

# MARIJUANA & OTHER DRUGS: LEGALIZE OR DECRIMINALIZE?

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## I. INTRODUCTION: HOW TO DEAL WITH DRUGS AND THEIR NEGATIVE EFFECTS?

Most countries in the world, including the United States, use a prohibitionist model of drug control.<sup>1</sup> Prohibition became the global standard

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through international agreements made in the 1960s, '70s, and '80s.<sup>2</sup> Under these agreements, however, production and trafficking of illegal drugs increased, and global drug use spiraled out of control.<sup>3</sup> The US War on Drugs<sup>4</sup> has been widely viewed as harmful to US society.<sup>5</sup> The Controlled Substance Act implemented prohibition, which was later expanded with harsh mandatory minimum sentences for drug crimes.<sup>6</sup> At least 20 million Americans were arrested for marijuana possession since the implementation of prohibition in the 1970s.<sup>7</sup> Approximately \$215 billion is the estimated economic impact of illegal drugs on the United States alone, including costs from the justice system, healthcare system, lost productivity, and environmental impact.<sup>8</sup> Many are calling for the end of mass incarceration for drug crimes because the social costs are too high, while others say that incarceration is necessary to protect society.<sup>9</sup>

The societal costs of drug use and prohibition are not restricted to the money spent prosecuting and detaining drug law violators. Other costs include health degradation and deaths from overdose, decreased ability to find work among convicts, and increased violent and non-violent crime. From 2000 to 2013, there was a fivefold increase in the number of heroin overdose deaths and a 29% increase in the number of cocaine overdose deaths in the United States.<sup>10</sup> The amount of treatment received for drug and alcohol abuse is well below what is currently needed.<sup>11</sup> For example, "In 2013, an estimated 22.7 million Americans (8.6 percent) needed treatment for a problem related to drugs or alcohol, but only about 2.5 million people (0.9 percent) received treatment at a specialty facility."<sup>12</sup> This means that 88% of those in need did not receive adequate treatment for their drug or alcohol problem.

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<sup>1</sup> See Brian A. Ford, *From Mountains to Molehills: A Comparative Analysis of Drug Policy*, 19 ANN. SURV. INT'L & COMP. L. 197, 201 (2013).

<sup>2</sup> *Id.* at 201-02.

<sup>3</sup> *Id.* at 204.

<sup>4</sup> The War on Drugs began in the U.S. in the 1970s with the passage of the Control Substances Act (CSA). *Id.* at 207.

<sup>5</sup> See *id.* at 198.

<sup>6</sup> Ford, *supra* note 1, at 207.

<sup>7</sup> *Id.* at 208 (citing U.S. Dep't of Justice, *National Drug Threat Assessment 2010*, (Aug. 2010), [www.justice.gov/archive/ndic/pubs38/38661/38661p.pdf](http://www.justice.gov/archive/ndic/pubs38/38661/38661p.pdf)).

<sup>8</sup> *Id.* at 207 (citing U.S. Dep't of Justice, *National Drug Threat Assessment 2010*, (Aug. 2010), [www.justice.gov/archive/ndic/pubs38/38661/38661p.pdf](http://www.justice.gov/archive/ndic/pubs38/38661/38661p.pdf)).

<sup>9</sup> *Id.* at 198, 209.

<sup>10</sup> *Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE (Dec. 2015), <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates>.

<sup>11</sup> *DrugFacts: Nationwide Trends*, NAT'L INST. ON DRUG ABUSE (June 2015), <https://www.drugabuse.gov/publications/drugfacts/nationwide-trends>.

<sup>12</sup> *Id.*

After paying their debt to society through incarceration, ex-convicts continue to pay because their criminal records make them virtually un-hirable.<sup>13</sup> Employers are reluctant to hire people with criminal records, and many categories of jobs are simply off limits to people with criminal convictions.<sup>14</sup> Men with criminal records account for about 34% of the non-working men aged 25 to 54.<sup>15</sup> The lack of job opportunities can cause people with convictions to return to criminal activity because there is no other way of providing for themselves or their families.<sup>16</sup> With high incarceration rates for drug offenses, the prohibitionist model can affect convicted drug offenders for the rest of their lives, rather than for the few months or years they stay in prison.

Under prohibition, selling drugs can increase the rates of violent crimes and induce addicts into criminal behavior.<sup>17</sup> For example, the introduction of crack cocaine sparked increased gun violence.<sup>18</sup> The crack business model required selling small one-time “hits” for cheaper than powder cocaine.<sup>19</sup> More sellers were needed to keep up with the high volume of demand, which created more territory based disputes between dealers, and an increased use of guns for protection against other dealers.<sup>20</sup> Subsequently, this created a heightened gun crime problem that now reaches beyond the drug trade.<sup>21</sup> The high prices of prohibition also cause addicts to engage in nonviolent crimes, such as property crimes and prostitution, to support their addiction.<sup>22</sup> The inflated drug prices caused by prohibition, coupled with the inability to work after a criminal conviction, forces addicts to continue down the criminal spiral into repeat offenses, which leads to more and more prison time.<sup>23</sup>

Prohibition is viewed as an ineffective drug control policy, and many politicians, organizations, and governments are calling for reform.<sup>24</sup> The issue facing policy makers now is how best to minimize the social costs of drugs. Drugs will always remain in our society while they are profitable, so it is a matter of reducing the impact of drugs on society rather than trying to remove them completely. The current model of prohibition has many social costs and some

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<sup>13</sup> See, e.g., Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), [http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?\\_r=0](http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See David Borden, *If Hard Drugs Were Legalized, Would More People Use Them?*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 569, 575–77 (2013).

<sup>18</sup> *Id.* at 576–77

<sup>19</sup> *Id.* at 576.

<sup>20</sup> *Id.* at 576–77.

<sup>21</sup> *Id.* at 577.

<sup>22</sup> Borden, *supra* note 17, at 578.

<sup>23</sup> See *id.*; Appelbaum, *supra* note 13.

<sup>24</sup> Ford, *supra* note 1, at 198.

governments, such as those of Portugal and Colorado, are experimenting with new alternative models.<sup>25</sup>

Portugal and Colorado are testing alternative drug policies that are radically different from the old prohibitionist methods.<sup>26</sup> Portuguese law makers “decriminalized” drug use in 2001 by making possession or use of a small amount of drugs an administrative offense rather than a crime.<sup>27</sup> The people of Colorado used a different method by making the use and sale of marijuana legal—under strict regulations—through the referendum process in 2012.<sup>28</sup> Both of these approaches show the spectrum of legality, because both policies float between complete prohibition and total legalization. Neither government has allowed the total and free use of drugs without regulation or government involvement.<sup>29</sup> Rather, they have moved into a grey area between complete legalization and prohibition to find an effective method of minimizing the costs of drugs to society.

This Note explores these alternative policies and looks at how these “great experiments” have been successful in minimizing the social costs of drugs. Section II details Portugal’s and Colorado’s drug policies, including evidence of the effectiveness and problems associated with the policies. Finally, Section III compares both programs to show which aspects of each policy are more effective and how those policies reduce social cost. While there may not be a way to completely remove drugs from society, these alternative policies may be the answer to ending the world drug crisis.

## II. ALTERNATIVE SOLUTIONS: THE EXPERIMENTS WITH NEW DRUG POLICIES

The experiments in Portugal and Colorado show tangible results for theoretical alternatives. Many argue the benefits, costs, and effects of the theories of decriminalization or legalization, but until Colorado’s recent legalization of marijuana, few have looked at how the outcomes of these theories compare.<sup>30</sup> This section will look at the real outcomes from the applications of the theory of decriminalization in Portugal, the legalization of marijuana in Colorado, and see how these systems minimize social costs. For the purposes of this article, “legalization” is defined as making the possession, use, sale, production, and

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<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *infra* Part II.

<sup>27</sup> Kellen Russoniello, *The Devil (and Drugs) in the Details: Portugal’s Focus on Public Health as a Model for Decriminalization of Drugs in Mexico*, 12 YALE J. HEALTH POL’Y L. & ETHICS 371, 385 (2012).

<sup>28</sup> Retail sales did not begin until 2014. John Hudak, *Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization*, 64 CASE W. RES. L. REV. 649, 649 (2015).

<sup>29</sup> See *infra* Part III.

<sup>30</sup> See generally Borden, *supra* note 17; Ford, *supra* note 1; Alexandra Natapoff, *Misdemeanor Criminalization*, 68 VAND. L. REV. 1055 (2015).

transportation of the substance allowed under the law,<sup>31</sup> whereas “decriminalization” means that it is not a criminal offense to possess, buy, or use the substance, but the conduct is still considered illegal.<sup>32</sup>

### **A. Portugal’s Decriminalization: Reducing Demand While Cracking Down on Supply**

Portugal’s revolutionary approach to decriminalize all drugs, including cocaine and heroin, is largely viewed as a success.<sup>33</sup> Decriminalization is designed to provide a more humane legal framework for dealing with drug users, and expands prevention policies and resources, including harm reduction, treatment, and social reintegration.<sup>34</sup> This model acts as a more humane framework because it channels all minor drug offenders through a drug treatment system rather than criminal prosecution.<sup>35</sup> Overall, this model targets reducing social costs of drugs by investing in addicts to reduce their dependence on drugs while maintaining prosecutorial rigor in pursuing the drug suppliers.

#### 1. Legal Framework: How Does Decriminalization Work?

Decree Law 30/2000, decriminalization, took effect on July 1, 2001 and made the use and possession of drugs an administrative offense instead of a criminal offense.<sup>36</sup> However, the law limits the allowable possession amount to the average amount of individual consumption for a 10 day period.<sup>37</sup> Portugal’s law still prohibits drug use,<sup>38</sup> so police continue to search people for drugs and confiscate any substances found.<sup>39</sup> If the amount of drugs found is in excess of

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<sup>31</sup> Natapoff, *supra* note 30, at 1066.

<sup>32</sup> *Id.*; GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 2 (2009), [http://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald\\_whitepaper.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf).

<sup>33</sup> Russoniello, *supra* note 27, at 391. After the program’s implementation in 2001, the Portuguese government has made changes and adaptations but the general principal, decriminalization of drug use and possession, remains the same. *See generally* EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, 2014 NATIONAL REPORT (2013 DATA) TO THE EMCDDA: “PORTUGAL” NEW DEVELOPMENTS, TRENDS (2014).

<sup>34</sup> Caitlin E. Hughes & Alex Stevens, *What Can We Learn From the Portuguese Decriminalization of Illicit Drugs?*, 50 *Brit. J. Criminol.* 999, 1002 (2010).

<sup>35</sup> *Id.*

<sup>36</sup> Russoniello, *supra* note 27, at 385; Lei No. 30/2000, de 29 de Novembro, DIÁRIO DA REPÚBLICA de 29.11.2000 (Port.) [hereinafter Law 30/2000].

<sup>37</sup> Law 30/2000, *supra* note 36, art. 2; GREENWALD, *supra* note 32, at 3.

<sup>38</sup> GREENWALD, *supra* note 32, at 3.

<sup>39</sup> Wiebke Hollersen, ‘This Is Working’: Portugal, 12 Years After Decriminalizing Drugs, SPIEGEL ONLINE (Mar. 27, 2013, 11:32 AM), <http://www.spiegel.de/international/europe/evaluating-drug-decriminalization-in-portugal-12-years-later-a-891060-druck.html>.

the 10 day supply rule, then the person is treated as a dealer and charged in court.<sup>40</sup> If the drugs found are under the limit allowed, then the police refer the user to report to a Dissuasion Commission<sup>41</sup> within 72 hours.<sup>42</sup> This Commission then gathers information about the person and determines what types of sanctions or treatment, if any, should be imposed.<sup>43</sup> The Commission has the power to enforce provisions of the law, but it is not part of the criminal justice system.<sup>44</sup>

## 2. Dissuasion Commissions: Identifying Addicts and Providing Treatment

It may appear that the Portuguese government is reducing intervention in drug addicts' lives by removing criminal sanctions, but in reality the Dissuasion Commissions are directly involved in the lives of drug users caught by the police. The Commission, which is made up of legal experts and health professionals, gathers information about each person cited and determines whether the person is addicted.<sup>45</sup> Then the Commission decides appropriate sanctions by looking at the circumstances surrounding the drug use, including the person's economic status, the nature of the substance, and whether consumption occurred in public or private.<sup>46</sup> These sanctions can range from paying fines, to ineligibility to practice certain occupations, to restrictions on foreign travel or association with certain people.<sup>47</sup>

The primary goal of the Dissuasion Commissions is to stop the consumption of drugs by the individual.<sup>48</sup> The sanctions are tailored to the circumstances of each user to prevent that specific user from consuming drugs again.<sup>49</sup> For addicts, the Commission uses sanctions as a way to encourage treatment.<sup>50</sup> If the addict agrees to undergo treatment, then the sanctions are not imposed and the proceedings are suspended.<sup>51</sup> A case is closed if treatment is

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<sup>40</sup> Hollersen, *supra* note 39.

<sup>41</sup> Russoniello, *supra* note 27, at 385–86. The commissions are called Comissões para a Dissuasão da Toxicodependência (Commissions for the Dissuasion of Drug Addiction). *Id.* at 386.

<sup>42</sup> *Id.*; GREENWALD, *supra* note 32, at 4.

<sup>43</sup> Russoniello, *supra* note 27, at 386–87.

<sup>44</sup> *Id.* at 386.

<sup>45</sup> *Id.*; Law 30/2000, *supra* note 36, art. 10.

<sup>46</sup> Russoniello, *supra* note 27, at 386; Law 30/2000, *supra* note 36, art. 10.

<sup>47</sup> Russoniello, *supra* note 27, at 387.

<sup>48</sup> Law 30/2000, *supra* note 36, art. 15(3); Hollersen, *supra* note 39.

<sup>49</sup> Law 30/2000, *supra* note 36, art. 15(3). Article 15 section 3 of the law states, “A comissão determina a sanção em função da necessidade de prevenir o consumo de estupefacientes e substâncias psicotrópicas.” *Id.* Translated, this means that the commission will determine the sanction based on the need to prevent the consumption of narcotics and psychotropic substances.

<sup>50</sup> Russoniello, *supra* note 27, at 387.

<sup>51</sup> *Id.*

successfully completed and there are no drug incidents three years after the proceeding.<sup>52</sup> For social users, especially of marijuana, the Commission usually suspends the proceedings and only imposes sanctions if the conduct is repeated.<sup>53</sup> These commissions give the Portuguese authorities direct contact with drug users and direct involvement in users' lives. Direct access means that the government can slowly chip away at drug suppliers' consumer base to reduce the overall demand for drugs, while also providing addicts with the support they need.

### 3. Prevention Programs: Stopping Potential Users Before They Start

In addition to the dissuasion tactics directed at addicts, the Portuguese model uses nationwide prevention campaigns. These preventative measures include universal education and activities targeted at high risk groups, such as teenagers and young adults.<sup>54</sup> Information about the negative results of drug consumption is disseminated at schools, health clinics, sports and recreational centers, and popular culture events.<sup>55</sup> In schools, classes are taught about the dangers of drugs and the health risks associated with drug use.<sup>56</sup> Print campaigns published by the Service for Intervention on Addictive Behaviours and Dependencies (S.I.C.A.D)<sup>57</sup> inform about the health effects of drugs.<sup>58</sup> There are also prevention teams created to target specific areas where drugs are commonly used, such as night clubs and bars.<sup>59</sup> The prevention team members "mingle with young people and talk to them about drug use . . . [and] provid[e] them with information about the possible health and life consequences of drug use."<sup>60</sup>

The prevention campaigns are carefully crafted to avoid the pitfalls of largescale campaigns and to focus on the most at risk groups. The message of the campaigns is not to condemn or discourage drug use, but instead to promote healthy lifestyles and explain the dangers of drug use.<sup>61</sup> An example of this is the

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<sup>52</sup> *Id.* at 387 n. 73; Law 30/2000, *supra* note 36, art. 14.

<sup>53</sup> Hollersen, *supra* note 39. If the social user is not caught again, then the case basically disappears. *See id.*

<sup>54</sup> ARTUR DOMOSLAWSKI, OPEN SOCIETY FOUNDS., DRUG POLICY IN PORTUGAL: THE BENEFITS OF DECRIMINALIZING DRUG USE 28 (Hanna Siemaszko trans.) (2011), <https://www.opensocietyfoundations.org/sites/default/files/drug-policy-in-portugal-english-20120814.pdf>.

<sup>55</sup> *Id.*

<sup>56</sup> Hollersen, *supra* note 39.

<sup>57</sup> Serviço de Intervenção nos Comportamentos Aditivos e nas Dependências.

<sup>58</sup> Serviço de Intervenção nos Comportamentos Aditivos e nas Dependências [Service for Intervention on Addictive Behaviours and Dependencies], Materiais / Campanhas [Materials / Campaigns], <http://www.sicad.pt/PT/Intervencao/Materiais/Paginas/default.aspx> (last visited Sept. 10, 2016).

<sup>59</sup> DOMOSLAWSKI, *supra* note 54, at 28.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

slogan of a bike tour stating, “Pedal using your own energy.”<sup>62</sup> This has an indirect message against drugs that promotes healthy living while also managing not to condemn the use of drugs.<sup>63</sup> Prevention activities are targeted because studies from the United States show that large-scale campaigns can prompt people to try drugs out of curiosity rather than stop people from using.<sup>64</sup>

The prevention campaigns are a key piece of the drug control policy<sup>65</sup> and help further decrease the demand for drugs. By targeting the young portion of the population, the government is trying to quash current and future demand. Preventing early addiction means less consumption over time. The conscious effort by policy makers not to condemn drug use is also a tactic designed to influence the young.<sup>66</sup> Some young people are prone to rebellion and may find solace in being condemned by society.<sup>67</sup> By not condemning anything, the campaigns avoid creating a “drugs are cool” counter culture. The prevention aspect of the Portuguese model helps dissuade demand and removes the need for drugs in the marketplace.

#### 4. Attacking Demand Through a Public Health Lens

Portugal’s decriminalization has always focused on public health issues. However, this public health focus may also be the secret to Portugal’s success. With decriminalization, the perception of drug addicts changed so that drug users are not seen as criminals, but as people who are ill.<sup>68</sup> Drug users no longer face the stigma resulting from criminal proceedings, because the dissuasion system is completely separate from the criminal justice system.<sup>69</sup> The commissions are designed to emphasize respect and encourage participation by the user.<sup>70</sup> This includes the commissioners sitting at the same level as the user and dressing informally.<sup>71</sup>

The membership of the commission also shows the emphasis on health. Each commission is comprised of three civilians: a legal expert appointed by the Ministry of Justice and two members appointed by the Ministry of Health with backgrounds in treating drug addiction.<sup>72</sup> Using civilians who are specialists in their fields provides the necessary expertise while still creating a less formal

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> DOMOSLAWSKI, *supra* note 54, at 28.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See, e.g., infra* Part II.B.4.b.

<sup>68</sup> Hollersen, *supra* note 39. People still skeptical of decriminalization do not hold this view. *Id.*

<sup>69</sup> Russoniello, *supra* note 27, at 386.

<sup>70</sup> *Id.* at 386–387.

<sup>71</sup> *Id.* at 387.

<sup>72</sup> *Id.* at 386; Law 30/2000, *supra* note 36, art. 7.



atmosphere.<sup>73</sup> One of the key barriers to treatment before decriminalization was fear of prosecution and stigmatization as a criminal.<sup>74</sup> Separating drug proceedings from criminal proceedings has made it easier for addicts to ask for help.

Decriminalization made government support accessible to drug users and addicts by creating an atmosphere of acceptance and an emphasis on health. Many addicts can now openly get clean needles and supplies from social workers who patrol areas where drugs are commonly used.<sup>75</sup> These social workers do not pressure the users to receive treatment.<sup>76</sup> The workers are only there to provide support if the users ever need it.<sup>77</sup> Some addicts notice the difference in public opinion, and are open to the support provided by the government.<sup>78</sup> The public health justifications help to remove barriers between addicts and society to make it easier for addicts to get help when they need it. Simple decriminalization without the focus on health and treatment may not have gained the same level of acceptance.

### 5. Effectiveness of Decriminalization

Statistical data about drug use after Portugal's decriminalization does not show clear cut results, but there are indicators that the program is effective.<sup>79</sup> At the very least, the trends show that decriminalization did not open the floodgates and expand Portugal's drug market like critics predicted.<sup>80</sup> The most effective way to look at Portugal's system is to compare its drug use statistics to Italy and Spain.<sup>81</sup> These three countries economic pasts are unique because they all had totalitarian governments during the last century.<sup>82</sup> This common history affects not only their economic development, but their interaction with drugs in modern history.<sup>83</sup> Italy, Spain, and Portugal had similar trends in the heroin epidemic and all reached the peak of death rates, due to drug overdose, in the late 1990s.<sup>84</sup> All

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<sup>73</sup> See Russoniello, *supra* note 27, at 386–87.

<sup>74</sup> *Id.* at 386.

<sup>75</sup> Global Compass, *Episode Five, Drugs: War or Store?*, ECONOMIST FILMS (2015), <http://films.economist.com/global-compass/drugs-war-or-store/>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Hughes & Stevens, *supra* note 34, at 1017.

<sup>80</sup> *Id.*; see Hollersen, *supra* note 39.

<sup>81</sup> See Hughes & Stevens, *supra* note 34, at 1016.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see also Hollersen, *supra* note 39. After the dictatorship in Portugal ended in 1974, “[s]uddenly, the drugs were there” and were a symbol of freedom. Hollersen, *supra* note 39. As people started moving on to stronger drugs such as heroin, the country became overwhelmed because they did not know how to treat addicts or overdose. *Id.*

<sup>84</sup> Hughes & Stevens, *supra* note 34, at 1014.

three countries together show regional trends in drug use between 2001 and 2007.<sup>85</sup> In comparison to Italy and Spain, Portugal's data indicate that decriminalization is a success in the following key areas: (1) the usage rates of drugs and overall health effects, (2) the increased effectiveness of law enforcement in seizing drugs, and (3) the reduced demand for drugs.<sup>86</sup>

#### a. Usage Rates and Overall Health Effects

The data surrounding the changes in usage rates are the murkiest, but there has been a reduction in the illicit drug use by problematic drug users and adolescents since 2003.<sup>87</sup> There has been a small to moderate increase in the overall drug use reported by adults.<sup>88</sup> However, this may reflect increased *reporting*, because of the reduced stigma created by decriminalization, or broader regional trends not attributable to decriminalization.<sup>89</sup> The reported increase of drug use in the Portuguese population reflects a regional trend when compared with Italy and Spain, so the increase in use cannot be attributed solely to decriminalization.<sup>90</sup> Also, Portugal is the only one to show a decline in the number of problematic drug users<sup>91</sup> (PDUs) showing "that the Portuguese decriminalization has not increased the most harmful forms of drug use."<sup>92</sup>

Other trends show that Portugal's drug usage rates indicate a better drug policy than its neighbors. These trends include an increase in treatment sought, reduction in opiate-related deaths, and reduction in the spread of infectious disease.<sup>93</sup> Since Portugal's decriminalization, all three countries have shown a decrease in drug related deaths.<sup>94</sup> However, the decline in Portugal's drug related death rates was more pronounced.<sup>95</sup> The proportion of deaths from opiate overdoses has declined from 95% in 1999 to 59% in 2008.<sup>96</sup> Portugal also has been largely immune to the increased regional use of cocaine.<sup>97</sup> Cocaine has taken over from heroin as a major cause of hospitalizations and death in Spain.<sup>98</sup> However, Portugal has maintained a low level of cocaine use and has not

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<sup>85</sup> *Id.* at 1006–07.

<sup>86</sup> *Id.* at 1017.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1005.

<sup>89</sup> Hughes & Stevens, *supra* note 34, at 1005.

<sup>90</sup> *Id.* at 1008.

<sup>91</sup> Problematic drug use identifies the portion of the population where drug use can lead to serious problems. *Id.* at 1006. This population would likely include addicts, and users of the more dangerous drugs such as heroin and cocaine. *See id.*

<sup>92</sup> *Id.* at 1008.

<sup>93</sup> Hughes & Stevens, *supra* note 34, at 1017.

<sup>94</sup> *Id.* at 1014.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Hughes & Stevens, *supra* note 34, at 1014.

experienced the same rise in cocaine usage rates as Spain.<sup>99</sup> Infectious disease rates in drug addicts in Portugal have also decreased substantially every year since decriminalization began, which is attributed to enhanced government treatment programs.<sup>100</sup>

The amount of people receiving treatment for drug use has significantly increased, but more importantly the average age of individuals in treatment has also increased.<sup>101</sup> Between 1998 and 2008, the number of drug users undergoing treatment in Portugal grew from 23,654 to 38,532.<sup>102</sup> The drug user population appears to be aging based on treatment center data.<sup>103</sup> In 2000, only 23% of people admitted for the first time were over 34.<sup>104</sup> This rate has steadily increased to 46% in 2008.<sup>105</sup> The increase in age suggests that there are a reduced number of young people dependent on drugs in Portugal.<sup>106</sup> These trends support the idea that the prevention campaigns are working and preventing young people from becoming addicts.

#### b. Increased Effectiveness of Law Enforcement

Portuguese police increased their effectiveness in investigating and seizing drugs after decriminalization took effect.<sup>107</sup> The amount of drugs seized increased by 499% between 2000 and 2004.<sup>108</sup> Portugal's rate of seizure since decriminalization is different from Italy and Spain.<sup>109</sup> In Portugal, there has not been a linear increase in seizure amounts across all substances.<sup>110</sup> Instead, seizures of different substances appear in spikes over different years.<sup>111</sup> Large seizures of ecstasy occurred "between 2001 and 2003, hashish between 2003 and 2006, cocaine between 2004 and 2006 and even larger quantities of hashish between 2007 and 2008."<sup>112</sup> Whereas in Spain, growth rates in seizure have been almost linear, and in Italy seizure rates have been relatively flat.<sup>113</sup> The spikes in seizures of different products at different times show increased enforcement by

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<sup>99</sup> *Id.*

<sup>100</sup> GREENWALD, *supra* note 32, at 19.

<sup>101</sup> Hughes & Stevens, *supra* note 34, at 1015.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Hughes & Stevens, *supra* note 34, at 1015.

<sup>107</sup> *See id.* at 1011.

<sup>108</sup> *Id.* "116 per cent for cocaine, 134 per cent for hashish, 219 per cent for heroin and 1,526 per cent for ecstasy." *Id.*

<sup>109</sup> *Id.* Italy has had a relatively flat seizure rate since 1999. Hughes & Stevens, *supra* note 34, at 1011. Spain's seizure rate has increased linearly over the years. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Hughes & Stevens, *supra* note 34, at 1011.

Portuguese authorities.<sup>114</sup> Portuguese police have found effective ways to target drug traffickers and focus on the higher-level of the drug market.<sup>115</sup> The police have introduced better investigative techniques and international collaborations to “increase the capacity of operational response with regard to drug trafficking by sea.”<sup>116</sup>

Police were initially wary that decriminalization would hinder their ability to investigate trafficking, but so far they have been successful in diminishing supply through seizure.<sup>117</sup> If the drug seizure rates were growing at a constant rate, then it would show that the Portuguese police were simply keeping up with the increase in availability of drugs. However, the spikes in seizures of multiple types of drugs show that the Portuguese police are more efficient about targeting and removing each drug from the market than they were before.<sup>118</sup> These trends suggest that after decriminalization, Portuguese law enforcement has become more effective in reducing the supply of drugs.

#### c. Evidence of Reduced Demand for Drugs

Decreasing prices of illicit substances point towards a decrease in demand for drugs.<sup>119</sup> The price of one gram of heroin in Portugal decreased from \$50.27 in 2001 to \$33.25 in 2008.<sup>120</sup> In Spain, drug prices have been relatively stable.<sup>121</sup> The change in price in Portugal could mean an increase in supply or a decrease in demand.<sup>122</sup> An increase in supply is not likely because there is no data showing an increase in the domestic production market<sup>123</sup> and police seizures have reduced the supply from other countries.<sup>124</sup> If control of supply was the only mechanism at work here, then prices would be higher because supply would be limited.<sup>125</sup> The decreased prices are more likely a reflection of decreased demand in the population.<sup>126</sup> More studies would need to be done to confirm this,<sup>127</sup> but it appears that Portugal’s focus on dissuading demand is working.

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1011–13

<sup>116</sup> *Id.* at 1013 (internal quotation marks omitted).

<sup>117</sup> *Id.* at 1011.

<sup>118</sup> Hughes & Stevens, *supra* note 34, at 1011.

<sup>119</sup> *Id.* at 1013 (citing reported prices).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1013.

<sup>123</sup> Hughes & Stevens, *supra* note 34, at 1011.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1013.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

## **B. Colorado's Regulated Legalization: Taxing Supply to Pay for the Costs of Demand**

Colorado's approach to the issue of drug control was also revolutionary, because it was the first jurisdiction to legalize the sale and possession of recreational marijuana.<sup>128</sup> Fifty-five percent of voters approved the measure legalizing retail marijuana sales as an amendment to the Colorado's State Constitution.<sup>129</sup> This measure has made retail sales legal,<sup>130</sup> but dispensaries must follow all regulations or face serious consequences.<sup>131</sup> Many claim that Colorado's program is a success simply because of the \$79 million tax revenue added to the State budget.<sup>132</sup> In addition to the tax revenue, marijuana dispensaries and tourism have created profitable new industries for Colorado's economy.<sup>133</sup> However, there is still substantial opposition to the law from both Colorado residents<sup>134</sup> and non-residents.<sup>135</sup> Negative side effects are growing as legislation and regulations develop, including increased availability of marijuana to teens and children.<sup>136</sup> Legalizing the sale of recreational marijuana continues to be a subject of debate, and the results of the experiment so far are mixed.<sup>137</sup>

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<sup>128</sup> Hudak, *supra* note 28, at 651.

<sup>129</sup> David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 359 (2014).

<sup>130</sup> This article will refer to Colorado's system as "legalization." However, the system is really more of a "regulated legalization" because using or selling marijuana outside the regulatory framework still is illegal. *Id.* at 362 n.13.

<sup>131</sup> See Dion Rabouin, *Colorado Marijuana Legalization 2015: Fighting the Black Market and the Everyday Challenges of Selling Legal Weed*, INT'L BUS. TIMES (May 18, 2015, 3:22 PM), <http://www.ibtimes.com/pulse/colorado-marijuana-legalization-2015-fighting-black-market-everyday-challenges-1913431>.

<sup>132</sup> Clarissa Cooper, *Colorado Profits, but Still Divided on Legal Weed*, CTR. FOR PUB. INTEGRITY (Aug. 16, 2015, 5:00 AM) <http://www.publicintegrity.org/2015/08/16/17841/colorado-profits-still-divided-legal-weed>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See John Ingold, *Nebraska and Oklahoma Sue Colorado Over Marijuana Legalization*, DENVER POST (Dec. 18, 2014, 6:12 AM), <http://www.denverpost.com/2014/12/18/nebraska-and-oklahoma-sue-colorado-over-marijuana-legalization/?source=infinite-up>.

<sup>136</sup> Cooper, *supra* note 132.

<sup>137</sup> *Id.*

### 1. Legal Framework: What Is Legal?

The proposal to legalize recreational marijuana (Amendment 64) passed in November of 2012, but no retail marijuana stores opened until January of 2014.<sup>138</sup> The amendment allowed for a delay in the stores opening so that the government had time to create the law for retail marijuana sales and licensing procedures.<sup>139</sup> Colorado law states that the use of marijuana by people 21 years of age or older is legal, and that it should be “taxed in a manner similar to alcohol.”<sup>140</sup> The regulating authority is the Marijuana Enforcement Division (MED), which is within the Department of Revenue.<sup>141</sup> MED creates regulations, controls licensing of dispensaries, and enforces compliance mandates.<sup>142</sup> MED created a complex system of regulation to go hand in hand with the statutes created by the legislature.<sup>143</sup>

In Colorado, legal activities include home growth of marijuana, possession of marijuana,<sup>144</sup> use of marijuana,<sup>145</sup> and the sale of marijuana in licensed dispensaries.<sup>146</sup> The law requires sellers to track and monitor every plant in every cultivation facility, so the product is tracked from planting to purchase.<sup>147</sup> MED requires cultivation, processing, and retail facilities to be extensively monitored by video surveillance.<sup>148</sup> This reduces incentives for illegal activity, such as theft or diversion of supply.<sup>149</sup> Dispensaries can only sell one ounce of marijuana to Coloradans or a quarter of an ounce to non-Coloradans.<sup>150</sup> The tax revenue from marijuana sales is used to fund MED, and provide funds for education and public safety.<sup>151</sup> The system is set up so that legalization pays for itself and for areas of general concern, such as public schools.<sup>152</sup>

The Colorado system is designed with a heavy emphasis on financial control and tax revenue, and seems to have little to do with public health. The

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<sup>138</sup> Hudak, *supra* note 28, at 649; Rob Hotakainen, *Colorado, Washington Face Big Challenges in Controlling Pot*, McCLATCHY DC (Feb. 13, 2015, 10:47 AM), <http://www.mcclatchydc.com/news/crime/article24780073.html>.

<sup>139</sup> Hudak, *supra* note 28, at 655.

<sup>140</sup> COLO. CONST. art. XVIII § 16(1)(a).

<sup>141</sup> *Colorado Department of Revenue Enforcement Division: Marijuana Enforcement*, COLORADO.GOV, <https://www.colorado.gov/pacific/enforcement/marijuana-enforcement> (last visited Aug. 19, 2016) [hereinafter MED Website].

<sup>142</sup> *See id.*

<sup>143</sup> *See generally* 1 COLO. CODE REGS. § 212 (2016); *see also generally* COLO. REV. STAT. § 12-43.4

<sup>144</sup> Including marijuana plants. COLO. CONST. art. XVIII § 16(3)(a)-(b)

<sup>145</sup> Unless consumed in public. *Id.* § 16(3)(a).

<sup>146</sup> *See id.* § 16(3).

<sup>147</sup> Hudak, *supra* note 28, at 661.

<sup>148</sup> *Id.* at 662.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*; 1 COLO. CODE REGS. § 212-2.402(c) (2015).

<sup>151</sup> Hudak, *supra* note 28, at 662–63.

<sup>152</sup> Cooper, *supra* note 132.

Department of Revenue regulates marijuana, and the controlling statutes are listed under the sections regulating professions and occupations.<sup>153</sup> The constitutional amendment itself lists “enhancing revenue for public purposes” as one of the interests in legalizing marijuana.<sup>154</sup> Facially, the laws surrounding legalization have more to do with finances and tax than health and safety.

Any possession or sale of marijuana not in compliance with the regulations, statutes, or constitution is still illegal.<sup>155</sup> In fact, any marijuana purchased not within the retail code is treated as a Schedule 1 narcotic under the criminal code and is illegal.<sup>156</sup> Retaining the ability to prosecute indicates that the motivation behind enacting Amendment 64 was more financially-centered than the public may realize. Instead of allowing marijuana to be completely legal, the State forces consumers to purchase within the bounds of the taxable retail system. With such an emphasis on economic factors in the law, legalization seems to be more about profit, for the State and the industry, than the triumph of personal liberties.

## 2. Resistance to Legalization on All Sides

Even though 55% of voters approved the legalization of marijuana in Colorado,<sup>157</sup> there is significant pushback from anti-legalization groups,<sup>158</sup> including residents of Colorado,<sup>159</sup> other states,<sup>160</sup> and out of state groups.<sup>161</sup> Colorado and the marijuana industry are fighting lawsuits on all sides because the issue is still rife with controversy.<sup>162</sup>

### a. Resistance from Inside the State

Most of the support for legalization was centered around Denver.<sup>163</sup> Not only did most of the votes to pass the amendment come from the Denver area, but

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<sup>153</sup> See generally 1 COLO. CODE REGS. § 212 (2016); see also generally COLO. REV. STAT. ANN. § 12-43.4 (West 2016).

<sup>154</sup> COLO. CONST. art. XVIII § 16(1)(a).

<sup>155</sup> Blake & Finlaw, *supra* note 129, at 362 n.13.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See Cooper, *supra* note 132.

<sup>159</sup> See generally *id.*

<sup>160</sup> Ingold, *supra* note 135.

<sup>161</sup> Kristin Wyatt, *Marijuana Opponents Using Racketeering Law to Fight Industry*, ASSOCIATED PRESS (Jul. 13, 2015, 12:53 AM), <http://bigstory.ap.org/article/98e5d1da8fe94f3583c8335c38888c6a/marijuana-opponents-using-racketeering-law-fight-industry>.

<sup>162</sup> See Cooper, *supra* note 132.

<sup>163</sup> *Id.* Denver is the capital city of Colorado.

rural municipalities have chosen to “opt out” of allowing marijuana sales.<sup>164</sup> Out of 321 municipalities, 228 opted out of allowing marijuana sales.<sup>165</sup> Choosing to opt out prevents the creation, sale, or distribution of marijuana in that area, but it also means not receiving the tax revenue from sales of marijuana.<sup>166</sup> While people can consume and possess marijuana in the “opt out” areas, it cannot be sold.<sup>167</sup> These municipalities would prefer to forgo the tax money to prevent marijuana sales in the area.

Local law enforcement officers also are resistant to the new regulations and have vocalized their reservations. Officers have difficulty figuring out what they are required to enforce because legalization contradicts federal laws that local officers are required to enforce.<sup>168</sup> For example, when officers arrest someone in possession of marijuana, officers must return the marijuana to the arrestee under Colorado law.<sup>169</sup> However, returning the marijuana is a violation of federal law.<sup>170</sup> For the officer to follow State law, he or she must violate federal law or vice versa. No matter what an officer does there is a violation, so the question becomes: which laws are the officers allowed to not enforce?

In addition, marijuana investigations are much more complex, time consuming, and resource intensive than in the past.<sup>171</sup> Police especially have concerns about “homegrowers,” because these growers are outside the enforcement of MED.<sup>172</sup> Black market sellers hide under the guise of home growing and grow marijuana to sell it in illegal markets or across state lines.<sup>173</sup> Marijuana advocates often argue that legalization would end the black market, but there is evidence that the black market is booming, not shrinking.<sup>174</sup> The costs of running legal dispensaries are high, so some have turned to working outside the regulatory system to increase profits.<sup>175</sup> With the ability to grow marijuana legally, “selling it illegally is now easier than ever.”<sup>176</sup> Police no longer have

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See Hudak, *supra* note 28, at 686; *Some Counties that Won't Allow Recreational Pot Still Want Slice of Pie*, CBS DENVER (Oct. 28, 2015, 4:24 PM), <http://denver.cbslocal.com/2013/10/28/some-counties-that-wont-allow-recreational-pot-still-want-slice-of-pie/> [hereinafter *Some Counties that Won't*].

<sup>167</sup> See Jon Murray & John Aquilar, *Colorado Cities and Towns Take Diverging Paths on Recreational Pot*, DENVER POST (Dec. 27, 2014, 1:05 PM), <http://www.denverpost.com/2014/12/19/colorado-cities-and-towns-take-diverging-paths-on-recreational-pot-2/>.

<sup>168</sup> Cooper, *supra* note 132.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Hudak, *supra* note 28, at 670.

<sup>173</sup> See *id.*

<sup>174</sup> Rabouin, *supra* note 131.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*



probable cause simply from the smell or sight of marijuana.<sup>177</sup> It is very difficult for law enforcement to find illegal marijuana, because it is almost “impossible to spot the [people] who are [growing] it illegally.”<sup>178</sup> Police argue that they do not have the resources to “keep up” with legalization and are less effective in upholding public safety.<sup>179</sup>

The number of marijuana arrests and prosecutions since legalization has dramatically decreased, but many attribute this drop to frustration by police and prosecutors rather than the success of legalization.<sup>180</sup> Having to parse the complexities of legalization leaves officers and prosecutors hesitant to pursue marijuana cases, especially cases of small quantity possession.<sup>181</sup> As a result of law enforcement frustration, 12 sheriffs from Colorado, Nebraska, and Kansas filed suit against the Governor of Colorado.<sup>182</sup> From the suit, the sheriffs want clarification on how to enforce state law without breaking vows to the federal government.<sup>183</sup>

#### b. Resistance from Other States and Outside Groups

Anti-legalization groups and state governments are also filing lawsuits against Colorado to stop the legalization of marijuana.<sup>184</sup> Nebraska and Oklahoma (the Plaintiff States) filed a suit against Colorado because Colorado marijuana is bleeding into the Plaintiff States and hurting their ability to enforce prohibition laws.<sup>185</sup> This suit claims that Colorado does not have the ability to enact legalization because it directly contradicts federal law.<sup>186</sup> The complaint for the suit focuses on the damage to the Plaintiff States, namely that Colorado is not preventing marijuana from leaving the state, so the Plaintiff States must use their resources to stop it.<sup>187</sup>

Anti-legalization groups are using a targeted approach and trying to shut down the marijuana industry one business at a time.<sup>188</sup> Under federal law, selling

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<sup>177</sup> John Ingold, *Marijuana Case Filings Plummet In Colorado Following Legalization*, DENVER POST (Jan. 12, 2014, 1:00PM), <http://www.denverpost.com/2014/01/11/marijuana-case-filings-plummet-in-colorado-following-legalization/>.

<sup>178</sup> Rabouin, *supra* note 131 (internal quotation marks omitted).

<sup>179</sup> Cooper, *supra* note 132.

<sup>180</sup> Ingold, *supra* note 177.

<sup>181</sup> *Id.*

<sup>182</sup> Cooper, *supra* note 132.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Ingold, *supra* note 135.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Wyatt, *supra* note 161.

marijuana is technically organized crime, so Safe Streets Alliance (SSA)<sup>189</sup> has begun a series of lawsuits using organized crime statutes to target marijuana businesses.<sup>190</sup> The lawsuits are based on claims under the 1970 Racketeer Influenced and Corrupt Organizations Act (RICO), which allows for federal criminal penalties for activities that benefit a criminal enterprise.<sup>191</sup> This group is suing (under RICO) not only marijuana shops, but every entity doing business with marijuana retailers.<sup>192</sup> So far, these suits have been successful in forcing businesses out of the market and intimidating companies into not doing business with the marijuana industry.<sup>193</sup> Because of the success of the test suits, SSA plans to continue with more RICO suits.<sup>194</sup> SSA is determined to change the economics of the marijuana industry by “putting a bounty on the heads of anyone doing business with the marijuana industry.”<sup>195</sup> SSA is determined to end legal sales of marijuana by making the price of the industry too high.<sup>196</sup>

### 3. The Problem of Federalism: Conflicts Between State and Federal Laws

Despite State legalization, marijuana is considered an illegal substance under the federal Controlled Substances Act.<sup>197</sup> Colorado’s legalization of marijuana causes a significant conflict between state and federal laws.<sup>198</sup> This conflict could effectively end retail marijuana in Colorado if the federal government chooses to prosecute marijuana retailers in federal court. To deal with this problem, President Obama’s administration directed federal prosecutions to focus on prosecuting criminal enterprises rather than people operating within state-regulated marijuana markets.<sup>199</sup> However, this directive does not end all of the conflicts between legalization and federal law. Marijuana businesses have

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<sup>189</sup> SSA is an anti-crime group, based in Washington, fighting to end legalization in Colorado. *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Wyatt, *supra* note 161

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (quoting Brian Barnes, a lawyer for SSA).

<sup>196</sup> *See id.*

<sup>197</sup> Blake & Finlaw, *supra* note 129, at 368.

<sup>198</sup> *See id.*

<sup>199</sup> *See generally* Memorandum from James Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, on Guidance Regarding Marijuana Enforcement to all U.S. Att’ys, (Aug. 29, 2013) [hereinafter Cole Memo]; *see also* Brady Dennis, *Obama Administration Will Not Block State Marijuana Laws if Distribution is Regulated*, WASH. POST (Aug. 29, 2013), [https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws--for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcdc09410972\\_story.html](https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws--for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcdc09410972_story.html).

problems ranging from finding banking,<sup>200</sup> to not being able to advertise in publications sent through the US Postal Service.<sup>201</sup> Agencies and businesses dealing with federal laws seem to be addressing the federal-state conflict cautiously, much to the frustration of the marijuana industry.<sup>202</sup>

#### a. The Cole Memos: Somewhat Turning a Blind Eye

While the Obama administration has attempted to give more legal guidance on some of these conflict issues, many groups are still cautious about interactions with the legal marijuana industry.<sup>203</sup> In August of 2013, Deputy Attorney General James Cole issued a memo (Cole Memo) guiding federal agencies to spend resources on investigating and prosecuting criminal drug enterprises rather than the state regulated marijuana industries.<sup>204</sup> The Cole Memo lists eight areas for federal agents to focus on when enforcing federal marijuana laws.<sup>205</sup> The memo shifts the focus of federal prosecution and law enforcement operations away from retail sellers in Colorado, but the memo explicitly does not guarantee that the legal marijuana businesses are immune from prosecution for violations of federal law.<sup>206</sup>

The Department of Justice issued another memo (Cole II) to clarify the conflict in banking laws.<sup>207</sup> Cole II reiterated the priorities of the Cole Memo, and said that prosecution of banking institutions for working with state-regulated marijuana businesses “may not be appropriate.”<sup>208</sup> However, if financial

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<sup>200</sup> Joel Warner, *Marijuana Banking: The Fourth Corner Credit Union Fights in Court to Become the World’s First Cannabis Bank*, INT’L BUS. TIMES (Dec. 29, 2015, 8:09 AM), <http://www.ibtimes.com/marijuana-banking-fourth-corner-credit-union-fights-court-become-worlds-first-2241994>.

<sup>201</sup> Lisa Rein, *The Pot Business May Be Legal, but Newspapers Can’t Run Ads For It, the U.S. Postal Service Says*, WASH. POST (Dec. 21, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/12/21/the-pot-business-may-be-legal-but-newspapers-cant-run-ads-for-it-the-u-s-postal-service-says/>.

<sup>202</sup> See *id.*; Warner, *supra* note 200.

<sup>203</sup> See, e.g., Warner, *supra* note 200 (“Because marijuana is still a Schedule I narcotic, banks risk being prosecuted for aiding and abetting drug traffickers, or for money laundering . . . even in jurisdictions where those businesses are legal. . . . All [marijuana businesses] risk having their [bank] accounts shut down without notice.”).

<sup>204</sup> Cole Memo, *supra* note 199, at 1–2.

<sup>205</sup> *Id.* These eight areas are highlighted to focus attention on serious criminal enterprises and away from state legalized and regulated markets. *Id.*

<sup>206</sup> *Id.* at 4 (“This memorandum does not alter in any way the Department’s authority to enforce federal law including federal laws relating to marijuana, regardless of state law.”).

<sup>207</sup> See generally Memorandum from James Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, on Guidance Regarding Marijuana Related Financial Crimes to all U.S. Att’y’s, (Feb. 14, 2014) [hereinafter Cole II].

<sup>208</sup> *Id.* at 3.

institutions work with marijuana-related businesses not compliant with the State regulatory scheme, then the financial institutions could be prosecuted for aiding illegal conduct.<sup>209</sup> While many have said that Cole II opens the door for legal marijuana banking, Colorado bankers do not see it that way.<sup>210</sup> Under the Cole II guidance, liability for banks could be increased because banks are now required to file suspicious activity reports and may be targets of investigations if their marijuana clients are not compliant with State regulations.<sup>211</sup> Banks are wary of entering into this legal gray area, especially because Cole II is a guideline and not law.<sup>212</sup> Nothing could legally stop a prosecution of a bank for having marijuana clients, so most banks are staying out of the controversy until the law is settled.<sup>213</sup>

#### b. The Linchpin: Presidential Changes with Elections

Colorado's entire retail marijuana industry could be destroyed with the stroke of a pen.<sup>214</sup> Both Cole Memos reflect the views of President Obama's administration, but the views of future presidents' may not be the same.<sup>215</sup> There are many bills proposed in Congress to alleviate the federal-state conflict,<sup>216</sup> but until those bills are passed, the fate of legal marijuana rests in the hands of the Executive Branch. While the Obama Administration has allowed states to try legalization,<sup>217</sup> the tightening of federal enforcement by a different president is all it takes to end Colorado's new industry.

#### 4. Effects of Legalization Thus Far

Retail marijuana in Colorado has only been active for three years, so it is hard to say whether the effort has been successful. Experts believe that it is inappropriate to make sweeping generalizations about the effects of legalization at this time.<sup>218</sup> Despite the small amount of data, there are some visible benefits to

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<sup>209</sup> *Id.*

<sup>210</sup> Matt Richtel, *The First Bank of Bud*, N.Y. TIMES (Feb. 5, 2015), [http://www.nytimes.com/2015/02/08/business/marijuana-industry-in-colorado-eager-for-its-own-bank-waits-on-the-fed.html?\\_r=0](http://www.nytimes.com/2015/02/08/business/marijuana-industry-in-colorado-eager-for-its-own-bank-waits-on-the-fed.html?_r=0).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Dennis, *supra* note 199.

<sup>215</sup> *Id.*

<sup>216</sup> Debra Borchardt, Commentary, *2016 Will Be Marijuana's Big Year*, FORBES (Dec. 28, 2015, 7:00AM), <http://www.forbes.com/sites/debraborchardt/2015/12/28/2016-will-be-marijuanas-big-year/>.

<sup>217</sup> Dennis, *supra* note 199.

<sup>218</sup> John Ingold, *After Two Years, Debate Remains Over Marijuana Legalization's Impacts*, DENVER POST (Dec. 27, 2015, 1:04 PM), <http://www.denverpost.com/2015/12/26/after-two-years-debate-remains-over-marijuana-legalizations-impacts/>.

legalization and continuing areas of concern. Benefits include the increased tax revenue for the state,<sup>219</sup> and the creation of a growing, profitable new industry in the state.<sup>220</sup> On the other hand, the biggest areas of concern are keeping marijuana out of the hands of children and teenagers,<sup>221</sup> and the increased awareness of “drugged driving.”<sup>222</sup>

#### a. Profits of the Industry and Drug Tourism

The legalization of marijuana created a new industry around marijuana and significantly increased tax revenue for the state.<sup>223</sup> In Colorado for 2014, recreational marijuana sales created revenue of \$313 million, and medical marijuana sales generated \$385 million.<sup>224</sup> In 2015 from January to October, legal marijuana sales in Colorado totaled \$814 million dollars, with recreational marijuana generating more than half of that.<sup>225</sup> In the 2014-2015 fiscal year, the State of Colorado took in \$70 million in tax revenue from marijuana sales, which is almost twice the amount collected in alcohol taxes.<sup>226</sup> Parts of the marijuana tax revenue are earmarked for schools, and in 2014, marijuana generated \$13.3 million for schools alone.<sup>227</sup> The large tax revenues and high profits make legal marijuana a benefit to the state coffers and the economy.

These numbers do not include other revenue generated by businesses incidental to marijuana sales. Many new businesses are taking advantage of marijuana through “drug tourism.”<sup>228</sup> Tour companies, such as My 420 Tours, shuttle out-of-state tourists from dispensaries to grow farms for a fee.<sup>229</sup> Other businesses include Puff Pass and Paint, a painting class that incorporates

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<sup>219</sup> Tanya Basu, *Colorado Raised More Tax Revenue From Marijuana Than From Alcohol*, TIME (Sept. 16, 2015), <http://time.com/4037604/colorado-marijuana-tax-revenue/>.

<sup>220</sup> See Ingold, *supra* note 218.

<sup>221</sup> See Cooper, *supra* note 132.

<sup>222</sup> See Noelle Philips & Elizabeth Hernandez, *Colorado Still Not Sure Whether Legal Marijuana Made Roads Less Safe*, DENVER POST (Dec. 29, 2015, 8:35 AM), [http://www.denverpost.com/news/ci\\_29322609/colorado-still-not-sure-whether-legal-marijuana-made?source=pkg](http://www.denverpost.com/news/ci_29322609/colorado-still-not-sure-whether-legal-marijuana-made?source=pkg).

<sup>223</sup> Ricardo Baca, *Welcome to Harvest Season: Colorado Marijuana Sales See Drop in October*, THE CANNABIST (Dec. 10, 2015, 3:20 PM), <http://www.thecannabist.co/2015/12/10/colorado-marijuana-sales-taxes-october/44948/>.

<sup>224</sup> *Id.* fig.

<sup>225</sup> *Id.*

<sup>226</sup> Basu, *supra* note 219.

<sup>227</sup> Baca, *supra* note 223.

<sup>228</sup> See Jackie Salo, *Colorado Marijuana Tourism: Cannabis Tours, Bud Hotels Popular with Visitors, But State Won't Market Legal Pot to Travelers*, INT'L BUS. TIMES (Dec. 19, 2015, 8:29 AM), <http://www.ibtimes.com/colorado-marijuana-tourism-cannabis-tours-bud-hotels-popular-visitors-state-wont-2222911>.

<sup>229</sup> *Id.*

marijuana use.<sup>230</sup> Another business offers classes pairing marijuana with other activities, such as Bend & Blaze, where the participants use marijuana to “complement” their yoga practice.<sup>231</sup> The economic benefits are not restricted to sales of marijuana alone; tourism helps the overall economy of Colorado.<sup>232</sup>

#### b. Area of Concern: Access to Kids

The government and critics of legalization worry about keeping marijuana out of the hands of children and teenagers.<sup>233</sup> In 2014, incidents of children accidentally ingesting marijuana were highly publicized as evidence of a failing regulatory structure.<sup>234</sup> Government officials responded by creating regulations that clearly mark edible-marijuana products, both in and out of packaging, so as to prevent child ingestion.<sup>235</sup> The government also tried to use advertising campaigns to prevent teens from using marijuana, but the first attempt did not have much success.<sup>236</sup> The first campaign, called “Don’t Be a Lab Rat,” involved erecting human sized rat cages outside schools and libraries.<sup>237</sup> It was designed to “unsettle [teens] with the uncertainty” that they do not know how marijuana will affect them later in life, and that teenage brains should not be a part of the testing ground for legalization.<sup>238</sup> Aside from criticism, this message was

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<sup>230</sup> *Id.*

<sup>231</sup> Kelsey Foster, *Downward-Facing Bong: Bend And Blaze Yoga Lets You Smoke During Class*, BEST BUDS, <http://bestbuds.com/yoga-smoke-during-class/> (last visited Oct. 28, 2016).

<sup>232</sup> “If someone went to Colorado to check out the cannabis system, they probably rented a room, filled their car with gas, [and] ate dinner out once or twice[.]” Haley Dover, *S. Burlington Leaders See Trouble in Pot Legalization*, BURLINGTON FREE PRESS (Dec. 16, 2015, 12:02 AM), <http://www.burlingtonfreepress.com/story/news/local/2015/12/16/s-burlington-leaders-see-trouble-pot-legalization/77032164/>.

<sup>233</sup> See Jack Healy, *After 5 Months of Sales, Colorado Sees the Downside of a Legal High*, N.Y. TIMES (May 31, 2014), [http://www.nytimes.com/2014/06/01/us/after-5-months-of-sales-colorado-sees-the-downside-of-a-legal-high.html?\\_r=0](http://www.nytimes.com/2014/06/01/us/after-5-months-of-sales-colorado-sees-the-downside-of-a-legal-high.html?_r=0); Kristen Wyatt, *Colorado Rebrands Teen Pot Education Campaign by Focusing on Their Future*, THE CANNABIST (Aug. 20, 2015, 11:17 AM), <http://www.thecannabist.co/2015/08/20/colorado-marijuana-teens-whats-next-pot-education-campaign/39661/>.

<sup>234</sup> See, e.g., Healy, *supra* note 233; John Ingold, *Children’s Hospital Sees Surge in Kids Accidentally Eating Marijuana*, DENVER POST (May 21, 2014, 5:31 AM), [http://www.denverpost.com/news/ci\\_25807342/childrens-hospital-sees-surge-kids-accidentally-eating-marijuana](http://www.denverpost.com/news/ci_25807342/childrens-hospital-sees-surge-kids-accidentally-eating-marijuana).

<sup>235</sup> Ingold, *supra* note 234.

<sup>236</sup> Wyatt, *supra* note 233.

<sup>237</sup> *Id.*

<sup>238</sup> John Ingold, *Colorado Ad Campaign Tests New Message to Prevent Teen Marijuana Use*, DENVER POST (Aug. 11, 2014), [http://www.denverpost.com/marijuana/ci\\_26308424/colorado-ad-campaign-tests-new-message-prevent-teen-marijuana-use/](http://www.denverpost.com/marijuana/ci_26308424/colorado-ad-campaign-tests-new-message-prevent-teen-marijuana-use/).

met with derision from teenagers by smoking marijuana in the cages and then posting the pictures on social media.<sup>239</sup> The campaign has since been replaced.<sup>240</sup>

Research shows that teenagers prefer to be given credible information to help them with health decisions rather than “preachy” messaging.<sup>241</sup> A new ad campaign, started in 2015, seeks to be more thoughtful and informative by telling teenagers not to let marijuana get in the way of “what’s next.”<sup>242</sup> Colorado has also launched a campaign targeted at parents, in both Spanish and English, encouraging them to talk with their children about marijuana and help discourage underage use.<sup>243</sup> Officials hope that a more informative approach will persuade teens to wait until they are 21 to use marijuana. The results of this campaign are still yet unknown.

Separate from the ad campaigns, Colorado provides grants for health professionals in schools.<sup>244</sup> These grants come from retail marijuana tax revenues dedicated “to support drug education and prevention programs.”<sup>245</sup> Schools are using the tax revenue to create programs designed to help address prevention and awareness of the health effects of all drugs, not just marijuana.<sup>246</sup> The goal is to create classroom prevention programs, but also to make school health professionals directly accessible to students.<sup>247</sup> The prevention classes focus on teaching critical thinking in evaluating risks and making healthy choices, rather than on drugs.<sup>248</sup> Hiring health professionals, such as nurses, helps the school to identify young people that are at risk for drug use or who are already using drugs.<sup>249</sup> These school programs continue to grow across the State as more and more schools gain access to the grant money.<sup>250</sup>

There is not enough data on the use of marijuana by Colorado teenagers post-legalization to form any conclusions about the impact of legalization on

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<sup>239</sup> Wyatt, *supra* note 233.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* This campaign launched in August of 2015, so the effectiveness is yet to be determined. *Id.*

<sup>243</sup> Wyatt, *supra* note 233.

<sup>244</sup> Yesenia Robles, *Marijuana Use in Colorado Schools Still Unclear, Prevention on the Rise*, DENVER POST (Dec. 28, 2015), <http://www.denverpost.com/2015/12/28/marijuana-use-in-colorado-schools-still-unclear-prevention-on-the-rise-2/>.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Robles, *supra* note 244 (stating “Nurses are one of the most trusted professionals in schools. They can get to some of the reasons why students are missing school or coming to the health room on a regular basis. Most of the time, there is something going on that is directing [the students] to using [drugs]”) (internal quotation marks omitted).

<sup>250</sup> *Id.*

teenagers thus far.<sup>251</sup> Before retail sales began, there were reports of increased marijuana use and possession at schools.<sup>252</sup> However after two years of legal retail sales, the initial predictions and anecdotal evidence remain unconfirmed and the data is unclear.<sup>253</sup> While there may be concern about increased use by teenagers from legalization, there is no statistical data to support those concerns.

### c. Area of Concern: Drugged Driving

Another area of concern is “drugged driving” and the involvement of marijuana in car accidents.<sup>254</sup> After legalization began, highway patrol officers have been tracking the number of drivers found under the influence (DUI) of marijuana.<sup>255</sup> Marijuana opponents use any increase in instances of drugged driving to show the dangers of legalization.<sup>256</sup> However, the new focus on drugged driving has shown holes in the DUI laws and law enforcement training.<sup>257</sup>

Colorado law combines all forms of impaired driving under one law.<sup>258</sup> The laws and officer training were developed primarily for detecting alcohol consumption.<sup>259</sup> Officers are finding that the standard tests and prevention measures for alcohol impairment are not applicable to drugged driving.<sup>260</sup> For example, if someone pleads guilty to DUI for marijuana, then that person is required to install a device that measures breath alcohol on to the ignition of their car.<sup>261</sup> This system does nothing to prevent the driver from using marijuana before driving, only alcohol.<sup>262</sup> Colorado law enforcement is trying to catch up by

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<sup>251</sup> Ingold, *supra* note 218 (quoting Colorado health department officials stating that “[t]here’s really no statistically significant data yet to demonstrate that there is increased use among adults or teens”).

<sup>252</sup> See, e.g., Nancy Lofholm, *Pot Problems in Colorado Schools Increase with Legalization*, DENVER POST (Nov. 11, 2013), [http://www.denverpost.com/breakingnews/ci\\_24501596/pot-problems-colorado-schools-increase-legalization](http://www.denverpost.com/breakingnews/ci_24501596/pot-problems-colorado-schools-increase-legalization).

<sup>253</sup> Robles, *supra* note 244.

<sup>254</sup> See Radley Balko, *Since Marijuana Legalization Highway Fatalities in Colorado Are at Near-historic Lows*, WASH. POST (Aug. 5, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/08/05/since-marijuana-legalization-highway-fatalities-in-colorado-are-at-near-historic-lows/>.

<sup>255</sup> John Ingold, *Marijuana Involved in 12 Percent of Colorado State Patrol DUI Cases*, DENVER POST (Jan. 29, 2015), [http://www.denverpost.com/news/ci\\_27421987/marijuana-involved-12-percent-colorado-state-patrol-dui](http://www.denverpost.com/news/ci_27421987/marijuana-involved-12-percent-colorado-state-patrol-dui).

<sup>256</sup> Balko, *supra* note 254.

<sup>257</sup> See Noelle Phillips & Elizabeth Hernandez, *Colorado Still Not Sure Whether Legal Marijuana Made Roads Less Safe*, DENVER POST (Dec. 29, 2015), [http://www.denverpost.com/news/ci\\_29322609/colorado-still-not-sure-whether-legal-marijuana-made?source=pkg](http://www.denverpost.com/news/ci_29322609/colorado-still-not-sure-whether-legal-marijuana-made?source=pkg).

<sup>258</sup> *Id.*; See COLO. REV. STAT. ANN. § 42-4-1301 (West 2016).

<sup>259</sup> Phillips & Hernandez, *supra* note 257.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*



certifying officers as Drug Recognition Experts.<sup>263</sup> However, there are currently only 229 officers certified in the entire State.<sup>264</sup> With only a few years of data for drugged driving, and insufficient police training, it is difficult to tell if legalization has had an effect on road safety.<sup>265</sup> Overall, there is not enough data to show any trends since legalization has occurred.

### III. ANALYSIS: MINIMIZING SOCIAL COSTS AND POLICY EFFECTIVENESS

Both Colorado and Portugal adopted drug policies that are radically different from the previous prohibition models. Drug use and possession is not completely legal in either jurisdiction, but both governments have constructed a policy to try to minimize the cost of drug use on society. Colorado chose to do this with regulated legalization of marijuana, and controlling the supply of marijuana to receive tax benefits.<sup>266</sup> Whereas Portugal used public health objectives to reduce demand by helping addicts, and reduced supply through drug seizure.<sup>267</sup> There are positive and negative attributes to each system, so which one is most effective in reducing social costs? There are four key areas to look at in comparing the two policies: reduction of harm to individuals, law enforcement's ability to protect society, reducing drug use among key age groups, and the benefits added to society. In each of these areas, one policy may appear more effective than the other, but as a whole it is difficult to say that one of these models is more cost effective than the other.

#### A. Reducing Harm to Individuals

Portugal appears to have the most effective policy in reducing harm to individuals. The Portuguese policy was designed to promote public health and provide aid to drug addicts rather than punish them.<sup>268</sup> Decriminalization allows addicts to get the treatment they need without the stigmatization of criminal proceedings.<sup>269</sup> The government provides harm reduction programs and healthcare instead of spending money on prosecuting drug addicts.<sup>270</sup> Rather than

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<sup>263</sup> *Id.*

<sup>264</sup> Phillips & Hernandez, *supra* note 257.

<sup>265</sup> *Id.*

<sup>266</sup> *See supra* Part II.B.

<sup>267</sup> *See supra* Part II.A.

<sup>268</sup> Hollersen, *supra* note 39 (“Drug users aren’t criminals, they’re sick, . . . Not everyone agrees . . . [b]ut the anti-drug commission quickly agreed on this position, which formed the basis for Portugal’s experiment in dealing with drug users without dealing in deterrents.”).

<sup>269</sup> Russoniello, *supra* note 27, at 386.

<sup>270</sup> *Id.* at 389–90.

ostracizing addicts and punishing them for dependence, this policy is designed to stop the dependence altogether and help the individual.

In contrast, the regulated legalization in Colorado does not have the focus on individual users or public health in general. Colorado's legalization helps individuals because they can no longer be prosecuted for using or possessing marijuana, but only if the marijuana was legally grown or sold under government regulations.<sup>271</sup> However, there are no health focused protections written into the statutes or the regulations. The State has reacted when major health issues arose,<sup>272</sup> but there are little to no health regulations currently in place. The new ability to legally use marijuana could be seen as a benefit to individuals, but there is nothing in Colorado's policy that shows the same amount of attentiveness to individual citizen's health like in Portugal.

The decriminalization in Portugal not only removes criminal punishments, but goes a step further and invests in drug addicts to attempt to improve their lives and their health. Colorado's legalization, on the other hand, removes criminal punishments<sup>273</sup> but takes a hands-off approach allowing citizens to decide if marijuana is right for them. The Portuguese model's focus on health and rehabilitation is better at reducing harm to the individual, whereas Colorado only addresses individual harms as issues arise.

## **B. Law Enforcement's Ability to Protect Society**

Decriminalization in Portugal created a more efficient policy for police to follow, while Colorado's legalization has led to confusion and apathy among police.<sup>274</sup> In Portugal, the data of drug seizures and decreasing prices show that law enforcement has been able to make a significant impact in disrupting the drug market.<sup>275</sup> Police are also more effective in directing people to the Dissuasion Commissions because drug use is still considered illegal.<sup>276</sup> The police play a vital role in helping addicts receive treatment, because police are required to direct any user they find to the Dissuasion Commissions.<sup>277</sup> Removing the criminal penalties for drug users seems to have made Portuguese police more effective in reducing the effects of drugs on society.

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<sup>271</sup> COLO. CONST. art. XVIII, § 16(3).

<sup>272</sup> For example, when an alarming number of children were reported mistakenly consuming edible-marijuana products, the government enacted labeling regulations. Ingold, *supra* note 234.

<sup>273</sup> For those who purchase and use marijuana legally allowed under the regulations. See Hudak, *supra* note 28, at 649.

<sup>274</sup> See *supra* Part II.A.5.b; *supra* Part II.B.2.a.

<sup>275</sup> See *supra* Part II.A.5.b-c; see also Hughes & Stevens, *supra* note 34, at 1011.

<sup>276</sup> See Hollersen, *supra* note 39.

<sup>277</sup> Russoniello, *supra* note 27, at 386.

Colorado police, on the other hand, are having a much more difficult time targeting illegal marijuana use and the black market.<sup>278</sup> Legal growth makes black market producers and sellers hard to detect, which forces the police to develop new, time-consuming investigative techniques.<sup>279</sup> Lack of resources and training make keeping up with legalization difficult for police.<sup>280</sup> The lack of training for law enforcement detection of drugged driving and failures in preventing drugged driving<sup>281</sup> are further examples that Colorado's police force is behind and trying to catch up to legalization.<sup>282</sup>

While Portuguese police did have some initial worries about their effectiveness after legalization,<sup>283</sup> the nature of the decriminalization policy makes police more effective when compared to Colorado's legalization. Under decriminalization, there are much clearer cut directions for police. All drugs are illegal, so police can still conduct investigations and are able to identify potential criminals based on possession of the illegal substances. The largest change is that people with personal use amounts of drugs are no longer arrested.<sup>284</sup> In contrast, legalization creates a new level of complexity because the underlying conduct, using and growing marijuana, is legal.<sup>285</sup> More complex investigative techniques must be used to target an illegal grower or seller,<sup>286</sup> which makes it more difficult for Colorado police to protect against any negative effects associated with illegal selling, such as gun violence.<sup>287</sup> Colorado's police force may eventually catch up with legalization and learn to become more effective, but Portugal's decriminalization seems to have created a more effective police force than did regulated legalization or prohibition.

### **C. Reducing Use by Key Age Groups**

It is not quite clear whether Portugal or Colorado has a more effective program for preventing young people from beginning to use drugs. Portugal's advertisement campaigns appear to be well thought out and targeted to promote healthy living rather than anti-drug sentiment.<sup>288</sup> However, Colorado's first campaign, the rat cages, fell into the trap of using fear tactics while also being

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<sup>278</sup> See *supra* Part II.B.2.a.

<sup>279</sup> See Cooper, *supra* note 132.

<sup>280</sup> See *supra* Part II.B.2.a.

<sup>281</sup> See *supra* Part II.B.4.c (stating the requirement that people pleading guilty to marijuana DUI install a breath alcohol measuring device on the ignition of the car does not prevent marijuana DUI from occurring again).

<sup>282</sup> See *supra* Part II.B.4.c.

<sup>283</sup> Hughes & Stevens, *supra* note 34, at 1011.

<sup>284</sup> Russoniello, *supra* note 27, at 386; GREENWALD, *supra* note 32, at 3.

<sup>285</sup> See generally Rabouin, *supra* note 131.

<sup>286</sup> See Cooper, *supra* note 132.

<sup>287</sup> See, e.g., Borden, *supra* note 17, at 576-77.

<sup>288</sup> See *supra* Part II.A.3.

easily mocked.<sup>289</sup> Time will tell if the current campaign, the “What’s Next” campaign, leads to a better outcome.<sup>290</sup> Despite the early failings of Colorado’s campaign, other programs, similar to Portugal’s, may be more effective at promoting prevention.

Both Portugal and Colorado are taking steps to influence young people and teenagers on an individual level rather than through mass media.<sup>291</sup> Portugal does this through prevention teams that talk with young people in places where drugs are likely to be consumed, such as night clubs and bars, and also through teaching classes in schools about the dangers and health risks associated with drugs.<sup>292</sup> Colorado is also creating prevention programs in schools, including classes and access to health professionals, such as nurses.<sup>293</sup> The most important thing to note about Colorado’s program is that these prevention programs are being funded entirely by marijuana tax revenue.<sup>294</sup> Colorado’s prevention programs are not aimed solely at marijuana prevention but the prevention of all drug use.<sup>295</sup> Without legalizing marijuana sales, there would not be enough money for the school to fund these prevention programs. It is difficult to say how effective these programs are for both governments. There is some evidence that the Portuguese program has been effective,<sup>296</sup> and the Colorado program already has positive anecdotal reviews but no statistical support.<sup>297</sup> While Portugal may have more effective advertising campaigns, both governments’ individualized prevention programs seem to be effective (or have the potential of being effective, in Colorado’s case).

#### **D. Benefits Added to Society**

The benefits added to Colorado by legalization appear more visible than the benefits from decriminalization in Portugal, but both systems add value to society. One of the largest benefits for Colorado’s legalization is the tax revenue from retail marijuana.<sup>298</sup> In one fiscal year, the State of Colorado collected in marijuana tax revenue almost twice the amount of alcohol tax revenue for the same period, and in 2014 marijuana taxes generated over \$13 million for schools alone.<sup>299</sup> Legal marijuana sales help pay for the marijuana regulatory system (the

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<sup>289</sup> See *supra* Part II.B.4.b.

<sup>290</sup> See *supra* Part II.B.4.b.

<sup>291</sup> See *supra* Part II.A.3; *supra* Part II.B.4.b.

<sup>292</sup> DOMOSLAWSKI, *supra* note 54, at 28; Hollersen, *supra* note 39.

<sup>293</sup> Robles, *supra* note 244.

<sup>294</sup> *Id.*

<sup>295</sup> See *id.*

<sup>296</sup> See *supra* Part II.A.3.

<sup>297</sup> Robles, *supra* note 244.

<sup>298</sup> See Basu, *supra* note 219.

<sup>299</sup> Baca, *supra* note 223.

MED), education, and public safety.<sup>300</sup> Some of these revenues also go to drug use prevention programs, which can help young people be healthier and teach them how to stay away from all drugs.<sup>301</sup> However, some of the financial benefits are reduced because of the large cost Colorado is incurring to defend its legalization policy. Legalization faces challenges from both inside and outside the state.<sup>302</sup> These challenges create financial and emotional costs in the form of paying for litigation and the division in ideology among citizens of the state. There could also be future costs associated with legalization of marijuana use because of the lack of health regulations built into the law.<sup>303</sup> Despite these added costs and concerns, the high tax revenues are hard to ignore. While many debate the safety and morality of retail marijuana sales, very few debate how helpful marijuana tax revenues are to the State government.

The benefits to Portuguese society are less ostentatious than Colorado's millions of dollars, but the primary benefits include a healthier population and the increased ability of law enforcement to clampdown on the drug trade. When compared to similar European countries, Portugal has seen a pronounced decline in the deaths from overdoses, the number of problematic drug users, and the spread of infectious disease.<sup>304</sup> Portugal's decriminalization has made society healthier overall, but there are no visible financial benefits like in Colorado. While the financial burden of small drug possession charges on the criminal justice system has been removed, the Portuguese government still must spend millions of dollars to keep decriminalization working.<sup>305</sup> The benefits for Portugal's decriminalization can be felt by all of society but are primarily directed at helping people affected by drugs.

Both decriminalization and regulated legalization provide benefits to society, but in very different ways. Decriminalization directs state aid to a group that legislators have deemed to be in need: drug addicts. This is a more paternalistic approach that concentrates resources on addicts to benefit society by minimizing the impacts of drugs. In contrast, Colorado's approach removes the prohibition on marijuana to use the profits for new government programs, including drug prevention programs for the young members of society. Decriminalization provides a large amount of support to a small concentration of people, but tax revenue from legalization can help a greater number of citizens and therefore be more valuable to society as a whole.

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<sup>300</sup> Hudak, *supra* note 28, at 662-63.

<sup>301</sup> See Robles, *supra* note 244.

<sup>302</sup> See *supra* Part II.B.2.

<sup>303</sup> See Part II.B.1.

<sup>304</sup> *Supra* Part II.A.5.a.

<sup>305</sup> Hollersen, *supra* note 39 (stating “[b]efore the euro crisis, Portugal spent €75 million (\$98 million) annually on its anti-drug programs”). The annual savings on the criminal justice system have not been fully calculated, but it is not likely to be a shockingly large amount. *Id.*

### **E. Implications: Moving Forward in Making Drug Policies**

If law makers are considering using an alternative policy, they must consider first how to address the weaknesses of Colorado's and Portugal's policies. Colorado's major problems include ineffective police enforcement and inadequate health protections, while Portugal's major problem is funding the Dissuasion Commissions and treatment facilities. Working out these problems could create policies that truly minimize the social costs of drugs on society, but not all of these problems are easily solved.

To address Colorado's law enforcement problem, one solution is not to allow home growing of marijuana. Police would be much better able to stop illegal growing and selling of marijuana if permit holding dispensaries and grow houses were the only places allowed to produce marijuana. Stopping illegal growth under Colorado's legalization model is more complicated because home growing camouflages illegal growing.<sup>306</sup> If home growth is illegal, then the state regulated marijuana would be the only legitimate source of marijuana. Therefore, police could continue to use the same tactics and investigation techniques that have already been developed over the past few decades for detecting marijuana growth facilities. Reducing the black market sales would increase state regulated marijuana, and give the State greater ability to enforce health protections and quality control.

The lack of health protections in Colorado's system are less easy to address. The safety and health effects of marijuana are very much debated in the media and the scientific community.<sup>307</sup> Research on marijuana and its long term effects continues to develop,<sup>308</sup> but there does not appear to be a consensus in the scientific community and more research is needed to determine the safety or dangers of marijuana.<sup>309</sup> With no concrete guidance from the medical community, it is very difficult for Colorado law makers to implement any health regulations beyond dealing with issues as they arise.<sup>310</sup> Future policies may be able to take

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<sup>306</sup> See *supra* Part II.B.2.a.

<sup>307</sup> See, e.g., Christopher Ingraham, *Marijuana May Be Even Safer Than Previously Thought, Researchers Say*, THE WASHINGTON POST, Feb. 23, 2015, <https://www.washingtonpost.com/news/wonk/wp/2015/02/23/marijuana-may-be-even-safer-than-previously-thought-researchers-say/>. But see *Hidden Dangers of Marijuana*, NARCONON, <http://www.narconon.org/drug-information/dangers-of-marijuana.html> (last visited Apr. 23, 2016).

<sup>308</sup> See Cari Nierenberg, *Pot Science: Top Marijuana Findings of 2015*, LIVE SCIENCE (Dec. 29, 2015), <http://www.livescience.com/53218-top-marijuana-scientific-findings-2015.html>.

<sup>309</sup> Stephanie Watson, *Is Marijuana Safe?*, WEBMD, <http://www.webmd.com/news/breaking-news/marijuana-on-main-street/is-marijuana-safe-web> (last visited Apr. 23, 2016) (stating "We're learning new things every day. . . . Before we can really understand the effects of marijuana, further research is needed.") (internal quotation marks omitted).

<sup>310</sup> See, e.g., Ingold, *supra* note 234. The government enacted labeling regulations when an alarming number of children were reported mistakenly consuming edible-marijuana products. *Id.*

forthcoming scientific findings into account, but regulating health and quality controls in Colorado or any other jurisdiction may not be possible at this time.

Portugal's funding problem is also not easy to solve. Funding Portugal's decriminalization model on a larger scale—for example, in a country like the United States—would be very difficult. One possible solution for future policies is to combine legalization and decriminalization. Marijuana is, debatably, the least harmful form of drug use, so legalizing marijuana for the tax revenue could be a fairly simple way to fund the decriminalization programs of other drugs. Revenue from marijuana would allow the State to pay for prevention programs for children and young adults, as well as treatment programs for addicts. This revenue could also be used by the police to fund supply reduction initiatives for more dangerous drugs. Decriminalizing the more dangerous drugs would also reduce the costs on the criminal justice system and help reduce the stigma of drug use and addiction.<sup>311</sup> Combining both systems could be very effective in reducing the monetary costs of drugs on society, but the unknown long term effects of marijuana could end up creating more harms for society.

## VI. CONCLUSION

The great experiments in alternative drug policies by Portugal and Colorado have shifted the drug policy discussion away from prohibition and towards finding a drug policy that fits each society. Decriminalization has been shown to be effective in reducing drug use<sup>312</sup> but does create hefty costs for the government.<sup>313</sup> Colorado's legalization policy creates large financial incentives, but push back from anti-legalization groups and conflicts between federal and state laws add new costs to the state.<sup>314</sup> By moving into the spectrum of legality between prohibition and complete legalization, both systems have attempted to minimize the negative impacts of drugs on society. Decriminalization helps addicts and reduces the selling of drugs, while legalization makes the once-black market a profitable revenue stream to benefit the whole State.

Deciding which system is most effective depends entirely on the goals of the society. If the goal is to try to decrease drug use to the smallest amount possible, then Portuguese decriminalization is the best model to follow. However, if the goal is to capitalize on the, arguably, least harmful form of drug use and use those profits to help the rest of society, then Colorado's regulated legalization is the best model to follow. The prohibition model for drug policies has been proven detrimental to many aspects of society.<sup>315</sup> When governments are evaluating how to minimize the impacts of drugs on their society, lawmakers should look at the

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<sup>311</sup> See Part II.A.4.

<sup>312</sup> See *supra* Part II.A.5.a.

<sup>313</sup> Hollersen, *supra* note 39.

<sup>314</sup> See *supra* Part II.B.2-3.

<sup>315</sup> See *supra* Part II.

spectrum of legality and determine what type of policy fits their goals for minimizing the effects of drugs.

