

Goodbye Marijuana Schedule I—Welcome to a Post-Legalization World

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ABSTRACT

Marijuana has been a Schedule I controlled substance under the Controlled Substances Act (CSA) for fifty years. However, the tide has turned, thirty-three states and Washington D.C. have legalized marijuana for either recreational and/or medical use, and it is likely that marijuana will eventually be removed as a Schedule I drug and become legal at the federal level as well. During this transition phase, it is important to reflect on how the criminalization of marijuana under the CSA has impacted the U.S. criminal justice system and the criminal procedure case law that followed. This article will examine the impact criminalizing marijuana has had on criminal procedure and how criminalizing possession, manufacturing, and distributing marijuana provided law enforcement with ever-expanding tools to detain, search, and arrest criminal defendants. Rarely has a controlled substance had such an impact on investigative tools—from trespassing to search for marijuana plants in fields, surveilling marijuana grows in the area, smelling (by humans) and sniffing (by dogs) for weed at traffic stops, to expanding the probable cause to arrest a particular defendant, marijuana has had quite an impact on the expansion of criminal procedure during the War on Drugs. There are several lessons to be learned from this failed 50-plus year criminalization experiment, and those failures and successes should be identified in order to make better scheduling choices in the future. After such reflections, this article will examine what life will be like in a readily available, post-legalization marijuana world. While simple possession of marijuana may become legal, the federal government will still have its hand in its regulation and taxation. Law enforcement's ability to arrest, search, and forfeit drug-related assets may be limited but not to as great an extent as one might think. Due to heavy regulation, law enforcement will still be using its tools to identify marijuana-related crime, such as violations of driving while intoxicated, open container laws, public

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intoxication, minor in possession laws, possession of large amounts of marijuana, etc. The laws and law enforcement activity in states where marijuana has already been decriminalized serve as a guidepost for a post-legalization world. Living in a post-legalization world will require some changes for the law enforcement community and will cause federal agents to shift from criminal investigative work to regulatory action.

I. INTRODUCTION

Marijuana will in the next few years lose its superstar status as a Schedule I drug¹ under the Controlled Substances Act (CSA).² It is inevitable. According to two firms specializing in the marijuana industry, all 50 states will legalize medical marijuana by 2024.³ Various congressmen have attempted to take marijuana off the list of substances controlled under the CSA multiple times.⁴ Former Presidential candidate Beto O'Rourke wanted to grant clemency to anyone currently in prison for marijuana possession, establish a model for marijuana legalization, and provide "Drug War Justice Grants" to those formerly incarcerated for nonviolent marijuana offenses in state and federal prison.⁵ A majority of licenses to produce, distribute or sell marijuana would be awarded "to companies owned by minorities and people disproportionately impacted by the war on drugs."⁶ Senator Cory Booker of New Jersey introduced a bill in 2019 to legalize marijuana nationwide by removing marijuana from the list of controlled substances in the CSA and offering financial incentives to states to relax their marijuana laws.⁷ Congress in its 2018 Farm Bill made hemp, marijuana's cousin, a legal crop in order to produce hemp textiles,

¹ A Schedule I substance is considered to have a high potential for abuse; no currently accepted medical use in treatment in the United States; and there is a lack of accepted safety for use under medical supervision. 21 U.S.C. § 812(b)(1)(2020).

² 21 U.S.C. § 812 (2020).

³ Kristine O'wram, *Every U.S. State Will Legalize Medical Marijuana By 2024, Report Says*, BLOOMBERG LAW, (June 20, 2019, 8:45 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/every-u-s-state-will-legalize-medical-pot-by-2024-report-says>.

⁴ Tom Angell, *Beto O'Rourke Proposes Drug War Reparations Funded By Marijuana Taxes*, FORBES, (September 19, 2019), <https://www.forbes.com/sites/tomangell/2019/09/19/beto-orourke-proposes-drug-war-reparations-funded-by-marijuana-taxes/#1fab8b7d1420>.

⁵ *Id.*

⁶ *Id.*

⁷ Carmin, Chappell, *Cory Booker introduces bill to legalize marijuana nationwide, with support from fellow 2020 candidates*, CNBC (February 28, 2019), <https://www.cnbc.com/2019/02/28/cory-booker-introduces-bill-to-legalize-marijuana-nationwide.html>.

fabrics, paper, and health care goods.⁸ Thirty-three states and Washington D.C. have now legalized marijuana for either recreational and/or medical use.⁹ A fairly certain prediction: after most states legalize marijuana, Congress will get on board and also legalize marijuana within the next decade.

This should not seem incredibly shocking to anyone—after all, the list of substances controlled under the CSA is constantly evolving. Since the enactment of the CSA in 1970, marijuana has been on the Schedule I controlled substance list with its compatriots: heroin, MDMA (ecstasy)¹⁰, GHB¹¹, cathinone (“khat” plant), and LSD.¹² Rescheduling/removing marijuana from Schedule I is relatively simple—(1) Congress can pass a bill removing marijuana from the Schedule I list or (2) the Attorney General can follow the process for adding or removing a substance from the drug schedules set forth in 21 U.S.C. 811.¹³

Once marijuana is no longer on the schedule of controlled substances, the DEA can wash its hands of it. Marijuana will be sold both recreationally (like alcohol) and medicinally. Marijuana sold for medicinal purposes will be regulated by the Federal

⁸ Agriculture Improvement Act of 2018, PL 115-334, 132 Stat 4490 (2018) (stating that the THC contained in hemp is minimal, no more than “.03 percent . . .”).

⁹ National Conference of State Legislatures, *State Medical Marijuana Laws* (October 19, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. Those states include Alaska (R), Arkansas (M), Arizona (M), California (R), Colorado (R), Connecticut (M), Delaware (M), Washington D.C (R), Florida (M), Hawaii (M), Illinois (R), Louisiana (M), Maine (R), Maryland (M), Massachusetts (R), Michigan (R), Minnesota (M), Missouri (M), Montana (M), New Hampshire (M), Nevada (R), New Jersey (M), New Mexico (M), New York (M), North Dakota (M), Ohio (M), Oklahoma (M), Oregon (R), Pennsylvania (M), Rhode Island (M), Utah (M), Vermont (R), Washington (R), and West Virginia (M).

¹⁰ 21 U.S.C. § 812 (2018) (schedules of controlled substances). *See also*, Harold Kalant, *The pharmacology and toxicology of “ecstasy” (MDMA) and related drugs* (2001), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC81503/>. MDMA (3,4-methylenedioxymethamphetamine) is commonly called ecstasy and is a synthetic, psychoactive drug with stimulant and hallucinogenic properties. Its chemical structure is similar to other neurotoxic compounds such as methamphetamine, methylenedioxyamphetamine (MDA), and mescaline.

¹¹ 21 U.S.C. § 812 (2018) (Schedules of controlled substances). *See also*, Prakhar Kappor, Revatri Deshmukh, & Ipsita Kukreja, *GHB Acid: A Rage Or Reprive*, JOURNAL OF ADVANCED PHARM. TECH & RESEARCH (Oct. 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3853692/>. GHB (gamma-hydroxybutyric acid) is a central nervous system depressant.

¹² 21 U.S.C. § 812 (2018) (Schedules of controlled substances); *see also*, *Common Hallucinogens and Dissociative Drugs*, NAT’L INSTITUTE ON DRUG ABUSE (Feb. 2015), <https://www.drugabuse.gov/publications/research-reports/hallucinogens-dissociative-drugs/what-are-dissociative-drugs>. LSD is also known as “acid” and is a hallucinogenic drug.

¹³ Zac Bolitho, *The U.S. Constitution, The U.S. Department of Justice, and State Efforts to Legalize Marijuana*, 4 Lincoln Memorial University L. Rev. 2 (2017). The Attorney General must request a scientific and medical evaluation and recommendation from the Secretary of Health and Human Services (HHS) on whether the substance should be controlled. 21 U.S.C. §811(b). The notice-and-hearings provisions of the Administrative Procedure Act also permit comment by interested parties. 5 U.S.C. § 553(b)(3)(A) (2020).

Drug Administration (FDA).¹⁴ According to 21 U.S.C. 811(g)(1), if the FDA allows marijuana to be sold over the counter and without a prescription, the DEA will have no control over its possession, trafficking, and manufacture.¹⁵ Presumably, marijuana will become another substance monitored to ensure compliance with excise tax requirements. Perhaps Alcohol, Tobacco, and Firearms (ATF) will become Alcohol, Tobacco, Marijuana, and Firearms (ATMF). All of this, of course, remains to be seen.

This article will reflect on how the criminalization of marijuana under the CSA has impacted the U.S. criminal justice system, and the criminal procedure case law that followed. What is the aftermath of a failed 60 year-plus experiment?¹⁶ Part II will discuss the years prior to criminalization under the CSA and why marijuana was criminalized in the first place. Part III will stroll down memory lane and examine the impact criminalizing marijuana has had on criminal procedure and how criminalizing possession, manufacturing, and distributing marijuana provided law enforcement with ever-expanding tools to detain, search, and arrest criminal defendants. Rarely has a controlled substance had such an impact on investigative tools—from trespassing to search for marijuana plants in fields, surveilling marijuana grows in the area, smelling (by humans) and sniffing (by dogs) for weed at traffic stops, to expanding the probable cause to arrest a particular defendant, marijuana has had quite an impact on the expansion of criminal procedure during the War on Drugs. Part IV will explore why the criminalization of marijuana was a failed experiment. In fact, the criminalization of marijuana was very similar to the prohibition of alcohol in the 1920s. What can we learn from this earlier failed experiment and what can we take away from it as lessons to guide us in the future when considering other substances, drugs, and vices? Lastly, Part V will examine what life will be like in a readily available, post-legalization marijuana world. While simple possession of marijuana may become legal, the federal government will still have its hand in its regulation and taxation. Law enforcement's ability to arrest, search, and forfeit drug-related assets may be limited, but not to a great extent. If marijuana is to be treated like alcohol, prepare to see criminal offenses related to marijuana similar to what we see as it pertains to alcohol: driving while intoxicated, public intoxication, minor in possession, etc. Such laws are already in effect in states

¹⁴ U.S. Food and Drug Administration, *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)* U.S. FOOD AND DRUG ADMIN, (Oct. 16, 2019), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd>. The FDA regulates substances that companies intend to market to treat diseases by approving drugs as safe and effective for the purpose stated. *Id.*

¹⁵ 21 U.S.C. § 811 (g)(1).

¹⁶ This is assuming marijuana will be removed from the CSA's controlled substance list by 2030.

such as Colorado that legalize marijuana possession.¹⁷ Law enforcement will have to train new drug dogs, identify new ways to determine marijuana intoxication levels for DUI charges, and understand that smelling marijuana at a traffic stop may no longer be the equivalent to probable cause to search the entire automobile. Living in a post-legalization world will require changes in the law enforcement community and will save taxpayers significant amounts of money housing those arrested for marijuana possession and distribution.¹⁸

II. WHY WAS MARIJUANA CRIMINALIZED IN THE FIRST PLACE?

Much has been written on why marijuana was first criminalized in the United States.¹⁹ Something changed between the late 19th century, when marijuana was an ingredient in medicinal products sold in pharmacies, and sometime after the Mexican Revolution in 1910. Mexican immigrants were said to have flooded into the United States, bringing with them their habits of using marijuana recreationally.²⁰ The drug eventually became associated with these immigrants.

¹⁷ COLO. REV. STAT. § 42-4-1301(2017) (driving while impaired), COLO. REV. STAT. § 18-13-122 (2019) (minor in possession).

¹⁸ *Do people still get arrested and punished for using marijuana?* DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/do-people-still-get-arrested-and-punished-using-marijuana> (last visited Oct. 31, 2019). According to the Federal Bureau of investigation, 650,000 people in the United States were arrested for marijuana law violations in 2015. This comprised almost half (40%) of all drug arrests that year. That's one marijuana arrest every 50 seconds. 89% were for simple possession and not for selling or manufacturing marijuana. The United States spends more than 3 billion enforcing marijuana every year.

¹⁹ Zachary Ford, *Reefer Madness: The Constitutional Consequence of the Federal Government's Inconsistent Marijuana Policy*, 6 TEX. A&M L. REV. 671, 672 (2019); Sam Kamin, *The Challenges of Marijuana Law Reform*, in ASPATORE SPECIAL REPORT, THE IMPACT OF THE DECRIMINALIZATION AND LEGALIZATION OF MARIJUANA 5, 22 (Melanie Zimmerman ed., 2010); RICHARD J. BONNIE & CHARLES H. WHITEBREAD, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 4 (1974) (describing hemp as a popular medical treatment in the mid-nineteenth century and noting that its primary use was for legitimate medical purposes).

²⁰ Anne Sraders, *History of Marijuana: Origins and Legalization*, THE STREET (Sept. 24, 2018), <https://www.thestreet.com/markets/history-of-marijuan-14718715>. "The political upheaval in Mexico that culminated in the Revolution of 1910 led to a wave of Mexican immigration to states throughout the American Southwest. The prejudices and fears that greeted these peasant immigrants also extended to their traditional means of intoxication: smoking marijuana. Police officers in Texas claimed that marijuana incited violent crimes, aroused a 'lust for blood' and gave its users 'superhuman strength.' Rumors spread that Mexicans were distributing this 'killer weed' to unsuspecting American schoolchildren. Sailors and West Indian immigrants brought the practice of smoking marijuana to port cities along the Gulf of Mexico. In New Orleans, newspaper articles associated the drug with African Americans, jazz musicians, prostitutes, and underworld whites. 'The Marijuana Menace,' as sketched by anti-drug campaigners, was personified by inferior races and social deviants." *Id.* Also see, Eric Schlosser, *More Reefer Madness*, THE ATLANTIC (April 1997) <https://www.theatlantic.com/magazine/archive/1997/04/more-reefer-madness/376827/>.

Anti-marijuana campaigners in the 1930s, such as William Randolph Hearst, warned against the "murder weed found up and down coast—deadly marihuana dope plant ready for harvest that means enslavement of California children."²¹ It is said that Hearst, who owned a significant amount of media at the time, found hemp to be a threat to his paper industry since hemp fibers were thought to be superior to timber. Hearst used his media connections to demonize marijuana and prey on racist views.²²

During the 19th century, the word "cannabis" was almost exclusively used to refer to the plant.²³ Some speculate that when marijuana was introduced in the United States in the early 20th century, Mexicans used the Spanish spelling "marihuana," and the United States used the English spelling "marijuana." Interestingly enough, there seemed to be a shift in the spelling of the word "marijuana" over the years from "marihuana" to "marijuana." When the anti-drug campaigners began to call for its ban, the federal government and states preferred to spell it with an "h" rather than the English "j" because those who thought it should be criminalized believed the racial bias would help them win the campaign alleging that marijuana was a bad social epidemic.²⁴

During the Great Depression, massive unemployment and increased fear and resentment of Mexican immigrants escalated public concern over the drug. By 1931, twenty-nine states outlawed it, and Congress effectively followed suit with the Marijuana Tax Act in 1937.²⁵ Harry J. Anslinger, the commissioner of the U.S.

²¹ Martin A. Lee, *Book Excerpt: The Origins of Reefer Madness*, FAIR (Feb. 1, 2013), <https://fair.org/home/book-excerpt-the-origins-of-reefer-madness/>.

²² David McDonald, *The Racist Roots of Marijuana Prohibition*, FOUNDATION OF ECONOMIC EDUCATION (April 11, 2017), <https://fee.org/articles/the-racist-roots-of-marijuana-prohibition/>. Not only Hearst but other business tycoons such as Rockefeller considered cannabis competition. Dr. David Bearman, *Oil vs Cannabis: Why Marijuana Became Illegal and Still Is Today*, HUFF POST (May 30, 2017), https://www.huffpost.com/entry/oil-vs-cannabis-why-marijuana-became-illegal-and_b_592d8b54e4b0a7b7b469cd4dguccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAJ8Q4J1AAQBAAVvq_B2weOCektl8TjUfixoPjYeC-owTLIPaTb9kzvYP3N_RAObnUh5aTSi3EnhwCrWdwpWKA6kyb8OmtnkDct8dzH8ErnxprFfj1z6NqB0e6v_F-m-EgeTgI4MlAimXCalkFa-F3eTWRJOTiwalf2s9XJPHXNT.

²³ Sraders, *supra* note 20.

²⁴ Katy Steinmetz, *420 Day: Why There Are So Many Different Names for Weed*, TIME (April 20, 2017, 8:25 AM), <https://time.com/4747501/420-day-weed-marijuana-pot-slang/>. Marijuana has several nicknames: reefer, hash, ganja, green, stinkweed, Maryjane, hay, and puff the magic dragon to name a few.

²⁵ Marijuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970). The Marihuana Tax Act imposed an excise tax on marijuana for medical and industrial uses. *Id.* S. REP. NO. 6906 AT 6 (1937). A report submitted by the Committee on Ways and Means meant to accompany the House of Representatives bill stated that "Not only is marihuana used by hardened criminals to steel them to commit violent crimes, but it is also being placed in the hands of high-school children in the form of marihuana cigarettes by unscrupulous peddlers." *Id.* The hearing discussed how school children have been driven to crime and insanity through the use of this drug. *Id.* "Its continued use results many times in impotency and insanity." *Id.* The act imposed a \$1-per ounce tax on registered persons and a \$100-

Treasury's Federal Bureau of Narcotics at the time, was one of the loudest opponents of marijuana, arguing in 1937 that "It's one of the most dangerous drugs that should be known only to be shunned."²⁶ After the Marijuana Tax Act came into effect, marijuana was essentially removed from the nation's drugstores.

In the 1960s, the younger generation seemed to be more lenient towards marijuana use. Reports commissioned by Presidents Kennedy and Johnson found that marijuana use did not incite violence, nor did it serve as a gateway to the later use of heavier drugs.²⁷ Despite the younger generation's tolerance of the drug, Congress subsequently passed the 1970 Comprehensive Drug Abuse Prevention and Control Act that established categories/schedules for drugs depending on their perceived medicinal usefulness and their potential for abuse.²⁸ Marijuana was placed in Schedule I, the category for drugs that have no medical value and a high potential for abuse.²⁹

Very little legislative history exists to explain why marijuana was originally placed in Schedule I. Roger O. Egeberg, then Assistant Secretary for Health and Scientific Affairs in the Department of Health, Education, and Welfare during the Nixon administration, wrote to Harley O. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, in 1969 and asked that marijuana be temporarily placed in Schedule I until further studies could be conducted as to its dangerousness and the potential for addiction.³⁰ Egeberg wrote that without a full understanding of marijuana, the recommendation was to view it as a Schedule I controlled substance.

There is still a considerable void in our knowledge of the plant and effects of the active drug contained in it, our recommendation is that marihuana be retained within schedule I at least until the completion of certain studies now underway to resolve the issue. If those studies make it appropriate for the Attorney General to change the placement of marihuana to a different

per-ounce tax on unregistered persons. *Id.* The act did not criminalize marijuana but made it virtually impossible to obtain due to the high transfer tax. Patricia D. Smith & Andrew P. Lannon, *Local Regulation of Medical Marijuana in Florida*, 91 FLA. B.J. 59, 59 (2017). ("In 1969, the U.S. Supreme Court found the transfer tax provisions of the Marihuana Tax Act unconstitutional because they violated the Fifth Amendment prohibition of self-incrimination.")

²⁶ *Statement of H. J. Anslinger, Commissioner of Narcotics, Department of the Treasury*, SCHAFFER LIBRARY ON DRUG POLICY <http://www.druglibrary.org/SCHAFFER/hemp/taxac/anslng1.htm>. (last visited Jan 2, 2020).

²⁷ *Survey on Marijuana Law in The United States: History of Marijuana Regulation in The United States*, ALEXANDER CAMPBELL KING LAW LIBRARY <https://libguides.law.uga.edu/c.php?g=522835&p=3575350> (last updated July 12, 2020).

²⁸ 21 U.S.C § 801 (2020).

²⁹ 21 U.S.C. § 812(b)(1)(2020).

³⁰ H.R. REP. NO. 91-14444 (1970).

schedule, he may do so in accordance with the authority provided under section 201 of the bill.³¹

Chairman Stagers, then advocated that marijuana be temporarily placed in Schedule I. Classifications in the Controlled Substances Act were meant to “be subject to continuing review by the executive officials concerned, notably in the Department of Justice and the Department of Health, Education, and Welfare.”³² Moreover, the House Report associated with the Act indicated that marijuana was placed in Schedule I “until the completion of certain studies now under way” and that “the Presidential Commission’s recommendations ‘will be of aid in determining the appropriate disposition of this question in the future.’”³³

This Presidential Commission, also known as the Shafer Commission or the National Commission on Marihuana and Drug Abuse, was appointed by President Nixon at the direction of Congress.³⁴ By 1972, the Shafer Commission, had reviewed laws and studies regarding marijuana and determined that personal use of marijuana should be decriminalized, or at least the penalties for personal possession should be reduced.³⁵ Despite the Commission’s findings, Nixon refused to implement the Commission’s recommendations.³⁶ Shortly after, a parent’s movement against marijuana began in 1976. By the 1980s, the War on Drugs campaign (including marijuana) was in full swing.³⁷ Marijuana was kept under Schedule I.

³¹ *Id.*

³² *The Nat’l Org. for the Reform of Marijuana Laws (NORML) v. Ingersoll*, 497 Fed.2d 654, 656 (D.C.Cir. 1974).

³³ *Id.* at 657. Section 801 of the Controlled Substances Act established a presidential Commission on Marihuana and Drug Abuse and directed the Commission to conduct a study of marijuana and submit reports containing recommendations for legislative and administrative action. 21 U.S.C §801 (2020).

³⁴ *Shilo Case, SB73 Important Historical Facts*, UTAH STATE LEGISLATURE (Mar. 6, 2013, 7:07 PM), <https://le.utah.gov/publicweb/LIFFEDE/PublicWeb/35399/35399.html>.

³⁵ Fred P. Graham, *National Commission to Propose Legal Private Use of Marijuana*, THE NEW YORK TIMES (Feb 13, 1972), <https://www.nytimes.com/1972/02/13/archives/national-commission-to-propose-legal-private-use-of-marijuana.html>.

³⁶ *Id.*

³⁷ *Marijuana Timeline*, PUB. BROAD. SERV., <http://www.pbs.org/wghb/pages/frontline/shows/dope/etc/cron.html> (last visited Jan 24, 2020).

III. MARIJUANA'S CONTRIBUTIONS TO CRIMINAL PROCEDURE AND THE FOURTH AMENDMENT

Since marijuana's placement on the CSA's controlled substance list, the DEA³⁸, Customs and Border Protection³⁹, the Federal Bureau of Investigation (FBI)⁴⁰, and local law enforcement have been very busy enforcing violations of the CSA. The investigations into illegal growing, importing, distributing, possessing, and selling of marijuana led to thousands of cases, which led to convictions and appeals. Some appeals eventually made their way to the Supreme Court. Had it not been for these cases and landmark decisions, the rules of criminal procedure that are now being taught to officers, agents, and law students would be much different today.

Police techniques used in marijuana investigations have run the gamut from simple surveillance, paid informants, to high tech gadgetry. In order to gather sufficient probable cause to justify a search warrant for a suspect's home, police commonly use aerial surveillance, informants, neighbors, undercover officers, utility bills, and nightly walks onto open fields. At traffic stops, police encounter marijuana joints or smell weed in the suspect's car; this alone provides (warrantless) probable cause to search the entire automobile under the automobile exception. Police arresting defendants for mere marijuana possession conduct both a physical search of the subject and his vehicle incident to lawful arrest in order to find additional evidence of other crimes or violations. The impact of criminalizing marijuana has been great—it has expanded the criminal laws by which police can gather sufficient probable cause to search additional persons, properties, and homes.

A. *Open Fields v. Curtilage*

In *Oliver v. United States*, narcotics agents from the Kentucky State Police went to Oliver's farm to investigate after receiving a tip that marijuana was being grown.⁴¹ The agents drove past Oliver's house and parked next to a "No Trespassing" sign and a locked gate.⁴² The agents walked around the gate and along a path, passing a barn and a parked camper.⁴³ Someone near the camper shouted, "No hunting is allowed, come back up here."⁴⁴ The officers announced themselves as Kentucky

³⁸ Exec. Order No. 11727, 38 Fed. Reg. 18357 (July 10, 1973); *see also* 21 U.S.C.S. § 801 (2020) (Congressional findings and declarations: controlled substances).

³⁹ Homeland Security Act of 2002, PUB. L. NO. 107-296, 116 Stat. 2135 (2002).

⁴⁰ 28 U.S.C.A. § 533 (2002).

⁴¹ *Oliver v. United States*, 466 U.S. 170, 173 (1984).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

State Police, but no one responded.⁴⁵ After walking past the barn and the camper, the agents eventually found marijuana growing in the field.⁴⁶

The Supreme Court could have ruled that the agents were trespassing on private property and therefore, their behavior constituted a search under the Fourth Amendment. Admittedly, the owners had placed a lock on the gate and posted “No Trespassing” signs at the entrance of the farm. Since the agents had no search warrant, the evidence of marijuana would have been excluded had the court ruled the agents had trespassed and violated the owner’s Fourth Amendment rights. This decision would not have been completely far afield. Our Founding Fathers strenuously voiced their opinion that a man’s home is his castle and must be protected from government interference.⁴⁷ Moreover, in *Olmstead v. United States*⁴⁸, Chief Justice Taft made clear that physical trespass by government actors is needed to constitute a search within the Fourth Amendment.

However, the Supreme Court focused on the fact that the marijuana field was over a mile from Oliver’s home, stating: “There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is generally true that fences or ‘No Trespassing’ signs effectively bar the public from viewing open fields in rural areas.”⁴⁹ But those who live in rural areas that own a significant amount of land should expect others to walk on that land, and therefore, police should be able to as well.⁵⁰

Justice Holmes established the “open fields” doctrine in the 1924 case of *Hester v. United States*.⁵¹ Open fields could be entered and searched by law enforcement without probable cause or a warrant. *Oliver* assesses its validity decades later in 1984. Why did the Court support this prohibition-era ruling? Perhaps the Justices reasoned this open field doctrine was non-intrusive and represented a reasonable tool needed by law enforcement in its pursuit of evidence and probable cause. It is likely a singular tip from a neighbor or even a reliable informant would not be enough probable cause to justify a search warrant. The Court recognized police require

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 178 (“[T]he Court since the enactment of the Fourth Amendment has stressed ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.’”).

⁴⁸ *Olmstead v. United States*, 277 U.S. 438 (1928).

⁴⁹ *Oliver*, 466 U.S. at 179.

⁵⁰ *Id.*

⁵¹ *Hester v. United States*, 265 U.S. 57 (1924). “[T]he special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers and effects,’ is not extended to the open fields. The distinction between the latter and the house is as old as the common law.” *Id.*

lawful procedures and tools to gather probable cause, and a warrantless perusal of an open field did not seem unreasonable in the context of this case.

Eventually over time, the idea that a “search” is triggered under the Fourth Amendment when the government commits a physical trespass dwindled into obscurity. At the end of the *Oliver* decision, Justice Powell wrote, “in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.”⁵² Initially, the *Katz* decision in 1967 had become the sole analysis the Court was using to determine whether the government action constituted a “search” under the Fourth Amendment. Subsequent to *Katz*, the Court began to ask “first [whether] a person [] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”⁵³

Property rights made a resurgence in Supreme Court decisions beginning with *United States v. Jones* in 2012. The Court clarified that “the *Katz* reasonable-expectation-of-privacy test has been *added* to, not *substituted for*, the common-law trespassory test.”⁵⁴ Despite this clarification that the trespass test is alive and well in Fourth Amendment jurisprudence, the Court has not backtracked from its decision in *Oliver* years ago. In fact, Justice Scalia explained in *Jones* that “an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment.”⁵⁵ The open fields doctrine is still frequently used today to justify law enforcement walks on private property to examine barns which may be outfitted for meth labs or nearby fields used for marijuana grows.

B. Aerial Searches

In 1986, the Santa Clara, California police received an anonymous telephone tip that marijuana was growing in Ciraolo’s backyard.⁵⁶ The yard was enclosed by two fences, a six foot outer fence and a ten foot inner privacy fence.⁵⁷ Thus, the yard was completely shielded from view at the ground level.⁵⁸ However, the owners had not purchased a fumigator’s tarp to cover the entire house, roof, and yard and shield it from aerial surveillance.⁵⁹ Therefore, the officers rented a private plane, flew over Ciraolo’s property at an altitude of 1,000 feet within navigable airspace, and

⁵² *Oliver*, 466 U.S. at 184.

⁵³ *Katz v. United States*, U.S. 347, 361 (1967).

⁵⁴ *United States v. Jones*, 565 U.S. 400, 409 (2012).

⁵⁵ *Id.* at 411.

⁵⁶ *California v. Ciraolo*, 476 U.S. 207 (1986).

⁵⁷ *Id.* at 209.

⁵⁸ *Id.* at 207.

⁵⁹ *Id.* at 210.

observed marijuana plants growing inside Ciralo's yard.⁶⁰ The officers obtained a search warrant on the basis of the tip and their aerial observations and seized 73 plants located in the yard.⁶¹

Justice Burger used the *Katz* analysis to determine whether Ciralo manifested a subjective expectation of privacy in his yard and whether society was willing to recognize that expectation as reasonable.⁶² The question to be asked was "whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable."⁶³ Similar to the assumption that the public is likely to trespass onto rural lands, in this case, the Court asked whether the public would be able to view the same things the police officers were able to do in the private plane. Justice Burger writes, "Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed."⁶⁴ Because the officers were flying in navigable airspace where any member of the public could have been flying, and in a physically nonintrusive manner (bringing up the trespass argument again), Ciralo's expectation that his yard was protected from such aerial observation was unreasonable. Thus, Ciralo had a subjective, but not objective, expectation of privacy. If the public can do it, so too can law enforcement.

This decision was reinforced three years later in *Florida v. Riley*, where the Pasco County Sheriff's Office used a helicopter at an altitude of 400 feet to view the roof of a greenhouse.⁶⁵ Fortunately for them, two of the greenhouse panels were missing, allowing officers to see marijuana growing inside.⁶⁶ Because "[a]ny member of the public could legally have been flying over Riley's property in a helicopter" at that altitude and observed the marijuana growing inside, the officers did not violate Riley's reasonable expectation of privacy.⁶⁷ Moreover, "there was no undue noise, and no wind, dust, or threat of injury," and therefore there was no physical trespass onto Riley's property.⁶⁸ The officers could conduct aerial surveillance without a warrant and use their observations to add to the list for probable cause to search.

⁶⁰ *Id.* at 208.

⁶¹ *Id.* at 209.

⁶² *Id.* at 211.

⁶³ *Id.* at 213.

⁶⁴ *Id.*

⁶⁵ *Florida v. Riley*, 488 U.S. 445 (1989) (plurality decision).

⁶⁶ *Id.* at 448.

⁶⁷ *Id.* at 446.

⁶⁸ *Id.*

C. Thermal Imaging

Thermal imaging was a helpful tool for law enforcement when it was first introduced; however, its use later became practically non-existent based on the 2001 *Kyllo* case. Thermal imaging devices in the 1990s were not particularly sophisticated. The device could detect relative amounts of heat in a home (which presumably would tell an investigator where marijuana was being grown since indoor grow houses required a significant amount of light and heat). The scanner would detect infrared radiation/high heat sources and reveal this information to the user in the form of large blobs/dots on the screen. Despite the inference in the *Kyllo* case, the thermal imaging scanner used at that time would not have relayed a graphic, detailed image of the lady of the house if she was taking her daily sauna and bath.

What was true at the time of the *Kyllo* decision was that officers were regularly using thermal imaging devices to strengthen their affidavits, alleging probable cause existed to believe marijuana was growing inside the house they wished to search. A tip, plus utility bills indicating high amounts of electricity were being used, plus a thermal imaging scanner indicating high amounts of heat were present in select rooms typically provided the probable cause needed to argue marijuana was being grown inside the home.

In *Kyllo*, agents from the Department of the Interior in Oregon used an Agema Thermovision 210 thermal imager to scan a triplex, a building divided into three self-contained residences.⁶⁹ “The scan showed that the roof over the garage and a side wall of [Kyllo’s] home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that [Kyllo] was using halide lights to grow marijuana in his house, which indeed he was.”⁷⁰

Not surprisingly, the Supreme Court considered whether the public had access to such a device, and ultimately found that the thermal imaging device was “not in general public use.”⁷¹ This was a strike against the lawful use of the device for developing probable cause. If the public doesn’t have the ability to do it, neither can the police. Moreover, the device was being used to penetrate the home and curtilage associated with the intimate activities of the home, and not being used to examine the open fields surrounding the home.⁷² Strike two. “We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a

⁶⁹ *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

⁷⁰ *Id.* at 30.

⁷¹ *Id.* at 34.

⁷² *Id.* at 36.

constitutionally protected area,’ constitutes a search—at least where (as here) the technology in question is not in general public use.”⁷³

Ingeniously, Justice Stevens tried to save the law enforcement device by arguing the scanner was only detecting heat emanating “off-the-wall” and therefore agents were only making observations of the exterior of the house.⁷⁴ If it had been snowing, perhaps the agents could have seen the snow melting faster on the roof over the garage compared to Kyllo’s exterior wall on one side of the house.⁷⁵ In other words, the scanner was not piercing “through-the-wall” and intruding on the intimate activities within the home but merely picking up on the heat emanating from the home.⁷⁶ The majority felt it needed to respond to Justice Stevens’ dissent and allay fears about futuristic development of this technology, “the homeowner [would be] at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take into account of more sophisticated systems that are already in use or in development.”⁷⁷

The *Kyllo* decision devastated companies that sold thermal imaging devices to law enforcement agencies. The industry needed a new customer base and a new marketing strategy. Why use a thermal imaging device to develop probable cause for a search warrant for the home if police now needed a search warrant to use the device in the first place? It would be interesting to revisit the *Kyllo* case today because the general public can now readily purchase thermal imaging technology and even attach it to their smartphones. The images have greatly improved since the 1990s, and users can instantly identify subtle temperature differences in a building. FLIR Systems, the world’s largest commercial company specializing in the design and production of thermal imaging cameras, components and imaging sensors, market their products to both military and civilian customers, including those interested in making mechanical and insulation repairs, e.g., devices “designed to be the go-to tool for building inspections, facilities maintenance, HVAC, or electrical repair.”⁷⁸ FLIR thermal cameras for smartphones can range from \$199 to \$500

⁷³ *Id.* at 34.

⁷⁴ *Id.* at 42. (Stevens, J., dissenting).

⁷⁵ *Id.* at 43.

⁷⁶ *Id.* at 43–44.

⁷⁷ *Id.* at 35–36.

⁷⁸ *Pro-Grade Thermal Camera for Smartphones*, Digi-Key Electronics (Mar. 7, 2019), <https://www.digikey.com/en/product-highlight/f/flir/pro-grade-thermal-camera-for-smartphones>. The site lists the product description for a pro-grade thermal camera for smartphones such as features and applications. *Id.*

dollars.⁷⁹ Will a future Court decision take into account that thermal cameras are now in general public use or will they continue to protect “the homeowner [perceived to be] at the mercy of advancing technology”?⁸⁰

D. Dog Sniffs

Marijuana has definitely contributed to the case law regarding drug dogs. In *Illinois v. Caballes*,⁸¹ an Illinois state trooper stopped Caballes for speeding and radioed the police dispatcher to report the stop.⁸² A second trooper, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and drove to the scene with his canine that was trained to detect the odor of various narcotics.⁸³ The state trooper was in the process of writing a warning ticket when the second trooper walked his dog around Caballes’ car.⁸⁴ The dog alerted to the trunk of the car. The officers then searched the trunk of the car, found marijuana inside, and arrested Caballes.⁸⁵

The Court already determined in a previous case that dog sniffs are “*sui generis*,”⁸⁶ in other words unique, “of their own kind.”⁸⁷ A dog’s sense of smell is somewhere between 100,000 and one million times stronger than a human’s sense of smell.⁸⁸ And if a dog is well-trained in that it is trained to detect ONLY the presence of odor emanating from an illegal substance, then the dog, when it alerts, is detecting a substance that no one has a lawful reason to possess. This makes a dog sniff *sui generis*. “We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.”⁸⁹ As long as police, and their dog counterparts, are in a public area, the dog can sniff luggage and the exterior of cars

⁷⁹ The FLIR One Gen 3 iOS thermal camera for smartphones was advertised for \$19999 on Amazon with free delivery with Prime membership. AMAZON, <https://www.amazon.com/thermal-camera/s?k=thermal+camera> (last visited June 10, 2020).

⁸⁰ *Kyllo*, 533 U.S. at 35.

⁸¹ *Illinois v. Caballes*, 543 U.S. 405 (2005).

⁸² *Id.* at 406.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *United States v. Place*, 462 U.S. 696, 707 (1983).

⁸⁷ *Sui Generis*, BLACK’S LAW DICTIONARY (2nd ed. 2019).

⁸⁸ *A Dog’s Sense of Smell*, ADVANCING SCIENCE SERVING SOCIETY, <http://sciencenetlinks.com/daily-content/9/25/>. (last visited Dec. 27, 2019).

⁸⁹ *Place*, 462 U.S. at 707.

without revealing the internal contents of the property that are legal to possess and should be protected from intrusive eyes, i.e., only illegal substances will be exposed.

Justice Stevens reaffirmed law enforcement's decision to use dogs to detect contraband during traffic stops by pointing out that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."⁹⁰ Justice Souter in his dissent attempted to poke holes in this "infallible dog" theory and pointed out that "their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are 'generally reliable' shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search. In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times."⁹¹

Since *Caballes*, the Court has wrestled with when and where dog sniffs are appropriate without triggering the Fourth Amendment. Despite the fact that dogs are only sniffing for illegal contraband, the Court has set limits on where police can be when a drug dog is unleashed for the purpose of investigating potential drug crimes. In *Florida v. Jardines*, a detective in the Miami-Dade Police Department approached Jardines' home with his narcotics-detection dog (after receiving a tip that marijuana was being grown inside) and had the dog sniff Jardines' front porch.⁹² The dog alerted to the base of the front door.⁹³ The detectives obtained a search warrant based on the dog's alert and they later found marijuana plants inside.⁹⁴

The Court set certain limitations on where drug-sniffing dogs may utilize their sensitive noses. Justice Scalia writes, "when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'"⁹⁵ Focusing on the front porch aspect of the case, the Court then asks what is the homeowner's customary privacy expectation for one's front porch.⁹⁶ "The knocker on the front door is treated as an

⁹⁰ *Caballes*, 543 U.S. at 410.

⁹¹ *Id.* at 412 (Souter, J., dissenting).

⁹² *Florida v. Jardines*, 569 U.S. 1 (2013).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 6–7.

⁹⁶ *Id.*

invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.”⁹⁷ Is a dog trained in detecting the odor of narcotics sniffing at one’s front door a normal, customary activity? The Court says “no.” A Girl Scout selling cookies, a trick-or-treater, or even a police officer knocking on the front door to talk to the owner is a customary activity that most private citizens would expect or would do themselves. “But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else.”⁹⁸ In other words, “[t]he scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose . . . Here the background social norms that invite a visitor to the front door do not invite him there to conduct a search.”⁹⁹

Therefore, the dog sniff cases, mostly surrounding marijuana, evolved to demonstrate that while the Court recognized the merits of using narcotics detection dogs as an important investigative tool to prove probable cause to search, there must be limits as to when and where the dog can be used. Despite many defense attorneys’ attempts to discredit the drug dogs by claiming they were unreliable; the Supreme Court has still held on to its infallible dog theory—at least to some degree. In *Florida v. Harris*, the Court was essentially asked how qualified a dog must be to be considered “infallible.”¹⁰⁰ The Florida Supreme Court had required the state prosecution to introduce evidence concerning the dog’s reliability, such as the dog’s field performance records as to false alerts, prior to ruling on the admissibility of the dog’s alert to the presence of narcotics.¹⁰¹ The Supreme Court has ruled a dog’s reliability must be analyzed on a case-by-case basis.¹⁰² A certification of a narcotics detection canine by a bona fide organization that incorporates training and testing records will generally be sufficient to establish that the dog is reliable enough.¹⁰³ If a narcotics detection dog is trained and certified, defense attorneys will have an uphill battle proving the “sui generis” dog is unreliable.¹⁰⁴

⁹⁷ *Id.* at 8.

⁹⁸ *Id.* at 9. Justice Scalia states, “it is not the dog that is the problem, but the behavior that here involved use of the dog. We think a typical person would find it ‘a cause for great alarm’ to find a stranger snooping about his front porch with or without a dog.” *Id.* at 9, n.3.

⁹⁹ *Id.* at 9–10.

¹⁰⁰ *Florida v. Harris*, 568 U.S. 237 (2013).

¹⁰¹ *Id.* at 242–43.

¹⁰² *Id.* at 247–48.

¹⁰³ *Id.* at 246–47.

¹⁰⁴ Many dog handlers argue there is no such thing as a false alert. If a dog alerts and no narcotics are found, it simply means the dog is alerting to the odor of narcotics and the narcotics were recently removed from the area. *Id.* at 246.

E. Informants/Anonymous Tipsters

In 1983, the Bloomingdale, Illinois Police Department received an anonymous letter which stated that Lance and Susan Gates were selling drugs.¹⁰⁵ The letter stated that Sue drives the car to Florida, the car is loaded with drugs, and Lance flies down and drives the car back to Bloomingdale.¹⁰⁶ Sue will drive back down to Florida on May 3rd, and Lance will fly down a few days later to drive the car back home.¹⁰⁷ The tipster also indicated that the Gates had over \$100,000 worth of drugs in their basement.¹⁰⁸

DEA agents told police that Lance flew to Florida on May 5th and was driving northbound on the interstate with an unidentified woman in a Mercury with Illinois license plates (registered to a Hornet station wagon owned by the Gates).¹⁰⁹ The police used the information in the tip and the DEA's information to obtain a search warrant to search the Gates' residence and automobile.¹¹⁰ When the Gates returned from their Florida trip, the officers were waiting for them. They searched the trunk of the Mercury and found 350 pounds of marijuana.¹¹¹ A search of the home revealed additional marijuana and weapons.¹¹²

Illinois v. Gates was an incredibly important case because the Court clarified that a tip based on partially corroborated evidence from an unknown tipster can satisfy the Fourth Amendment's probable cause requirement.¹¹³ Originally, the Court had addressed this issue in the 1960s in two cases that created what has been called the *Aguilar-Spinelli* test.¹¹⁴ This standard required a magistrate to review (1) the informant's basis of knowledge/credibility and (2) the informant's reliability,¹¹⁵ i.e., how did the informant get the information and why should the magistrate believe this person? If both prongs were satisfied, the information provided by an informant could be used as a basis for probable cause.

¹⁰⁵ *Illinois v. Gates*, 462 U.S. 213 (1983).

¹⁰⁶ *Id.* at 225.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 226.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 227.

¹¹² *Id.*

¹¹³ *Id.* at 267.

¹¹⁴ *Id.* at 267–68; *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

¹¹⁵ *Gates*, 462 U.S. at 267–68.

With the *Illinois v. Gates* case in 1983, the Court became more flexible and decided that, although the *Aguilar-Spinelli* factors are important, “they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is ‘probable cause.’”¹¹⁶ Due to the rigidity of the *Aguilar-Spinelli* test, anonymous tips previously could not be used as a basis for probable cause because they did not demonstrate knowledge or reliability. In its decision in *Gates*, the Supreme Court reconsidered the value of anonymous tips. “[S]uch tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise ‘perfect crimes.’”¹¹⁷ Since the probable cause standard is a “practical, nontechnical conception . . . on which reasonable and prudent men, not legal technicians act,” the Court suggested that magistrates review warrants using a totality-of-the-circumstances approach.¹¹⁸ Magistrate judges should make practical, commonsense decisions and consider the informant’s basis of knowledge or the anonymous tipster’s detail and description of future activity, the reliability of the informant, and/or any evidence the officer found while corroborating an anonymous tip.¹¹⁹

This flexibility in considering informant information was an incredible win for law enforcement. Police rely heavily on tipsters and informant information to initiate investigations and develop probable cause to dig deeper. Drug informants are incredibly valuable in the drug war. As the saying goes, “it takes a thief to catch a thief.” While some informants may lack reliability (especially anonymous tipsters like Sue Gates’ hairdresser who had no idea how important it was to sign her anonymous letter to police), the *Gates* case demonstrates that a tipster’s information can still be considered if the tipster’s basis of knowledge appears to be strong (i.e., detailed facts only someone close to the defendant would know, facts that predict criminal activities in the future, etc.) and the tip can be corroborated. The *Aguilar-Spinelli* test proved to be too rigorous and limiting, especially in the case of anonymous tipsters and unreliable informants.

F. *The Exigent Circumstances Exception*

One of the most unique aspects of marijuana is its smell. Police can immediately smell burnt marijuana before they see it. While human noses may not be as sensitive as a dog’s nose, this distinctive smell certainly assists law enforcement in gathering probable cause to search a car or property without a warrant. In the case of the exigent circumstance exception, if the police can smell burnt marijuana outside the home and can hear running, moving, and flushing of

¹¹⁶ *Id.* at 230.

¹¹⁷ *Id.* at 237–38.

¹¹⁸ *Id.* at 230–31 (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949)).

¹¹⁹ *Id.* at 238, 241.

items inside the home, the police can make a strong argument that exigent circumstances exist for them to enter without a warrant in order to prevent the destruction of evidence. Legalization of marijuana will most certainly lead to fewer circumstances in which police have exigent circumstances to obtain evidence of other crimes.

In *Kentucky v. King*, police officers in Lexington, Kentucky set up a controlled buy of crack cocaine outside an apartment complex.¹²⁰ After the deal occurred, the suspect escaped toward the breezeway of an apartment building.¹²¹ Officers drove into a nearby parking lot and ran to the breezeway where they heard a door shut and detected a strong odor of burnt marijuana.¹²² Officers saw two apartments at the end of the breezeway and they did not know which apartment the suspect had entered.¹²³ They approached the apartment on the left where they smelled the marijuana smoke.¹²⁴

When the officers banged on the door and announced their presence, they heard people moving things inside.¹²⁵ Officers believed the people inside were possibly destroying drug-related evidence and so they kicked in the door and found three people inside.¹²⁶ Hollis King, his girlfriend, and a guest were smoking marijuana.¹²⁷ The officers performed a protective sweep and found marijuana and powder cocaine in plain view.¹²⁸ The initial suspect was eventually found in the apartment on the right side of the breezeway.¹²⁹

The Court reassured police officers that the marijuana smell and suspected movement/destruction of evidence from inside the home was sufficient probable cause for the officers to enter the home without a warrant. Justice Alito writes, “[w]here, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”¹³⁰

Without the smell of marijuana emanating into the hallway, the police would have had no reason to believe the sound of people inside moving items around had

¹²⁰ *Kentucky v. King*, 563 U.S. 452, 455 (2011).

¹²¹ *Id.* at 456.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 456–57.

¹²⁸ *Id.* at 457.

¹²⁹ *Id.*

¹³⁰ *Id.* at 462.

anything to do with destroying drug evidence. Perhaps the occupants were cleaning up or sweeping. No other drug (other than perhaps methamphetamine) could provide such an exigency for action (unless officers had seen the initial drug dealer suspect actually run in to that particular apartment).

Methamphetamine has a distinctive odor when it is being cooked. Many officers have likened the smell to cat urine.¹³¹ Perhaps in a meth lab scenario, if police smell something that seems similar to meth (or cat urine), and they hear people inside moving items around, this might constitute probable cause to justify exigent circumstances exist to enter the home without a warrant and conduct a protective sweep. However, in the meth scenario, it is unlikely the suspects could destroy all evidence of a meth lab before police were able to secure a warrant. Even so, exigent circumstances may exist in a similar situation and police would more than likely be justified in entering the home and securing the scene. Yet, the smell of burnt marijuana has provided law enforcement with probable cause to justify exigent circumstances exist more than any other “illegal” odor.

G. *The Automobile Exception*

Not only has marijuana impacted when the Fourth Amendment is triggered (and therefore the government action at issue constitutes a “search”), it has also shaped many exceptions to the warrant requirement.

In 1979, a DEA agent had information that Charles Carney’s mobile home was being used to exchange marijuana for sex.¹³² The agent watched Carney approach a youth and then noticed them both walk to Carney’s motor home parked in a lot in downtown San Diego.¹³³ The agent waited until the youth left the motor home seventy-five minutes later and then approached him.¹³⁴ The youth told the agent that he had received marijuana in return for doing sexual favors for Carney.¹³⁵ Without a warrant or consent, one agent entered the motor home and observed marihuana, plastic bags, and a scale of the kind used in weighing drugs on a table.¹³⁶ A second search of the motor home revealed additional marijuana, and Carney was arrested for possession of marihuana for sale.¹³⁷

¹³¹ Amy Keller, *What does Meth Smell like?*, DRUG REHAB, <https://www.drugrehab.com/addiction/drugs/crystal-meth/smell/> (last updated Feb. 27, 2020).

¹³² *California v. Carney*, 471 U.S. 386, 387–88 (1985).

¹³³ *Id.* at 388.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

The Court in *Carney* supported what the Court during the prohibition-era had authorized. In *Carroll v. United States*¹³⁸ the Court found that Treasury Department officials had probable cause that Carroll was transporting alcoholic beverages in his car, and despite the fact that they conducted the search without a warrant, the search was still valid.¹³⁹ The Court explained that “because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought,” agents can search without a warrant if they have probable cause.¹⁴⁰ The 1985 *Carney* decision expanded on prohibition-era ruling by pointing out that an owner of a vehicle (or motor home in this case) which can be readily moved from one location to another has a reduced expectation of privacy due to the mobility of his vehicle, and therefore the vehicle can be searched without a warrant.¹⁴¹ *Carney* may have been living in his motor home, but because it was in a parking lot and easily mobile with a turn of an ignition key, agents could search it without a warrant.¹⁴² “At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.”¹⁴³

A marijuana case also clarified what containers law enforcement can open when conducting a warrantless search of containers in a car. In *California v. Acevedo*, police officers of the Santa Ana, California Police Department observed Charles Steven Acevedo enter Jamie Daza’s apartment and leave ten minutes later with a brown paper bag that looked full.¹⁴⁴ Officers knew Daza had just received a package of marijuana at his apartment two hours earlier.¹⁴⁵ Acevedo placed the bag in the trunk of his silver Honda and drove away.¹⁴⁶ Officers stopped him, opened the trunk, and found the bag containing marijuana.¹⁴⁷ The Court held that as long as the police have probable cause to believe drugs will be found in a container in the car, the police can search the container without a warrant.¹⁴⁸ The officers had reason to believe the bag contained marijuana, the bag was placed in the car, and therefore, the automobile exception applies to any container in the car where that marijuana

¹³⁸ *Carroll v. United States*, 267 U.S. 132 (1925).

¹³⁹ *Id.* at 160–62.

¹⁴⁰ *Id.* at 153.

¹⁴¹ *Carney*, 471 U.S. 386.

¹⁴² *Id.*

¹⁴³ *Id.* at 393.

¹⁴⁴ *California v. Acevedo*, 500 U.S. 565, 567 (1991).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 579.

may be stashed.¹⁴⁹ With this ruling, law enforcement officers gained a significant tool to be utilized during traffic stops.

H. *Search Incident to Lawful Arrest*

While marijuana cases have not completely dominated the rules that apply to the “search incident to lawful arrest” exception to the warrant requirement, marijuana has certainly played a role in the foundation of the exception as it pertains to traffic stops. In *New York v. Belton*, a New York State police officer stopped a driver for speeding.¹⁵⁰ While the officer discovered that none of the occupants owned the car or were related to the owner, he also smelled burnt marijuana and saw on the floor of the car an envelope marked “Supergold,” which he associated with marijuana.¹⁵¹ The officer arrested the occupants for possession of marijuana and subsequently searched each person and the passenger compartment of the car.¹⁵² In the car, he found Belton’s jacket, unzipped the pockets, and found cocaine.¹⁵³ Belton was then also arrested for criminal possession of a controlled substance.¹⁵⁴

What gave the officer the right to search the car after all the occupants exited the vehicle? The Court wanted to advance a bright-line rule that officers might follow in any traffic stop situation when the driver and/or passengers are arrested, and the occupants are ordered out of the car.

[T]he police may also examine contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.¹⁵⁵

The *Belton* decision allowed officers to automatically search the passenger compartment of the car any time someone is arrested. The rationale for this rule

¹⁴⁹ *Id.* at 579–80.

¹⁵⁰ *New York v. Belton*, 453 U.S. 454, 455 (1981).

¹⁵¹ *Id.* at 455–56.

¹⁵² *Id.* at 456.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 460–61 (citing *United States v. Robinson*, 414 U.S. 218 (1973); *Draper v. United States*, 358 U.S. 307 (1959)).

appeared to be two-fold: (1) officer safety and (2) potential destruction of evidence.¹⁵⁶ Officers eventually had a third reason to search the passenger compartment of the car even if the defendant was handcuffed and placed in the back of the patrol car. Officers could continue to search the passenger compartment of the car in that instance if it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.¹⁵⁷ Officers still had a bright line rule in cases where arrestees were outside of the car but secured, but if the officer chose to handcuff the arrestee and place them in the patrol car, the officer would have to go through the additional step of asking if there was reason to believe evidence of the crime for which he or she is being arrested would be found in the vehicle.¹⁵⁸ If yes, there is justification to conduct a warrantless search of the interior passenger compartment for evidence.

I. *Border Searches*

Marijuana is at the forefront of border searches. Flores-Montano attempted to enter the United States at the Otay Mesa Port of Entry in southern California, and a customs inspector sent Flores-Montano and his 1987 Ford Taurus to a secondary station for further inspection.¹⁵⁹ Once there, a customs inspector tapped the gas tank and noticed it sounded solid.¹⁶⁰ The inspector called for a mechanic who arrived within 20 to 30 minutes.¹⁶¹ The mechanic took 15 to 25 minutes to remove the gas tank, and he eventually found 37 kilograms of marijuana bricks inside.¹⁶²

The Court used this case to stress the fact that “searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.”¹⁶³

The Court did not perceive that Flores-Montano had a significant privacy interest in his gas tank nor did they discern that the time it took to disassemble and reassemble the gas tank was a significant deprivation of his property interest.¹⁶⁴ “We have long recognized that automobiles seeking entry into this country may be

¹⁵⁶ *Id.* at 464 (Brennan, J, dissenting).

¹⁵⁷ *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

¹⁵⁸ *Arizona v. Gant*, 556 U.S. 332 (2009).

¹⁵⁹ *United States. v. Flores-Montano*, 541 U.S. 149, 150–51 (2004).

¹⁶⁰ *Id.* at 151.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 152–53 (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1972)).

¹⁶⁴ *Id.* at 155.

searched. It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile's passenger compartment."¹⁶⁵

J. School Searches

A teacher at a New Jersey high school discovered T.L.O., a 14 year-old freshman, and her companion smoking cigarettes in a school bathroom in violation of school rules.¹⁶⁶ The teacher took them to the Principal's office where they were questioned by the Assistant Vice Principal.¹⁶⁷ T.L.O. denied she had been smoking and claimed she did not smoke at all.¹⁶⁸ The Assistant Vice Principal demanded to see her purse, opened her purse, and found a pack of cigarettes and a package of cigarette rolling papers commonly associated with the use of marijuana.¹⁶⁹ He searched the purse further and found some marijuana, a pipe, plastic bags, a fairly substantial amount of money, an index card containing a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in her marijuana dealing.¹⁷⁰

The T.L.O. case was important in that it ensured that the Fourth Amendment served as a check on not only criminal searches but also other types of government searches. In the case of searches done for non-criminal investigative purposes, the justification for the search must be reasonable.¹⁷¹ Public school officials were on notice that "the search as actually conducted '[be] reasonably related in scope to the circumstances which justified the interference in the first place.'"¹⁷² The scope of the search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."¹⁷³ If there were reasonable grounds to believe T.L.O. was hiding marijuana in her purse, a clear violation of a school rule, the school official had the right to search her purse. In 1985, cigarettes and marijuana were the banned substances of choice in our schools; today, perhaps similar searches will be conducted for other such popular products banned by schools such as vaping devices.

¹⁶⁵ *Id.* at 154.

¹⁶⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 326.

¹⁷² *Id.* at 341.

¹⁷³ *Id.* at 342.

K. *Exceptions to the Exclusionary Rule—Independent Source Exception*

While most of the marijuana cases discussed above dealt with court decisions on the use of specific police investigative tools and when these techniques triggered the Fourth Amendment, this final marijuana case is important because of its impact in developing the constantly evolving exclusionary rule (and its many exceptions).

In 1983, federal agents once again received a tip from an informant that Michael Murray and James Carter were selling and distributing marijuana.¹⁷⁴ The agents watched Murray in a truck and Carter in a green camper as both suspects drove to a warehouse in South Boston.¹⁷⁵ Agents could see inside the warehouse; besides Murray and Carter, the agents observed two additional individuals and a tractor-trailer rig bearing a long, dark container.¹⁷⁶ Twenty minutes later, the agents saw Murray and Carter hand over their vehicles to two other drivers who then left the warehouse.¹⁷⁷ The agents followed the two vehicles which were stopped and the drivers arrested. An inspection of the two vehicles uncovered a substantial amount of marijuana.¹⁷⁸

Rather than wait for a search warrant for the warehouse, agents entered the warehouse and found “in plain view numerous burlap-wrapped bales that were later found to contain marijuana.”¹⁷⁹ The agents knew at this point that they should probably leave and get a warrant so they could lawfully seize the marijuana; a search warrant was required to ensure the seized marijuana would be admissible in court during Murray and Carter’s criminal trial.¹⁸⁰ The agents did not mention their unlawful entry in their affidavit for the search warrant.¹⁸¹ When the warrant was issued, the agents returned to the warehouse where they “seized 270 bales of marijuana and notebooks listing customers for whom the bales were destined.”¹⁸²

At issue was whether the search warrant was tainted by the officers’ initial entry and the fact that the police officers never informed the magistrate judge about their initial warrantless entry.¹⁸³ This case essentially created the “independent source” exception to the exclusionary rule. While the exclusionary rule prohibits the

¹⁷⁴ Murray v. United States, 487 U.S. 533, 535 (1988).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 535–36.

¹⁸² *Id.* at 536.

¹⁸³ *Id.*

introduction of evidence seized during an unlawful search, if “the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.”¹⁸⁴ Justice Scalia anticipated the possible abuse of the independent source exception, e.g., law enforcement might be tempted to take an initial sneak peek or inventory a property suspected of housing drugs or contraband prior to writing out a search warrant affidavit for the property.¹⁸⁵ Thus, Justice Scalia made clear that:

[a]n officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous a burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers’ decision to seek a warrant or the magistrate’s decision to grant it. Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate.¹⁸⁶

Had the initial warrantless entry of the warehouse not contributed to the agents’ pursuit of the warrant, the government could have argued the warrant-authorized search of the warehouse was an independent source of the marijuana bales.

IV. LOOK BACKWARDS AND FORWARDS

Each of these cases derived from some marijuana investigation—marijuana being either the main focal point of the investigation or, at least, a pivotal part. Regardless, crucial investigative tactics, constitutional rights, and new police standards were created on the basis of marijuana possession being unlawful. Existing law enforcement standards for the conduct of criminal investigations are based substantially on these early court decisions in marijuana cases.

A. *Why was Marijuana Criminalization a Failed Experiment?*

Law enforcement, both at the state and federal levels, has vigorously enforced marijuana criminal laws since Congress passed the CSA in 1970 and states

¹⁸⁴ *Id.* at 537 (1988); (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)).

¹⁸⁵ *Id.* at 539.

¹⁸⁶ *Id.* at 540.

criminalized its possession and distribution.¹⁸⁷ As seen from the numerous cases in which police officers and federal agents attempted to use a variety of tools to investigate those suspected of possessing, growing, and distributing marijuana, this drug has been seen as dangerous enough to make it a law enforcement priority. And because of its distinctive smell and relatively common use, police have been able to use its illegality as a touchstone into exploring what other types of crimes may be lurking beneath the surface of a burnt marijuana smell.

Marijuana has in many ways been responsible for filling up U.S. prisons. There are still more arrests for marijuana possession every year than for all violent crimes combined.¹⁸⁸ According to one study, the United States spent more than three billion dollars enforcing marijuana laws in one year alone.¹⁸⁹ The average cost of keeping a defendant in federal prison is \$20,000 to \$30,000 a year.¹⁹⁰ At the federal level, defendants who are caught distributing or growing less than fifty plants or fifty kilograms of marijuana are facing up to five years in prison.¹⁹¹ For between fifty to ninety-nine plants or kilograms, the penalty increases to a maximum of twenty years in prison.¹⁹² For between 100-999 plants or kilograms, the penalty increases to a minimum of five years and a maximum of forty years.¹⁹³ For 1000 plants or kilograms, the minimum imprisonment is ten years and the maximum is life.¹⁹⁴ Those caught, at least at the federal level, spend a lot of time in prison before returning to society where they confront integration difficulties.

Why are so many Americans possessing and using marijuana? Despite law enforcement's best efforts, criminalizing marijuana appears to have failed to eliminate or, at the very least, reduce marijuana use. Marijuana appears to be much more acceptable, popular and prevalent than other drugs. Most ordinary Americans

¹⁸⁷ *Drug Enforcement in the United States: History, Policy, and Trends*, CONGRESSIONAL RESEARCH SERVICE, <https://fas.org/sgp/crs/misc/R43749.pdf> (last visited June 19, 2020).

¹⁸⁸ *Do People Still Get Arrested and Punished for Using Marijuana*, DRUGPOLICY.ORG, <https://www.drugpolicy.org/do-people-still-get-arrested-and-punished-using-marijuana> (last visited Dec. 26, 2019).

¹⁸⁹ Christal Hayes, *Marijuana Arrests Were Up Last Year—And You're Paying Billions for It*, NEWSWEEK (Sept. 26, 2017), <http://www.newsweek.com/pot-arrests-rising-and-youre-paying-millions-it-671478>.

¹⁹⁰ *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, OFFICE OF THE INSPECTOR GENERAL, DEP. OF JUST. (Feb. 2016), <https://oig.justice.gov/reports/2015/e1505.pdf>.

¹⁹¹ *Federal Laws and Penalties*, NORMAL.ORG, <https://norml.org/laws/federal-penalties-2> (last visited Jan. 12, 2020).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

do not believe marijuana is as devastating as other illegal drugs—devastating in terms of one’s own personal health and devastating to the community at large.¹⁹⁵

California demonstrated this lack of concern when voters passed Proposition 215 in 1996 allowing for the sale of medicinal marijuana for patients with AIDS, cancer, and other serious illnesses.¹⁹⁶ Many states followed California’s lead, first passing referendums legalizing marijuana for medicinal purposes, and later for recreational purposes.¹⁹⁷ Perhaps the younger generations that were using marijuana in the 1960s are now older and they favor and support the legalization of marijuana along with their children and grandchildren. Maybe the opposition has died off, e.g., the older generation from Nixon’s era, who never experimented with marijuana and supported the decision to place marijuana as a Schedule I drug on the CSA, are no longer concerned with this issue. A Gallup poll in 2018 found that about one in four young adults in the United States have experimented with and/or use marijuana.¹⁹⁸ According to a 2015 National Survey on Drug Use and Health, marijuana is the most commonly used illicit drug with an estimated 22.2 million people using the drug in the last month alone.¹⁹⁹ An estimated 64% approve of marijuana being used for recreational purposes.²⁰⁰

Marijuana also appears to be much cheaper to purchase than other illegal drugs, much more available for purchase, and less addictive.²⁰¹ Criminal enterprises have

¹⁹⁵ Matt Ferner, *Marijuana May be the Least Dangerous Recreational Drug, Study Shows*, HUFF POST (Dec. 6, 2017), https://www.huffpost.com/entry/marijuana-safer-than-alcohol-tobacco_n_6738572. Opioid, crack, and heroin addictions have proven to be incredibly devastating to communities at large. Alexis Nager, *The Devastating Impact of Addiction in Rural America and What’s Being Done About it*, THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE, (June 21, 2020), <https://cosancadd.org/the-devastating-impact-of-addiction-in-rural-america-and-whats-being-done-about-it/?erthndxbcv=yes>.

¹⁹⁶ Carey Goldberg, *Medical Marijuana Use Winning Backing*, N.Y. TIMES (Oct. 30, 1996), <https://www.nytimes.com/1996/10/30/us/medical-marijuana-use-winning-backing.html>.

¹⁹⁷ *Marijuana Overview*, Nat’l Conference of State Legislatures (Oct. 13, 2020), [http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx\[https://perma.cc/HMN2-PX38\]](http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx[https://perma.cc/HMN2-PX38]).

¹⁹⁸ Justin McCarthy, *Snapshot: About One in Four Young Adults Use Marijuana*, GALLUP (Aug. 15, 2018), <https://news.gallup.com/poll/240932/snapshot-one-four-young-adults-marijuana.aspx>.

¹⁹⁹ Sarra L. Hedden et al., *Behavioral Health Trends in the United States: Results from the 2014 National Survey on Drug Use and Health*, SUBSTANCE ABUSE AND MENTAL HEALTH ADMINISTRATION (Sept. 2015), <https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf>.

²⁰⁰ Justin McCarthy, *Record-High Support for Legalizing Marijuana Use in U.S.*, GALLUP (Oct. 25, 2017), <https://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx>.

²⁰¹ *Most Expensive U.S. Marijuana Dispensary Prices Compared to Street Prices in January 2016, by State*, STATISTA, <https://www.statista.com/statistics/589821/steet-and-dispensary-marijuana-price-difference-by-us-state/> (last visited Dec. 27, 2019). The price of marijuana differs drastically depending on the state. According to one statistic in 2016, marijuana from a dispensary in Michigan

made large amounts of money from selling marijuana. There are certainly many more marijuana users than cocaine users. . . Even though a pound of marijuana might sell for around \$1,000 and a pound of cocaine might sell for \$10,000, the demand for marijuana is high, and therefore, marijuana is more than likely the number one illegal money maker in the drug distribution business.²⁰² Criminal enterprises selling marijuana will probably take the greatest hit financially when marijuana is removed from Schedule I.

Moreover, due to the current confusion between state and federal laws, criminal enterprises are most certainly taking greater risks to compete in the market and hoping law enforcement priorities are placed elsewhere; criminal enterprises want law enforcement to turn a blind eye to illegal marijuana trafficking, but legalization of marijuana would be anathema. Criminal organizations are hoping federal agents are looking the other way as well.

Marijuana is unique in the Schedule I controlled substance list. Its criminalization has promoted the cartelization of the illicit drug industry and caused the underground market for marijuana to flourish. The decrease in supply due to law enforcement efforts has, over the years, seen an increase in prices—again, such a monopoly power benefits criminal enterprises. The outdoor marijuana grows of the 1960s with lower tetrahydrocannabinol [THC] concentrations²⁰³ have been replaced by hydroponic grows with a much higher THC content. Therefore, the marijuana of today is much more potent. There has been an increase in violence within the underground market as marijuana dealers have no form of legal dispute resolution they can legally turn to, and there has clearly been an increase in incarceration due to the high arrest rates.

The case law analysis outlined above also demonstrates that with marijuana criminalization, there has been an increase in police powers. Marijuana investigations were at the forefront of using thermal imagers, exploring records under the third-party doctrine, talking to informants and anonymous tipsters, performing exploratory walks on private property looking for marijuana fields, and warrantless searches based on exigent circumstances such as someone destroying drug evidence, etc.

Lastly, along with an increase in arrests and criminal investigations, placing marijuana on the Schedule I list has made it difficult for patients (such as those with

cost \$301 an ounce or \$274 if sold illegally in the street. In Oregon, an ounce was sold for \$214 at a dispensary or \$191 in the street.

²⁰² *Id.*

²⁰³ THC, or tetrahydrocannabinol, is the psychoactive component of marijuana. Zerrin Atakan, *Cannabis, a Complex Plant: Different Compounds and Different Effects on Individuals*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., (Dec. 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3736954/>.

cancer or epilepsy) to use marijuana for medicinal purposes.²⁰⁴ Moreover, its criminalization has hindered medical researchers from exploring the positive benefits marijuana might have on various illnesses.²⁰⁵

In summary, placing marijuana on the CSA's Schedule I most-dangerous list has led to a large amount of convictions and arrests with an increase of incarceration rates, and significant criminal procedural changes authored by the Supreme Court to help regulate law enforcement operations. Yet, this drug's placement on the controlled substance list will not withstand the test of time like other drugs, such as cocaine, heroin, or methamphetamine. It is only a matter of time before marijuana will be decriminalized and regulated.

V. LIVING IN A POST-LEGALIZATION WORLD

It is unclear how American society will change after marijuana is taken off the CSA's Schedule I controlled substances list. Will the use of marijuana dramatically increase? Will children take this as a signal that marijuana use is socially acceptable and begin to use it on a regular basis? Will Betty Crocker startups begin to offer brownie mixes containing bits of cannabis?

The future is uncertain. What is clear is that the ambivalence and confusion that federal law enforcement currently faces concerning its obligation to uphold existing federal marijuana laws, in light of contradictory state law in those states which have already decriminalized the drug, will end. Law enforcement, both federal and state, can hopefully rechannel its resources into combatting other, more serious drug crimes. There will no longer be any conflict among disparate state marijuana laws. More than likely, if there are any holdout states who do not legalize marijuana in the near future, they will do so after the federal government lifts its ban. Banks will no longer have to worry about being federally charged with money laundering. Marijuana dispensaries will no longer have to store large amounts of currency in their vaults and hire security guards to prevent robberies that regularly occur as a result of having to keep all that cash onsite since banks cannot do business with businesses that deal in marijuana.

Will there be mass chaos? No. In all likelihood, marijuana will be treated just like alcohol is treated. The 21st Amendment to the Constitution was responsible for repealing prohibition in the United States, and it allows individual states to control the sale, distribution, and importation of alcohol within the state.²⁰⁶ Thus, a

²⁰⁴ Peter A. Clark, Kevin Capuzzi & Cameron Fick, *Medical Marijuana: Medical Necessity Versus Political Agenda*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Dec. 1, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3628147/>. Synthetic THC has been used to create the drug Marinol to treat nausea and vomiting associated with cancer treatment. *Highlights of Prescribing Information, Marinol*, www.rxabbvie.com/pdf/marinol_PI.pdf. (last updated Aug. 2017).

²⁰⁵ Clark et al., *supra* note 185.

²⁰⁶ U.S. CONST. amend. XXI § 1.

combination of federal, state, and local laws dictates the manufacture and sale of alcohol and dictates who can drink alcohol, as well as when and where.

A. New or Revised Laws Applicable to Future Legal Marijuana Use

Removing marijuana from the CSA does not mean that marijuana will not be heavily regulated or that marijuana is removed from the list of crimes entirely. Common state criminal offenses like DUI/driving while impaired, open container laws, public intoxication laws, and possession by a minor laws will more than likely be on the books. In juvenile courts, possession of marijuana will more than likely be considered a “status” offense similar to the consumption of alcohol.

Marijuana used for medicinal purposes will be regulated by the FDA. Fortunately, gaps in the system today will be closed with stronger regulations on marijuana (both THC and CBD²⁰⁷ chemicals). Up to now, the FDA has done little to stop the sale of spiked CBD products.²⁰⁸ There are currently CBD edibles, candies, beverages, lotions, and creams. Unfortunately, it has been up to the manufacturer to test the product’s medicinal quality, and according to a survey of government labs in nine states, 138 samples out of more than 350 had synthetic marijuana in products marketed as CBD.²⁰⁹ People have died or ended up in a coma after inhaling or eating what they thought to be CBD but, in reality, was illegal synthetic marijuana.²¹⁰ More FDA regulation can allay many fears about CBD products.

Recreational marijuana sold over the counter will be regulated at the federal level, similar to alcohol. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers regulations designed to protect consumers and ensures alcohol and tobacco products are appropriately labeled, advertised and marketed.²¹¹ Marijuana users will no longer have to worry about what marijuana purchased in the black market is cut with, whether the grower used pesticides, or what the particular THC content is. The contents will be spelled out on the label.

The TTB is also responsible for levying and collecting excise taxes on alcohol, tobacco, firearms and ammunition.²¹² It will likely fall to the ATF to identify

²⁰⁷ Holbrook Mohr, *Some CBD Vapes Contain Street Drug Instead of the Real Thing*, AP News (Sept. 16, 2019), <https://apnews.com/7b452f4af90b4620ab0ff0eb2cca62cc> (Cannabidiol is one of the chemicals found in cannabis and does not get users high. CBD has been said to “reduce pain, clam anxiety, increase focus and even prevent disease.”).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Regulation*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, (<https://www.ttb.gov/what-we-do/regs-guidance/regulations> (last updated Jan. 18, 2018) (outlining the regulations administered by the TTB).

²¹² *Id.*

criminal enterprises which traffic in illicit marijuana or contraband marijuana in interstate commerce. The ATF is currently responsible for monitoring the] "m]anufacture, wholesale and importation of alcohol and tobacco; [r]egulating the alcohol and tobacco industries and Special Occupational TAX (SOT); and [c]ollection of the Alcohol, Tobacco, Firearms and Ammunition Excise Taxes imposed on manufactures and importers of these products."²¹³ ATF criminal investigators "target, identify, and dismantle criminal enterprises with ties to violent crime, that traffic illicit liquor or contraband tobacco in interstate commerce; seize and deny their access to assets and funds; and prevent their encroachment into the legitimate alcohol or tobacco industry."²¹⁴ It is a criminal offense to knowingly ship, transport or receive contraband cigarettes or smokeless tobacco, and a violation could result in a maximum of five years' imprisonment.²¹⁵

Since marijuana will be sold recreationally, the federal government's biggest concern will be shutting down any criminal operation that attempts to distribute marijuana in avoidance of any federal or state tax. The TTB will presumably monitor lawful marijuana manufacturers and collect the requisite taxes, the state liquor control boards will presumably do the same at the state level, and the ATF will attempt to dismantle any criminal operation that attempts to sell marijuana in the black market.

At the state level, Colorado is an example of what the post-legalization environment in each state will look like. The greatest change will be that simple possession of marijuana will be legal. In Colorado, adults over the age of twenty-one can buy and possess up to one ounce of marijuana at a time.²¹⁶ Only licensed retailers can sell marijuana products.²¹⁷ Adults (over twenty-one) can give up to one ounce of marijuana to another adult but they cannot sell it.²¹⁸ Adults can also possess and grow up to six marijuana plants, with three or fewer being mature, flowering plants, provided that the growing takes place in an enclosed, locked space, it is not

²¹³ *Alcohol and Tobacco*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES. <https://www.atf.gov/alcohol-tobacco> (last visited May 3, 2020).

²¹⁴ *Id.* (*What We Do* section of website lists the roles of investigators and the types of crimes they investigate).

²¹⁵ 18 U.S.C. § 2342, 2344 (2006). Contraband cigarettes refer to a quantity of more than 10,000 cigarettes in the possession of certain people or companies such as common carriers or persons with a license to sell cigarettes without proof that state and local taxes have been paid on the cigarettes. 18 U.S.C. § 2341 (2006).

²¹⁶ *Laws About Marijuana Use*, COLO. OFFICIAL STATE WEB PORTAL, <https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use> (last updated Jan. 23, 2020).

²¹⁷ *Id.*

²¹⁸ *Id.*

conducted openly or publicly, and the plants (and the marijuana produced by the plants) are not sold.²¹⁹

Use of marijuana (smoking, eating, vaping, etc.) is not allowed in public places, which includes sidewalks, parks, ski resorts, concert venues, businesses, restaurants, cafes, bar, and common areas of apartment buildings or condominiums.²²⁰ Hotel and rental property owners can also ban the use and possession of marijuana.²²¹ Employers can test for marijuana and make employment decisions based on drug test results.²²² Marijuana purchased for recreational use is taxed at a much higher rate than marijuana purchased with a medical card.²²³ In 2013, Colorado voters approved adding a 10 percent sales tax to retail marijuana in addition to the state's 2.9 percent standard sales tax rate.²²⁴ In addition, a 15 percent excise tax was added to the wholesale price between cultivators and businesses of retail marijuana.²²⁵ Despite the high taxes, business is booming.²²⁶

A recent AAA Foundation for Traffic Safety survey revealed that 15 million Americans have driven a vehicle within an hour of smoking marijuana or consuming marijuana products.²²⁷ In Colorado, drivers with five nanograms of active tetrahydrocannabinol (THC) in their blood can be prosecuted for driving under the influence.²²⁸ Researchers have determined that “THC is detectable in breath for up to three hours after smoking marijuana” and that this three-hour timeframe “is within the timeline that people are more likely to be impaired.”²²⁹ Officers need not obtain a warrant for a blood draw to prove the exact THC content—rather, they can base

²¹⁹ Jade Woodard, *Children & Marijuana: Safe, Unsafe, or At-Risk?* https://www.colorado.gov/pacific/sites/default/files/PF_WIC_Marijuana_Jade-Woodard.pdf. (last visited Jan. 23, 2020).

²²⁰ *Laws about Marijuana Use*, *supra* note 191.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Aristros Georgiou, *Marijuana Breath Tests Could Be Available By 2020*, NEWSWEEK (Oct. 11, 2019), <https://www.newsweek.com/marijuana-breath-tests-available-2020-1464696>.

²²⁸ COLO. REV. STAT. § 42-4-1301(6)(a)(IV) (2017).

²²⁹ Jamie Bittner, *Marijuana Breathalyzer Technology is Here, and it's Coming for Drivers*, FOX43 (Nov. 21, 2019), <https://www.fox43.com/article/news/marijuana-breathalyzer-technology-is-here-and-it-is-coming-for-drivers/521-3ed728a3-d23c-48e0-8bf8-643e92d08bad>.

the arrest on field sobriety tests and observed impairment.²³⁰ Moreover, a few companies have taken the lead and developed roadside breathalyzers that will be able to detect whether a person has smoked marijuana in the last three hours.²³¹ The device is designed to look for evidence of THC in the body.²³² Many of these new devices will be available to law enforcement by the end of the year.²³³

“Colorado’s open container law makes it illegal to have marijuana in the passenger area of a vehicle if it is in an open container, container with a broken seal, or if there is evidence marijuana has been consumed.”²³⁴ Therefore, drivers and passengers cannot leave half-smoked joints sitting in open ashtrays in the car. It is also illegal in Colorado to consume marijuana on any public roadway.²³⁵

What increases might we see if simple marijuana possession is legalized? Will marijuana turn out to be the gateway drug everyone feared it would be if the drug became legal? One can look to crimes commonly associated with alcohol and surmise the future problems associated with legalizing marijuana. Child abuse rates have been known to increase when the abuser is intoxicated.²³⁶ About 40 percent of convicted murderers had used alcohol before or during the crime.²³⁷ Rape is another crime that is more likely committed if the aggressor is intoxicated. Over 50 percent of all sexual assault or abuse cases are committed while the abuser is intoxicated.²³⁸ Lastly, there is a substantial rise in domestic violence when someone is under the influence of alcohol or a drug. One in four victims of violent crimes report that their attacker had been drinking before the incident.²³⁹ Alcohol is similar to marijuana in that it lowers one’s inhibition and can impair one’s judgment—thus, the link between alcohol and criminal behavior. While still controversial, the worry exists that legalizing marijuana use might lead to more crime, specifically more violent crime.

²³⁰ Cynthia Sherwood, Alexander Mills, & Davis Griffin, “Even Dogs Can’t Smell the Difference,” 55 Tennessee Bar Journal 12 (2019).

²³¹ Eric Westervelt, *The Pot Breathalyzer Is Here. Maybe*, NPR (Aug. 4, 2018), <https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe>.

²³² *Id.*

²³³ Georgiou, *supra* note 211.

²³⁴ COLO. REV. STAT. § 42-4-1305.5 (2014).

²³⁵ *Id.*

²³⁶ Carol Galbicsek, *Alcohol-Related Crimes*, ALCOHOL REHAB GUIDE (July 14, 2019), <https://www.alcoholrehabguide.org/alcohol/crimes/>.

²³⁷ *Id.*

²³⁸ Antonia Abbey, et al., *Alcohol and Sexual Assault*, NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, <https://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm>. (last visited Jan. 26, 2020).

²³⁹ *Alcohol Related Crimes*, ALCOHOL ADDICTION CTR, <http://alcoholaddictioncenter.org/alcohol/crimes/> (last visited Dec. 29, 2019).

B. Law Enforcement's New Post-Legalization World

In the state of Washington, adults over the age of 21 are able to carry up to an ounce of marijuana for personal use.²⁴⁰ In the city of Seattle, consuming marijuana in public carries a civil fine.²⁴¹ After the Seattle Police Department (SPD) was told of the new laws and that public use of marijuana by adults was a low enforcement priority, the City Council analyzed marijuana enforcement actions taken by the SPD between January 1st and June 30, 2014.²⁴² SPD officers had written approximately 82 tickets for public marijuana use, and 37 percent of the tickets were issued to African Americans (African Americans comprise about 8% of the Seattle population).²⁴³ Half of the tickets were issued to homeless individuals, and the data revealed that a single officer wrote 80 percent of all the tickets.²⁴⁴

Law enforcement's discretion to arrest or dismiss is extremely powerful and cannot be ignored. These past fifty years that marijuana has been criminalized under the CSA have demonstrated the enormous impact police and prosecutorial discretion have on the criminal justice system. Police officers have used the fact that marijuana possession is illegal to detain, arrest, search, and interrogate suspects. The initial detentions, arrests, and searches have led to additional evidence of crimes and additional charges levied against defendants. With the legalization of marijuana, will we see a narrowing of the ability to develop probable cause? Has law enforcement truly lost a great deal of tools it used to have in its arsenal? Not necessarily.

As explained in this section, only simple possession of marijuana will be legal. Consumption in public is illegal in places such as Colorado and Washington where personal possession and private use is legal. Traffic stops will be the same with officers being permitted to conduct field sobriety tests and determine if the driver is high. Officers can arrest the driver and others if he or she sees marijuana or a marijuana joint in plain view in violation of open container laws. The only significant difference will be in the context of the automobile exception. If an officer smells marijuana when approaching a vehicle, he will have to determine if the marijuana is being consumed (a possible driving under the influence crime) or is properly stored for later, lawful, personal use. Smelling marijuana, whether it be by an officer or a narcotics detection dog, will no longer provide automatic probable

²⁴⁰ WASH. REV. CODE ANN. § 69.50.4013 (2017).

²⁴¹ Valerie Bauman, *Seattle City Council Passes \$27 Fine for Smoking Marijuana in Public*, BIZ J. (Dec 17, 2013), <https://www.bizjournals.com/seattle/blog/2013/12/seattle-city-council-passes-27-fine.html>.

²⁴² Maria L. La Ganga, *One Seattle Police Officer Wrote 80% of the Marijuana Tickets Issued*, L.A. TIMES (July 31, 2014), <https://www.latimes.com/nation/la-na-seattle-pot-cop-20140731-story.html>.

²⁴³ *Id.*

²⁴⁴ *Id.*

cause to search the entire car for marijuana. Moreover, now that hemp is legal, and neither dogs nor humans can tell the difference between hemp and marijuana, “plain smell” does not provide the officer with probable cause to search.²⁴⁵ The officer must identify the potential crime he or she is investigating and how the “plain smell” helps develop the probable cause necessary to justify the search of the vehicle.

If an officer were to see a person smoking marijuana in a public street or sidewalk, the officer still has the discretion to issue a ticket (typically a civil offense in states that have legalized personal marijuana use). However, a citation is not enough to justify a search incident to lawful arrest. The officer would need the authority to arrest someone and then would have the necessary probable cause to conduct a search and find additional evidence of additional crimes. Without seeing marijuana consumption, there would not be sufficient probable cause to justify issuing a ticket either. Perhaps public intoxication statutes might justify a brief stop to ask questions and verify whether reasonable suspicion exists to believe illegal marijuana consumption is present. However, consumption would necessitate actually seeing the person smoking/vaping/eating in order to justify probable cause to arrest a suspect if consumption has been deemed a crime and not a civil offense. Once again, officers could not simply rely on their noses.

The two exceptions to the warrant requirement that rely upon the “plain smell” doctrine are the automobile exception and search incident to lawful arrest. In the 2019 case of *Pacheco v. Maryland*, officers approached a parked car outside a laundromat and smelled the odor of fresh, burnt marijuana coming from the car.²⁴⁶ Standing next to the car, one of the officers saw a marijuana joint in the center console and asked Pacheco to give him the joint.²⁴⁷ Pacheco complied and he was ordered to exit the car.²⁴⁸ The officers searched Pacheco and found cocaine in his left front pocket.²⁴⁹ Officers then searched his car and found a marijuana stem and two packets of rolling papers.²⁵⁰ Pacheco was given a citation for possessing less than ten grams of marijuana for the joint (possessing less than ten grams was a civil offense in Maryland), and was charged with possession of cocaine with intent to distribute.²⁵¹

²⁴⁵ Cynthia Sherwood, Alexander Mills, & Davis Griffin, “Even Dogs Can’t Smell the Difference,” 55 Tennessee Bar Journal 12 (2019).

²⁴⁶ *Pacheco v. State of Maryland*, 465 Md. 311, 317 (Md., 2019).

²⁴⁷ *Id.* at 317–18.

²⁴⁸ *Id.* at 318.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

The Court of Appeals of Maryland determined that the automobile search was valid because marijuana is still considered contraband.²⁵² The “plain smell” of burnt marijuana indicated there was probable cause to believe the car contained contraband.²⁵³ The officers could search the car for three possible crimes: possession of ten grams or more of marijuana, distribution of marijuana, or driving while intoxicated.²⁵⁴ However, the Court of Appeals also determined the search incident to lawful arrest was invalid.²⁵⁵ Pacheco had not committed a crime, only a civil offense when found smoking a joint in his parked car. Since there was no crime for which he was being arrested, there was no reason to conduct a search of his person.²⁵⁶ The cocaine was excluded.²⁵⁷ *Pacheco* illustrates the complexities that develop now that simple possession is legal in some states but other crimes involving marijuana (distribution, possession of larger amounts, driving while smoking, etc.) are on the books. Police have to think through potential charges and specific exceptions to the warrant requirement before acting on marijuana odor or observations of personal use.

A federal district court came to a similar conclusion when evaluating a San Benito County, California deputy sheriff’s decision to search the passenger compartment and center console of a vehicle after smelling a strong odor of marijuana coming from inside the car, and the defendant admitted to having a small amount of marijuana (“a little sack”) and a “little blunt” inside the car.²⁵⁸ In California, possessing an open container of less than 28 grams of marijuana while driving a vehicle is a fine-only infraction, while the possession of marijuana in excess of 28.5 grams is punishable by imprisonment for up to six months.²⁵⁹ Based on this information, the deputy searched and found the small amount of marijuana in the center console (6.11 grams) and then continued to search the rest of the passenger compartment, finding a firearm under the console.²⁶⁰ The judge believed there was a fair probability that at the time of the search, there was a “‘criminal’ amount—more than 28.5 grams—of marijuana somewhere in the vicinity of the passenger compartment of Defendant’s car” and found the entire search to be valid

²⁵² *Id.* at 319.

²⁵³ *Id.* at 325.

²⁵⁴ *Id.* at 332.

²⁵⁵ *Id.* at 333–34.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *United States v. David Paul Martinez*, 2018 WL 3861831 (N.D. Calif. Aug. 14, 2018) at 5–7.

²⁵⁹ *Id.* at *6 (citing CAL. VEH. CODE § 23222(b) and CAL. HEALTH AND SAFETY CODE §§ 11362.1(a) and 11357(b)(2)).

²⁶⁰ *Id.* at *2. The marijuana and blunt weighed 6.11 grams. *Id.* at *1.

under the automobile exception.²⁶¹ The smell of marijuana and defendant's admission to a small amount of marijuana in the car was sufficient probable cause to justify a thorough search of the passenger compartment in a state where possession of a blunt in a car is a fine-only infraction. Plain smell is still being used as a legitimate factor in the probable cause analysis.

However, a Pennsylvania state court judge in 2019 had a contrary view on the impact marijuana legalization has on the automobile exception. In *Pennsylvania v. Barr*, state troopers approached a vehicle, smelled burnt marijuana, and the defendant presented them with a medical marijuana identification card allowing him to possess medical marijuana.²⁶² Despite the knowledge that the defendant had a medical card, troopers conducted a search of the vehicle based on the plain smell. Troopers found 79 grams of marijuana and a loaded handgun in the vehicle.²⁶³ The trial judge found that the search of the vehicle to be unlawful.²⁶⁴ "This is not a simple issue of 'plain smell' since the legalization of medical marijuana. The smell of marijuana is no longer per se indicative of a crime. With a valid license an individual is permitted, and expected, to leave an odor of marijuana emanating from his or her person, clothes, hair, breath, and therefore, his or her vehicle."²⁶⁵ Because "there is no difference in odor of ingesting the medical marijuana when utilizing a vaping pen and the odor of smoking regular marijuana from an unlawful source," it is "unreasonable" to believe some sort of criminal activity is afoot.²⁶⁶ When officers are presented with a medical marijuana card, this judge argued in her order there is no reason to believe something that constitutes a crime may be in progress.²⁶⁷ Officers again must analyze the plain smell on a case-by-case basis depending upon what crimes and civil offenses exist in their jurisdiction.

How are marijuana grow investigations impacted? An anonymous tip that suggests someone is growing marijuana in their yard or inside their home will have to go the extra step to argue that the grow is over the six marijuana plants authorized by the state. To that end, agents will still have to evaluate the tip under the *Aguilar*-

²⁶¹ *Id.* at *6. The Ninth Circuit later vacated and remanded the case back to the district court to consider whether the defendant consented to the search of his car and if necessary, to "determine whether the facts known to Deputy Creager supported probable cause to believe that Martinez's car contained evidence of a crime [to include current laws in California that restrict the possession and use of marijuana] for which the Fourth Amendment permitted Deputy Creager to search." *United States v. David Paul Martinez*, No. 18-10498, D.C. No. 5:17-cr-00257-LHK-1 at *2 (9th Cir. Apr. 20, 2020).

²⁶² *Commonwealth of Pennsylvania v. Barr*, No. CP-39-CR000279-2019, 2019 WL 5581309, at *2 (Pa. Com. Pl. Aug. 2, 2019).

²⁶³ *Id.* at *3.

²⁶⁴ *Id.* at *6.

²⁶⁵ *Id.* at *7.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

Spinelli factors using the *Gates* totality-of-the-circumstances test; they must also walk over and into the fields to investigate the veracity of the tip. Will law enforcement expend the resources needed to determine whether a property owner has exceeded the six-plant rule? It is within the discretion of the police officer. But very few officers will make the effort to secure a warrant merely to gain the opportunity to utilize a drug-sniffing dog on the front porch of a suspect's home in the hope the dog can confirm the presence of marijuana inside, but still leave in doubt if the household contains more than the legally-allowed six marijuana plants.

Law enforcement dog handlers will be the most affected by the new marijuana laws. Local police departments and federal agencies everywhere will have to train new drug dogs to detect the usual illegal substances, such as heroin, cocaine, and methamphetamine, but exclude the odor of marijuana. In Colorado, drug dogs trained to detect marijuana, methamphetamine, cocaine, heroin and ecstasy can no longer be used as a sole factor in permitting a full-blown search under the automobile exception. In *People v. McKnight*, Kilo, a narcotics detection dog trained to detect marijuana and other illegal substances, alerted on a truck that had been stopped because the defendant failed to use his turn signal.²⁶⁸ Based on the alert, the truck was searched, and a pipe with traces of methamphetamine was found.²⁶⁹ The Colorado Supreme Court determined that a dog sniff by a dog trained to detect illegal drugs and a legal substance (marijuana) violates a person's expectation of privacy.²⁷⁰ The dog sniff was considered a Fourth Amendment search (the dog sniff is no longer sui generis because it might be detecting a legal substance) and the evidence found as a result of the dog sniff was excluded.²⁷¹ Many drug dogs will be out of a job or transferred to schools or private companies where marijuana use is prohibited.

Lastly, drug interdiction tactics at airports will more than likely change. Federal agents will still be able to track the illegal transportation and distribution of large amounts of marijuana, but asset forfeiture provisions will have to be revisited. In one recent case at Ft. Lauderdale's airport, deputies that were part of a narcotics and money laundering task force led by the Broward County Sheriff's Office smelled the odor of marijuana on a traveler named Curtis Simmons.²⁷² Simmons told the two detectives that he had smoked marijuana earlier due to work-related pain.²⁷³

²⁶⁸ *People v. McKnight*, 446 P.3d 397, 400 (Colo., 2019).

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 401.

²⁷¹ *Id.* at 414.

²⁷² Francisco Alvarado, *These Cops Are Seizing Cash from People Who Smell Like Weed Before They Fly to California*, *Vice* (Sept. 9, 2019), https://www.vice.com/en_us/article/qvgvwm/cops-seizing-weed-cash-flying-fort-lauderdale-to-california-lax.

²⁷³ *Id.*

Simmons had just purchased a ticket for a non-stop flight to Los Angeles.²⁷⁴ Simmons gave them permission to search his backpack and his carry-on suitcase and they found \$6,290 in cash in his pocket and another \$5,000 in a pair of jeans in his carry-on.²⁷⁵ The money was seized under civil forfeiture laws.²⁷⁶ Such forfeitures are usually justified due to the fact that their belongings smell like marijuana, they purchased one-way plane tickets to a California city on the same day or a few days earlier, a drug dog alerts to the presence of the odor of marijuana, and the traveler appears to provide untruthful or evasive answers to questions regarding the source of the money or reasons why they are traveling to California.²⁷⁷ Detectives assume the money will be used to purchase marijuana in California and then ship large quantities of it back to Florida illegally.²⁷⁸

If simple marijuana possession becomes legal in all 50 states, such an arrest scenario will most likely fail based on Fourth Amendment protections. Again, the odor of marijuana will become irrelevant and not serve as a justification for thinking criminal activity is afoot. Travelers will be able to consume marijuana in the privacy of their home before boarding a plane later in the day. Officers will need to develop further probable cause to justify seizing cash and alleging the traveler plans to illegally transport large amounts of marijuana over state lines.

VI. CONCLUSION

Placing marijuana on the Schedule I controlled substance list of the CSA has had a tremendous impact on law enforcement. It expanded the tools used in drug investigations, it informed prosecution and defense alike as to what constitutes a search under the Fourth Amendment, and due to its prevalent use among Americans, it provided the police with significant discretion to arrest, search, and further investigate for additional crimes. While it may be difficult to argue marijuana is “*sui generis*,” after all, methamphetamine has its own meth labs and distinctive smell, we can say marijuana has certainly created long-lasting criminal procedure memories that will be discussed for years to come.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*