of marijuana is still against state law.¹⁷³ It is possible some prosecutors will argue that, because of the one-ounce limit, the scent of marijuana still gives the police probable cause to search in legalization states, on the theory that the officer needs to confirm compliance with the one-ounce limit. But it is exceedingly unlikely courts would agree. In contrast to medical marijuana states, where illegal users almost surely continue to outnumber legally protected patients, it is safe to assume the overwhelming majority of people in possession of marijuana in legalization states are complying with the law. Apart from a small segment of heavy users and illegal market operators, most people who possess marijuana will fall well below the one-ounce limit.¹⁷⁴ As a result, it would be very difficult to argue in a legalization state that evidence of marijuana possession standing alone would give the police probable cause to conduct a search.

A 2015 report from the Police Foundation and the Colorado Association of Chiefs of Police highlights the impact Colorado's legalization law has had on law enforcement investigative authority.¹⁷⁵ According to the report, "Colorado police officials interviewed by the Police Foundation said one of the biggest concerns for law

¹⁷³ See Silvia Irimescu, *Marijuana Legalization: How Government Stagnation Hinders Legal Evolution and Harms a Nation*, 50 GONZ. L. REV. 241, 254-58 (2016) (providing an overview of state marijuana legalization laws and reporting that Colorado, Washington, Alaska, and Oregon all limit possession of marijuana plant material in public to one ounce). The rules differ somewhat in some states for possession in the home or for possession of non-plant material, such as liquid-infused marijuana products. *Id.*

¹⁷⁴ A survey of marijuana businesses, for example, reported that the average purchase by a customer was in the \$60 to \$100 range. Becky Olson, *Chart of the Week: Average Purchase Amount at Dispensaries Ranges From \$50 to \$100+*, MARIJUANA BUS. DAILY (June 29, 2015), <https://mjbizdaily.com/chart-week-average-marijuana-dispensary-purchase-amounts-range-60-100/>. Around the same time, Colorado stores were selling one ounce of marijuana for between \$250 and \$300. Tom Huddleston, Jr., *Here's Why Marijuana Prices Appear to Be Dropping in Colorado*, FORTUNE (June 22, 2015), <http://fortune.com/2015/06/22/marijuana-prices-colorado/>. Thus, it would seem that most individuals were purchasing less than an ounce of marijuana at a time.

¹⁷⁵ POLICE FOUND., COLORADO'S LEGALIZATION OF MARIJUANA AND THE IMPACT ON PUBLIC SAFETY: A PRACTICAL GUIDE FOR LAW ENFORCEMENT (2015), http://www.nccpsafety.org/assets/files/library/Legalized_Marijuana_Practical_Guide_for_Law_Enforcement.pdf.

enforcement is attempting to establish probable cause for a search warrant under the conflicting laws regulating medical and recreational marijuana.”¹⁷⁶ Similarly, the report lists as a “key issue” that “Drug-Sniffing Canines May Have To Be Retrained or Replaced” because they are trained to detect marijuana.¹⁷⁷ The report noted these concerns in the context of policing black and gray markets.¹⁷⁸ But the concerns raised in the Colorado report also suggest the potential of marijuana legalization laws to impact street-level policing. If the scent of marijuana alone no longer gives the police reasonable suspicion or probable cause to search or detain during a car or pedestrian stop, it will no longer be possible to use marijuana enforcement as a pretext for other investigative aims.¹⁷⁹ Similarly, officers willing to bend the rules in order to search a car will be unable to manufacture probable cause by claiming to smell marijuana.

In addition to taking away some of the legal authority the police rely on during pretextual stops, marijuana legalization makes pretextual stops less rewarding for the police. As discussed above, marijuana is by far the most commonly used illegal drug and accounts for a little less than half of all drug arrests.¹⁸⁰ Removing the possibility of a marijuana arrest or marijuana-related forfeiture from pretextual stops means a much smaller percentage of pretextual stops will generate an arrest and a forfeiture.¹⁸¹ In the analysis of five years of Maryland State Police stop data by Samuel Gross and Katherine Barnes discussed above,¹⁸² for example, the police found “[h]ard drugs (anything other than marijuana)” in only “slightly more than a quarter of [searches] in which any drugs were recovered.”¹⁸³ Marijuana was responsible for the lion’s share of the remaining searches in which drugs were found.¹⁸⁴ While this is only one example, it suggests marijuana legalization has the potential to dramatically reduce the “hit rate” of pretextual stops.

¹⁷⁶ *Id.* at 14.

¹⁷⁷ *Id.* at 15.

¹⁷⁸ *Id.* at 17-21 (discussing some of the challenges Colorado police face policing black and gray markets, including confirming that people growing marijuana in their homes are within the legal limit and preventing the diversion of marijuana to other states).

¹⁷⁹ See *supra* Part I.B (discussing the use of marijuana enforcement as a pretext for other investigative aims).

¹⁸⁰ See *supra* Part I.B.

¹⁸¹ For a discussion of how tangible performance metrics incentivize marijuana arrests, see Logan, *supra* note 19, at 332.

¹⁸² See Gross & Barnes, *supra* note 30, at 658; *supra* Part I.B.

¹⁸³ Gross & Barnes, *supra* note 30, at 668 (alteration in original).

¹⁸⁴ *Id.* at 668 tbl.7.

Because pretextual stops are only worthwhile if enough of them yield results for the police, it is possible that after marijuana legalization too few pretextual stops will result in the discovery of contraband for the police to deem them a good use of resources.

In sum, marijuana legalization will remove some of the legal and practical incentives that encourage pretextual stops and similar proactive policing tactics, like the overaggressive use of stop-and-frisk. It would be foolish to think that marijuana legalization will put an end to these drug war-era tactics completely. But, could marijuana legalization noticeably reduce their use? This is much harder to say.

On the one hand, there is good evidence that marijuana prohibition has played a pivotal role in the rise of proactive policing tactics.¹⁸⁵ It is tempting to conclude that legalizing marijuana would have a similar impact, only in reverse. After all, if the war on marijuana helped to give rise to the use of pretextual stops, then it seems logical that legalization would cause the use of pretextual stops to decrease. On the other hand, even without marijuana in the picture, there are still many other types of contraband for the police to search for during a pretextual stop. If marijuana accounts for, say, fifty percent of all contraband found during pretextual stops,¹⁸⁶ the remaining fifty percent might very well be enough to sustain pretextual stops at their current level. In other words, it is possible that pretextual stops will continue to produce enough contraband post-marijuana legalization that the police will continue to employ them at their current rate. Tactics like pretextual stops are also now a deeply ingrained part of modern policing.¹⁸⁷ It is possible that they will continue to be used at a similar rate for the foreseeable future on that basis alone, regardless of how frequently they yield evidence or arrests. Finally, with respect to legal authority, although marijuana legalization will make it more difficult for the police to develop probable cause to justify a search during a pretextual stop, people often consent to searches when asked by the police. It may be that people consent frequently enough that legalization will have only a negligible impact on the chances that an officer will be able to search a car during a stop.

¹⁸⁵ See *supra* Part I.B.

¹⁸⁶ This number is just for purposes of illustration. For some empirical data on how often traffic stops result in the discovery of marijuana relative to other drugs, see Gross & Barnes, *supra* note 30, at 668 tbl.7.

¹⁸⁷ See, e.g., Sekely, *supra* note 40.

CONCLUSION

Marijuana legalization has brought with it a wide range of fascinating legal problems. In the near term, the most important challenges for marijuana legalization laws will revolve around the conflict with federal prohibition — how to ensure banking access for marijuana businesses, whether state legalization laws can continue to co-exist with federal prohibition, and so forth. If the march toward legalization continues at its current pace, however, it will not be long before the majority of states have legalized marijuana and federal law has changed.¹⁸⁸ As this happens, it will be important to consider some of the less obvious ways marijuana legalization might impact the law and law enforcement, particularly in the long-term.

As this article argues, marijuana legalization has the potential to change policing practices by taking away some of the legal tools and practical incentives that encourage proactive tactics like pretextual stops. Only time will tell whether or how much these changes will translate into actual reductions in the prevalence of pretextual stops. But the dynamics at play suggest there is a real possibility marijuana legalization could lead to a pullback from drug war-era policing methods. If this comes to pass, drug war critics will have one more reason to support marijuana legalization while proponents of proactive policing and the drug war will have one more reason to oppose it.

¹⁸⁸ See Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 718 (2015) (arguing that, barring an unexpected shift in public opinion, federal marijuana law reform is inevitable and examining the different options for reform).