

**Model Legislation:  
Rice University's Baker Institute and  
the South Texas College of Law  
Drug Policy Collaboration 2013**

Part 2 of 8: Recriminalization Statutes

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The following is one of several collections of model statutes produced by the legislation class at South Texas College of Law (STCL) during the spring 2013 semester. The class was offered in collaboration with Rice University's Baker Institute. Students attended lectures on drug policy, legislation, and statutory interpretation conducted by Dru Stevenson, J.D., STCL professor and Baker Institute Scholar; Nathan Jones, Ph.D., Alfred C. Glassell III Postdoctoral Fellow in Drug Policy; and William Martin, Ph.D., Harry and Hazel Chavanne Senior Fellow in Religion and Public Policy and director of the Baker Institute's Drug Policy Program. Each student completed a project addressing one aspect of marijuana legalization or postlegalization regulation through a model statute or ordinance. Links to each of the model statutes can be found at [bakerinstitute.org/model-legislation-2013](http://bakerinstitute.org/model-legislation-2013). Neither the Baker Institute nor the South Texas College of Law endorse any particular policy. The model legislation has not undergone editorial review by the Baker Institute.

## **Introduction to This Collection**

By Dru Stevenson, J.D., Helen and Harry Hutchins Research Professor, South Texas College of Law, and Baker Institute Scholar

This compilation will present what we have dubbed “recriminalization” statutes. In anticipation of general decriminalization, these are measures to ensure that there will be ongoing criminal liability for certain uses of marijuana that pose a continuing risk to public health or safety, such as consumption in conjunction with driving a vehicle, or using the temporary mental impairment from marijuana intoxication as an excuse for other illegal behavior. Please note that the decriminalization statutes may contain a few retained-criminalization provisions, and the recriminalization statutes may contain cursory decriminalization provisions – the sorting follows the overall focus of each model statutes.

Each proposed statute includes commentary explaining the policy rationale for specific provisions or verbiage. Ultimately, legislators could choose from various provisions, cobbling together components from each proposal to make a new statute. The proposed statutes, however, have internal coherence in their form, flow, and terminology, so they appear here as coherent, freestanding individual proposals. Most of the statutes focus heavily on defining terms; statutory definitions are often dispositive when courts interpret and apply the laws in individual cases. The advantage of attached commentary is that it can become part of the legislative history, to which courts often turn when seeking the interpretation of ambiguous terms or phrases.

The last two of the six model statutes in this collection could arguably fit into the “decriminalization” collection just as well. We have included them here because they contain extensive provisions that function as restrictions on use or possession of marijuana even after the decriminalization overall. The last section of commentary is more of an essay or manifesto than explanatory comments about specific provisions; hence its placement at the end of the collection.

# STATUTE 1

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## Title 10. Offenses Against Public Health, Safety, and Morals

### CHAPTER 50. Intoxication and Marijuana Offenses

#### Section 50.01 DEFINITIONS.

(1) FOR PURPOSES OF THE TERM “INTOXICATED,” THIS STATUTE HEREBY ADOPTS THE LANGUAGE FROM TEXAS PENAL CODE (“TPC”) 49.01(2)(A). SPECIFICALLY, THE TERM “INTOXICATED” MEANS “NOT HAVING THE NORMAL USE OF MENTAL OR PHYSICAL FACULTIES BY REASON OF THE INTRODUCTION OF ALCOHOL, A CONTROLLED SUBSTANCE, A DRUG, A DANGEROUS DRUG, A COMBINATION OF TWO OR MORE OF THOSE SUBSTANCES, OR ANY OTHER SUBSTANCE INTO THE BODY. \*

\*(SEE: REFERENCE #1)

(2) FOR PURPOSES OF THE TERM “MOTOR VEHICLE,” THIS STATUTE HEREBY ADOPTS THE LANGUAGE FROM TPC 32.34(A)(2). "MOTOR VEHICLE" MEANS A DEVICE IN, ON, OR BY WHICH A PERSON OR PROPERTY IS OR MAY BE

TRANSPORTED OR DRAWN ON A HIGHWAY, EXCEPT A DEVICE USED EXCLUSIVELY ON STATIONARY RAILS OR TRACKS.\*

\*(SEE REFERENCE #2)

#### SECTION 50.02. POSSESSION OF MARIJUANA IN A MOTOR VEHICLE

(A) IN THIS SECTION:

(1) "OPEN PACKAGE" MEANS A BAG, PIPE, JOINT, OR ANY OTHER CONTAINER USED FOR THE MEANS OF HOLDING OR TRANSPORTING MARIJUANA AND THAT IS OPEN, HAS BEEN OPENED, HAS A BROKEN SEAL, OR HAS HAD CONTENTS PARTIALLY REMOVED FROM THE CONTAINER. \*

\* (Language borrowed from tpc 49.031(1)) (see reference #1)

(2) "PASSENGER AREA OF A MOTOR VEHICLE" MEANS THE AREA OF A MOTOR VEHICLE DESIGNED FOR THE SEATING OF THE OPERATOR AND PASSENGERS OF THE VEHICLE. THE TERM DOES NOT INCLUDE THE TRUNK OF A VEHICLE.\*

\* (Language borrowed from tpc 49.031(2)) (see reference #1)

(B) A PERSON COMMITS AN OFFENSE UNDER THIS SECTION IF THE PERSON KNOWINGLY POSSESSES AN OPEN PACKAGE IN A PASSENGER AREA OF A MOTOR VEHICLE THAT IS LOCATED ON A PUBLIC HIGHWAY REGARDLESS OF WHETHER THE VEHICLE IS IN OPERATION, STOPPED, OR PARKED. POSSESSION BY A PERSON OF ONE OR MORE OPEN PACKAGES IN A SINGLE CRIMINAL EPISODE IS A SINGLE OFFENSE BUT POSSESSION OF MORE THAN ONE OPEN PACKAGE MAY ALLOW FOR HARSHER PUNISHMENT.\*

\* (Language borrowed from tpc 49.031(b)) (see reference #1)

(C) THIS SECTION ADOPTS THE EXCEPTION PROVISIONS IN TPC 49.031(C)\*

\* (SEE REFERENCE #1)

(D) AN OFFENSE UNDER THIS SECTION IS A CLASS B MISDEMEANOR (SEE TPC SEC. 12.22)\*

\* (SEE REFERENCE #3)

#### SECTION 50.03 DRIVING WHILE INTOXICATED

(A) A PERSON COMMITS AN OFFENSE IF THE PERSON IS INTOXICATED WHILE OPERATING A MOTOR VEHICLE IN A PUBLIC PLACE.\*

\* (LANGUAGE BORROWED FROM TPC 49.04(A)) (SEE REFERENCE #1)

(B) EXCEPT AS PROVIDED BY SUBSECTIONS (C), (D), AND (E), AN OFFENSE UNDER THIS SECTION IS A CLASS A MISDEMEANOR, WITH A MINIMUM TERM OF

CONFINEMENT OF 120 HOURS.

(C) IF IT IS SHOWN ON THE TRIAL OF AN OFFENSE UNDER THIS SECTION THAT AT THE TIME OF THE OFFENSE THE PERSON OPERATING THE MOTOR VEHICLE HAD AN OPEN PACKAGE OF MARIJUANA, WITHIN THE MEANING OF SECTION 50.02, IN THE PERSON'S IMMEDIATE POSSESSION, THE OFFENSE IS A CLASS A MISDEMEANOR, WITH A MINIMUM TERM OF CONFINEMENT OF 6 DAYS.\*

\* (Language borrowed from tpc 49.04(c)) (see reference #1)

(D) IF IT IS SHOWN ON THE TRIAL OF AN OFFENSE UNDER THIS SECTION THAT AN ANALYSIS OF A SPECIMEN OF THE PERSON'S BLOOD, FAT CELLS, OR URINE SHOWED AN INTOXICATION LEVEL OF DOUBLE THE LEGAL LIMIT OR MORE AT THE TIME THE ANALYSIS WAS PERFORMED, THE OFFENSE IS A CLASS A MISDEMEANOR WITH A MINIMUM TERM OF CONFINEMENT OF 7 DAYS.

(E) IF ANOTHER MEDICALLY OR LEGALLY ACCEPTED METHOD OF PROVING INTOXICATION IS DEVELOPED IN THE FUTURE THEN IT MAY SUBSTITUTE FOR THE METHODS DESCRIBED IN SECTION 50.03(D) ABOVE.

(F) AN OFFENSE UNDER THIS SECTION IS A CLASS A MISDEMEANOR, WITH A MINIMUM TERM OF CONFINEMENT OF 45 DAYS AND A SUSPENSION OF DRIVERS LICENSE FOR 30-DAYS POST-JAIL RELEASE, IF IT IS SHOWN ON THE TRIAL OF THE OFFENSE THAT THE PERSON HAS PREVIOUSLY BEEN CONVICTED ONE TIME OF AN OFFENSE RELATED TO THE OPERATING OF A MOTOR VEHICLE WHILE INTOXICATED.

50.04 PUBLIC INTOXICATION

(A) A PERSON COMMITS AN OFFENSE IF THE PERSON APPEARS IN A PUBLIC PLACE WHILE INTOXICATED BY MARIJUANA OR A COMBINATION OF MARIJUANA AND ALCOHOL TO THE DEGREE THAT THE PERSON MAY ENDANGER THE PERSON OR ANOTHER. \*

(LANGUAGE BORROWED FROM TPC 49.02(A)) (SEE REFERENCE #1)

(B) IT IS A DEFENSE TO PROSECUTION UNDER THIS SECTION THAT THE MARIJUANA WAS ADMINISTERED FOR MEDICINAL PURPOSES AS A PART OF THE PERSON'S PROFESSIONAL MEDICAL TREATMENT BY A LICENSED MEDICAL DOCTOR.

(C) EXCEPT AS PROVIDED BY SUBSECTION (E), AN OFFENSE UNDER THIS SECTION IS A CLASS C MISDEMEANOR. (SEE TPC 12.23)\*

(SEE REFERENCE #3)

(D) AN OFFENSE UNDER THIS SECTION IS NOT A LESSER-INCLUDED OFFENSE UNDER SECTION 50.03.

(E) AN OFFENSE UNDER THIS SECTION COMMITTED BY A PERSON LESS THAN 22

YEARS OF AGE IS PUNISHABLE BY ONE OR MORE OF THE FOLLOWING:

- (1) A FINE NOT TO EXCEED \$500
- (2) COURT APPROVED COMMUNITY SERVICE HOURS (MINIMUM OF 20; MAXIMUM OF 40)
- (3) SUSPENSION OF DRIVERS LICENSE OR PERMIT (MINIMUM OF 30 DAYS; MAXIMUM OF 90)
- (4) DELAY IN ISSUANCE OF A DRIVERS LICENSE OR PERMIT (MINIMUM OF 30 DAYS; MAXIMUM OF 90)

#### SECTION 50.05 NO MEDICAL DEFENSE

(A) IN A PROSECUTION UNDER SECTIONS 50.02 AND 50.03, THE FACT THAT THE DEFENDANT HAS BEEN PRESCRIBED MARIJUANA FOR MEDICINAL PURPOSES BY A LICENSED MEDICAL DOCTOR IS NOT A DEFENSE.

(B) IF THE DEFENDANT CAN SHOW PROOF OF BEING PRESCRIBED MARIJUANA FOR MEDICINAL PURPOSES BY A MEDICAL DOCTOR THEN IT MAY BE CONSIDERED AS A FACTOR FOR LESSER FINES OR CONFINEMENT UNDER SECTION 50.02 ONLY. SPECIFICALLY, 50.02(D).

#### Commentary

##### (1) Section 50.01 Definitions

(i) The language for the term “Intoxicated” has been adopted from TPC 49.01(2)(A) because it encompasses the word “drug.” This would cover marijuana, a substance commonly classified as a drug. The definition depends on the mental and physical faculties affected by the substance which concerns us more than the use itself. The police will have to employ reasonable standards to enforce the legislation and test for intoxication. Some accepted methods we know of include blood samples, urine samples, fat cell samples, and roadside examination. However, this list is not restricted to those methods. If an officer can reasonably determine with some degree of accuracy that an individual’s use of marijuana significantly affected their mental or physical faculties, then he or she will fall within the intoxicated standard. Evidence will be collected in order to prove the offender in a given case is in fact intoxicated.

(ii) The language for the term “Motor vehicle” has been adopted from TPC 32.34(A)(2) for purposes of simplicity and also because this shows how this term has traditionally been viewed within the confines of the Texas Penal Code. Most often times this term will be used in regards to vehicles such as cars, trucks, and SUV’s for purposes of these statutes relating to marijuana. However, it is not limited to such vehicles.

(2) Section 50.02 Possession of Marijuana in a Motor Vehicle

(i) The term “Open Package” in section 50.02(a)(1) must be interpreted broadly in order to encompass the true meaning of this definition. For instance, a bag could be small, large, paper, plastic, or transparent. Also, a pipe or a joint could be made from many different objects and come in a variety of shapes and sizes. We simply want to convey that the device can be construed broadly so long as it also meets the requirements of either holding or transporting marijuana.

(ii) The burden will be on the defendant in a case to prove there was no open package. It is the responsibility of a person carrying or transporting marijuana in a motor vehicle to exercise due diligence in making sure their drugs are sealed to the utmost satisfaction of the law. At this time it is not known what the packaging requirements will be. However, the package will have to be sealed in a manner that limits its accessibility without the use of effort to dislodge its contents.

(iii) Section 50.02 (a)(2) proposes a broad definition in regards to the “Passenger area of a motor vehicle” in order to help ensure that no matter where the open package may be located within the car, aside from the trunk, it will be sealed and unopened. The only place not covered is the trunk since there is typically restricted access both while the vehicle is in drive and park. However, the legislature is aware of the ability of a passenger who may have access to the trunk by pulling the back seat forward via a hidden strap or compartment. In cases where the operator or passenger(s) have some way of accessing the trunk from the inside of the vehicle this should be included within the definition of “Passenger area of a motor vehicle.”

(iv) In section 50.02(b) to determine if a person satisfies the “knowingly” standard we adopt an objective approach. The analysis would ask if the operator or passenger(s) in a motor vehicle would know if he or she were in possession of marijuana based on the evidence presented. If an open package is found in a passenger area of a motor vehicle it creates a rebuttable presumption that the operator and passenger(s) knew it was in their possession. This creates more of an incentive to make sure the product is sealed at all times and is not too heavy of a burden for the defendant to carry.

(v) If law enforcement officials find more than one open package on a person, then the officers may have grounds to give a harsher punishment. Texas law explicitly prohibits open alcohol containers in a motor vehicle, and the same clarity of enforcement can exist for open marijuana packages. Punishment for having open marijuana packages will increase incrementally and proportionally in relation to the number of packages found, a logical progression that will predominantly cover situations in which more than one occupant of a vehicle possesses an open package of marijuana. but is not limited to such a scenario.

(vi) The exception provisions were adopted for 50.02 from 49.031(c) because we do not wish to punish those accessing the services of a bus, taxi cab, or limousine. Furthermore, the living quarters of a motor home must be treated with the same respect for privacy as immobile homes unless in motion. .

(vii) There are policy reasons for invoking harsher punishment when an open package violation exists. A class B misdemeanor for an open package will serve as notice to the citizens of this state that this is a serious punishment not to be taken lightly even for first time violators. If we are going to accomplish our goal of no open packages under this section we must make sure there is a strict policy in place to curb this type of behavior.

### (3) Section 50.03 Driving While Intoxicated

(i) section 50.03(a) adopts the same language as 49.04(a) in an effort to help protect the public from intoxicated drivers whose faculties may be impaired from smoking marijuana in a manner similar to the treatment of drunk drivers under the law. The law will explicitly prohibit the use of motor vehicles in a public place while intoxicated by alcohol or by marijuana.

(ii) A marijuana related DWI will result in a harsher penalty than an alcohol related DWI because it will effectually provide as a deterrence effect. Again, in order to curb this type of behavior a strict policy such as this must be invoked. The public will be made aware of these changes to the law so that it comes as no surprise when this harsher penalty is first issued. A class A misdemeanor under this section allows for higher fines and longer confinement periods. The revenue from these violations needs to be used to promote awareness that this is a serious crime that could cause great harm. The longer confinement period is justified by the fact that it will postpone the violator's ability to harm the public in any way.

(iii) Section 50.03(c) allows for longer confinement when an open package is found within the immediate possession of someone charged with a marijuana related DWI charge. Multiple violations of the Texas Penal Code justify the longer confinement, and the intoxicated driver could potentially pose more of a danger to society when the intoxicant is readily accessible. . The intoxicated person could potentially consume more of the intoxicant when in possession of an open package while driving, and this could negatively impact the safety of other individuals.

(iv) Section 50.03(d) allows for longer confinement when the violators blood, fat cells, or urine reveal an intoxication level of double the legal limit. A higher level of intoxication, assuming that a reasonably accurate measure of intoxication is being used, implies a greater level of incapacitation when driving, and, therefore, a greater potential public harm. A greater potential public harm warrants for a greater punishment. Secondly, it will keep the offender in confinement for a longer period of time and can allow for the offender to sober up before returning to the public sphere. The longer we can keep them in confinement the better, so they do not have the opportunity to cause anyone harm or repeat their behavior. In sum, this law will help serve our main purpose with this type of legislation, which is to protect society as a whole and keep them out of harm's way.

(v) Section 50.03 (e) is an important aspect of this piece of legislation because it serves as a safeguard for the development of new testing methods, which are in their infancy stages. The legislature should leave the law open-ended in this regard so to allow for the development and implemented of new methods of testing for marijuana intoxication.

When new methods present themselves we will make sure they are accurate, fair, and in accordance with what should be legally permissible. Future developments should aim to be non-invasive and accurate. . It is important to note that we do not want an overload of methods. We have already accepted the urine, blood, and fat cells testing. If too many methods exist the testing can become convoluted and will eventually create grey areas. Again, accuracy is key, and 50.03(e) will allow for the development of better testing technology. Before a method can officially be adopted there needs to be a vote to amend this statute to include such method. This will allow for a vote in order to provide as a second safeguard against adopting unnecessary methods of testing.

(vi) Section 50.03 (f) prescribes harsher punishment for repeat offenders. The 45 days of confinement will serve to penalize those who have not been deterred by previous punishments. Repeat offenders show consistency in putting the public in danger, and incrementally harsher punishment could help prevent these offenders from continuing their current patterns. First-time offenders should be made aware of this penal gradient so they understand the repercussions of future actions. A 30-day suspension of their drivers' licenses will help serve not only to remind offenders of their criminal wrongdoings, but also to promote public safety. Driving is a privilege, and abusing that privilege will result in a driving suspension. The last provision of 50.03(f) gives the court presiding over these matters the ability to strip repeated offenders of their rights to possess marijuana in any form and will allow the court to revert to previous marijuana laws for these individuals. This will allow the court to reduce the ability of those repeat offenders who they believe will not alter their criminal behaviors. The right to smoke or ingest marijuana is not constitutional and therefore we have no problems with stripping that right away when the holder of that right puts the public in danger. This last section of 50.03(f) should evolve over time. We trust that the judges in the court systems throughout this state will have the ability to use their wisdom and rule in the favor of justice when determining whether or not to apply this removal of rights.

#### (4) Section 50.04 Public Intoxication

(i) The purpose of Section 50.04(a) is to prohibit any person from being intoxicated through the use of marijuana in a public place. A person would not be held criminally responsible for being intoxicated within the confines of a private place or area. This piece of legislation is intended to protect the public from the actions of an intoxicated individual who makes an appearance in public. Marijuana use can limit inhibitions in individuals, and this relative loss of inhibition could pose a threat to those who come in contact with the individual. It needs to be clear that the word "appears" is not restrained by a time limit. Meaning that if the individual is intoxicated and is in a public place for a time period as brief as one second his conduct could be found punishable under 50.04. This is intended to be a harsh standard in order to warn potential offenders that putting the public in danger is something we simply will not tolerate. It should also be noted that this section highlights the legislature's intent to protect the individual who is the offender as well. If people are publically intoxicated they can also be a danger to themselves. Reducing this ability is of key importance.

(ii) Section 50.04 (b) provides a defense for someone who would otherwise be an

offender, but ingests marijuana for medicinal purposes. This is intended to be an affirmative defense to public intoxication. The legislature recognizes the needs of patients who may be prescribed marijuana to treat various ailments. We do not wish to punish those who lawfully receive a prescription from a doctor to use marijuana. We trust that licensed doctors will instruct their patients on how to safely consume marijuana, how much of it to consume and at what times to use it. We would like to reiterate that the patient, if questioned, must be able to prove they received a prescription as part of his or her medical treatment by a licensed medical doctor. All patients with prescriptions from a doctor must carry a license to smoke and/or use the drug. The medical professional diagnosing the patient will distribute these licenses to their patients who require such prescriptions. This will work similar to a driver's license. You need one to drive on public roads. You will need a license from your doctor to smoke marijuana in a public place. This will allow for an easier verification of someone's medical needs that grant them protection under 50.04(b). The goal of this section is to afford protection to those who are abiding by the legal system and consuming marijuana in the public sphere for medical purposes only.

(iii) Section 50.04(e) provides certain punishments for those who are publically intoxicated (50.04a) and are under the proposed legal age limit of 22. These punishments are intended to curb the behavior of those who have not yet reached the established legal age limit. The legislature believes that it would be in the best interest of the offender under 50.04(e)(2) to fulfill community service hours in an environment that will enhance their knowledge of actions that could have a perceived harm to the public. This educational exposure may have a deterrent effect on the individual and could help change their minds about underage use of marijuana. This idea is similar to the shattered dreams project for alcohol related incidents. We wish to promote awareness to the underage offenders that they could harm themselves and others when under the influence of this drug. When determining which punishment(s) to choose for the offender it is important to consider all the circumstances involved with the offense and assign a punishment proportional to the potential or actual harm caused by the individual.

#### (5) Section 50.05 No Medical Defense

(i) Section 50.05(a) prohibits the use of an affirmative medical defense, similar to the one in 50.04(b), but only for violations of 50.02 (Possession of Marijuana in a Motor Vehicle) and 50.03 (Driving While Intoxicated). The public should be aware of the dangers that come along with possession of marijuana in a vehicle, especially considering that ingesting marijuana to the point of intoxication and then driving creates a potentially hazardous situation for the public. If a public harm is the net outcome of such a situation, then the intentions behind the action do not change the outcome. This section prohibits the affirmative defense for driving because a prescription for marijuana does not allow for ignorance of its side effects. Even many over-the-counter drugs have a disclaimer that advise against driving after consuming the drug. Therefore, all medically issued marijuana must have a label explaining in detail the side effects of marijuana and the concerns of driving after taking the drug.

(ii) Section 50.05 (b) allows for lesser punishment under 50.02 (Possession of Marijuana

in a Motor Vehicle) when the defendant can show proof that he or she was prescribed marijuana for medicinal purposes by a licensed medical professional. The court is not obligated to give a less severe punishment. This section exists because the legislature deems it necessary to cut a break to those who are authorized to use marijuana by a licensed medical professional. While the legislature does not condone possessing an open package in the passenger area of a motor vehicle, we envision certain circumstances where this may occur for those patients who are prescribed marijuana.

#### (6) General Commentary

(i) When examining the intent of the legislature under Title 10 Chapter 50 of the Texas Penal Code it is important to remember that public safety is always our chief concern. While we wish to reward law-abiding citizens with a safe environment in which they can live, we also wish to punish those who do not abide by these laws and, therefore, put the safety of others in jeopardy. When considering punishment under Chapter 50 for any crime, one should always take into account the offender's disregard for his own safety and the safety of the public. Additionally, one should always consider the measures taken by offenders to conceal their crimes. The law is clear and is intended to benefit everybody by helping provide safe and crime-free communities throughout the state.

(ii) The term marijuana is not to be defined narrowly within the confines of Chapter 50. This term could include a variety of methods to ingest marijuana. Including but not limited to joints, blunts, bongs, brownies, etc. A limited number of loopholes in the law will help maintain the law's integrity and offer a more equitable distribution of punishment for all offenders.

(iii) The legal age limit is set to 22 years after birth because college students generally graduate with their first degrees and begin their professional careers at this age. The legislature believes this will capture the majority. We arrive at this age limit based on the following age scale in college years:

18- freshman

19- sophomore

20- junior

21- senior

Setting the legal age limit at 22 will likely lessen the amount of violations under 50.02, 50.03 and 50.04. When there is a lot at stake and harsh penalties to pay for criminal behavior, potential offenders have more incentives to avoid punishment and abide by the law. Many workplaces prefer hiring responsible employees. Violations under these laws will often reveal the character of irresponsible individuals. People will find it necessary to avoid a criminal charge under Chapter 50 that makes them look irresponsible in the eyes of current and/or future employers.

## Bibliography/References

- 1) <http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.49.htm>
- 2) <http://codes.lp.findlaw.com/txstatutes/PE/7/32/C/32.34>
- 3) <http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.12.htm>
- 4) <http://law.onecle.com/texas/alcoholic/106.071.00.html>

## STATUTE 2

### PROPOSED LEGISLATION

#### MARIJUANA INTOXICATION'S EFFECT ON MENS REA

(A) NO ACT COMMITTED BY A PERSON WHILE IN A STATE OF VOLUNTARY MARIJUANA INTOXICATION IS LESS CRIMINAL DUE TO HIS OR HER HAVING BEEN IN THAT CONDITION.<sup>1</sup>

(B) A PERSON SHALL NOT BE FOUND GUILTY OF A CRIME WHEN, AT THE TIME OF THE ACT, OMISSION, OR NEGLIGENCE CONSTITUTING THE CRIME, THE PERSON, BECAUSE OF INVOLUNTARY INTOXICATION, WAS NOT SUBSTANTIALLY CAPABLE OF KNOWING OR UNDERSTANDING THE WRONGFULNESS OF SUCH PERSON'S CONDUCT AND OF CONFORMING SUCH PERSON'S CONDUCT AS TO THE REQUIREMENTS OF LAW.<sup>2</sup>

(I) VOLUNTARY INTOXICATION INCLUDES THE VOLUNTARY INHALATION, INGESTION, INJECTION, OR TAKING OF ANY MARIJUANA PRODUCT BY ANY OTHER MEANS.<sup>3</sup>

(II) INVOLUNTARY INTOXICATION MEANS INTOXICATION CAUSED BY:

(A) CONSUMPTION OF A SUBSTANCE THROUGH EXCUSABLE IGNORANCE; OR

(B) THE COERCION, FRAUD, ARTIFICE, OR CONTRIVANCE OF ANOTHER PERSON<sup>4</sup>

(C) EVIDENCE OF VOLUNTARY INTOXICATION IS ADMISSIBLE SOLELY ON THE ISSUE OF WHETHER OR NOT THE DEFENDANT ACTUALLY FORMED A REQUIRED SPECIFIC INTENT, OR, WHEN CHARGED WITH MURDER, WHETHER THE DEFENDANT PREMEDITATED, DELIBERATED, OR HARBORED EXPRESS MALICE AFORETHOUGHT.<sup>5</sup>

(D) EVIDENCE OF VOLUNTARY INTOXICATION SHALL NOT BE ADMITTED TO NEGATE THE CAPACITY TO FORM ANY MENTAL STATES FOR THE CRIMES CHARGED, INCLUDING BUT NOT LIMITED TO, PURPOSE, INTENT, KNOWLEDGE, PREMEDITATION, DELIBERATION, OR MALICE AFORETHOUGHT, WITH WHICH THE ACCUSED COMMITTED THE ACT.<sup>6</sup>

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<sup>1</sup> Cal. Ann. Penal Code § 29.4(a) (West 2013).

<sup>2</sup> Ga. Code Ann. §16-3-4(a) (West 2012).

<sup>3</sup> Cal. Ann. Penal Code § 29.4(c) (West 2013).

<sup>4</sup> Ga. Code Ann. § 16-3-4(b) (West 2012).

<sup>5</sup> Cal. Ann. Penal Code § 29.4(b) (West 2013).

<sup>6</sup> Cal. Ann. Penal Code § 29.4(a)(2) (West 2013).

MARIJUANA DEFINITION

(A) "MARIJUANA" MEANS THE SEEDS, AND LEAVES, BUDS, AND FLOWERS OF THE PLANT (GENUS) CANNABIS, WHETHER GROWING OR NOT; IT DOES NOT INCLUDE THE RESIN OR OIL EXTRACTED FROM ANY PART OF THE PLANTS, OR ANY COMPOUND, MANUFACTURE, SALT, DERIVATIVE, MIXTURE, OR PREPARATION FROM THE RESIN OR OIL, INCLUDING HASHISH, HASHISH OIL, AND NATURAL OR SYNTHETIC TETRAHYDROCANNABINOL; IT DOES NOT INCLUDE THE STALKS OF THE PLANT, FIBER PRODUCED FROM THE STALKS, OIL OR CAKE MADE FROM THE SEEDS OF THE PLANT, ANY OTHER COMPOUND, MANUFACTURE, SALT, DERIVATIVE, MIXTURE, OR PREPARATION OF THE STALKS, FIBER, OIL OR CAKE, OR THE STERILIZED SEED OF THE PLANT WHICH IS INCAPABLE OF GERMINATION.<sup>7</sup>

CULPABLE MENTAL STATE DEFINITION

(A) KNOWING

(I) HAVING OR SHOWING AWARENESS OR UNDERSTANDING

(II) DELIBERATE; CONSCIOUS

(B) UNDERSTANDING

(I) TO APPREHEND THE MEANING OF AN ACT

(C) PREMEDITATED

(I) DONE WITH WILLFUL DELIBERATION AND PLANNING

(II) CONSCIOUSLY CONSIDERED BEFOREHAND

(D) DELIBERATED

(I) INTENTIONAL

(II) FULLY CONSIDERED

(E) MALICE AFORETHOUGHT

(I) THE REQUISITE MENTAL STATE FOR COMMON-LAW MURDER, ENCOMPASSING ANY OF THE FOLLOWING:

(A) THE INTENT TO KILL, OR

(B) THE INTENT TO INFLICT GRIEVOUS BODILY HARM, OR

(C) EXTREMELY RECKLESS INDIFFERENCE TO THE VALUE OF HUMAN LIFE, OR

(D) THE INTENT TO COMMIT A DANGEROUS FELONY<sup>8</sup>

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<sup>7</sup> Alaska Stat. Ann. § 11.71.900(14) (West 2013).

<sup>8</sup> *Black's Law Dictionary* (9th ed. 2009).

## Commentary

### I. General Principles

Whether alcohol intoxication will diminish mens rea has long been established in the United States. In 1791, the two-year-old Supreme Court held that voluntary drunkenness could not be used to excuse a crime; in effect, continuing the old English common law rule in the new republic.<sup>9</sup> This belief has continued into modern times with many states codifying this rule into their statutes.<sup>10</sup> Very few courts in the U.S. judicial system have ever dissented from this maxim.<sup>11</sup> However, courts have held that while intoxication is no excuse for crime, it should be considered as affecting the capability to form the mental condition required for a specific intent.<sup>12</sup> While intoxication may be taken into consideration for intent, if, while a person is sober, he formulates his intent then voluntarily intoxicates himself, he will be found to have the required specific intent.<sup>13</sup>

Marijuana, unlike alcohol, is new to legalization and does not have a long-established legislative history. Marijuana legislation should follow alcohol's diminished mens rea legislation. Alcohol and marijuana are similar in the effect that people can be in a different state of mind, yet the public agrees that people should still be held responsible for their actions when they are in this state of mind. Furthermore, many statutes that do not recognize a diminished mens rea under alcoholic intoxication include intoxication from drugs. Many states would not need to change their diminished mens rea laws if marijuana became legal.

### II. Involuntary Intoxication

#### **A. Involuntary Intoxication by unknown ingestion**

Courts have recognized involuntary intoxication "through the fault of another, by accident, inadvertence, or mistake on his [or her]own part, or because of a physiological or

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<sup>9</sup> *Respublica v. Weidle*, 2 U.S. 88 (1781).

<sup>10</sup> Cal. Ann. Penal Code § 29.4 (West 2013); Ga. Code Ann. § 16-3-4 (West 2012); Minn. Stat. Ann. § 609.-75 (West 2013); 18 Pa. Cons. Stat. Ann. § 308 (West 2013); S.D. Codified Laws § 22-5-5 (2012); Utah Code Ann. § 76-2-306 (West 2012).

<sup>11</sup> R. W. Gascoyne, Annotation, *Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R.3d 1236 (1966).

<sup>12</sup> *Cornwall v. State*, 8 Tenn. 147 (1827)(Mart. & Yer.) Intoxication is no excuse for crime, but should be considered as effecting defendant's mental condition, with reference to his capability of a specific intent; *State v. Jones*, 105 So.3d 246 (La. Ct. App. 2012) the defendant was so intoxicated as to preclude the existence of any specific intent on his part to commit a theft or felony therein; *Crosslin v. State*, 446 So.2d 675 (Ala. Crim. App. 1983) Intoxication must render the accused incapable of discriminating between right and wrong.

<sup>13</sup> *State v. Miller*, 149 S.E. 590 (N.C. 1929)

psychological condition beyond his control."<sup>14</sup> A spiked drink would be a prime example of involuntary intoxication. While this may not seem like an issue that would arise frequently with marijuana, it has arisen in the past. In 1923, a defendant claimed that he was not guilty for his actions because while he thought he was drinking Whiskey, he claimed to have been unknowingly drinking "dope."<sup>15</sup> The court held that it did not matter whether he was drinking whiskey or dope.<sup>16</sup> He was still voluntarily drinking an intoxicating beverage; therefore, he cannot claim he was involuntarily intoxicated.<sup>17</sup> This case law suggests that anyone claiming involuntary intoxication by cannabis substances would have to have been drinking a beverage that would not, on its own, lead to intoxication.

Another common cause of involuntary intoxication is when a physician wrongly administers a drug. This old case law may become problematic since medical marijuana may be prescribed. Courts have reasoned that wrongly admitted drugs are involuntary because "the patient is entitled to assume that an intoxicating dose would not be prescribed."<sup>18</sup> However, this reasoning does not apply to medical marijuana. It is well known in the medical community as well as to the public that marijuana is intoxicating. Therefore, this application of involuntary intoxication should be discarded when prescribing medical marijuana.

Another instance in which involuntary intoxication may occur is when a child ingests the intoxicant, or someone reasonably believed she or he was taking some other non-intoxicating substance.<sup>19</sup> Both hinge on whether the individual knew or believed he or she was taking an intoxicating substance. The first might be easier to prove since children, especially younger children, may not know what contains cannabis and what does not contain cannabis. However, it will probably be harder for an adult to prove he or she reasonably believed to be simply smoking a cigarette or eating a brownie. In either case, the jury should be given the issue to decide.

## **B. Psychological disabilities effect on involuntary intoxication**

In more recent years, psychological disabilities have been the basis for involuntary intoxication claims. The first and most common approach is that the disability compels individuals to become intoxicated.<sup>20</sup> Second, that a brain injury combined with the intoxicant produces an insanity that would not have occurred without the mental condition.<sup>21</sup> And finally, that due to a disability, a small dose of the intoxicant renders the individual intoxicated, which would not have occurred but for the mental condition.<sup>22</sup>

The first approach is referring to drug addiction. Whether or not marijuana is addictive is a debated topic; most courts, however, have recognized any intoxication caused by addiction as

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<sup>14</sup> Phillip E. Hassman, Annotation, *When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge*, 73 A.L.R.3d 195, § 2(a) (1976).

<sup>15</sup> *Bennett v. State*, 257 S.W. 372, 374 (1923).

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

<sup>17</sup> *Id.*

<sup>18</sup> *Saldiveri v. State*, 143 A.2d 70, 77 (Md. 1958).

<sup>19</sup> *See, State v. Brown*, 16 P. 390 (Kan. 1888) (Mr. Brown was charged with public drunkenness, and the court held that children, the insane, and persons who have been made drunk by force or fraud may, as part of their defense, show that they became intoxicated on accident).

<sup>20</sup> Phillip E. Hassman, Annotation, *When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge*, 73 A.L.R.3d 195, § 2(a) (1976).

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

<sup>22</sup> *Id.*

involuntary.<sup>23</sup> There are a number of reasons courts have rejected to say intoxication due to addiction is voluntary. One argument is that scientists cannot agree or prove that the addiction compelled the individual to use the intoxicant.<sup>24</sup> Another argument is that the individual voluntarily chose to use the intoxicating substance; therefore, any subsequent addiction was the individual's voluntary choice.<sup>25</sup> And finally, courts have chosen to declare that an individual was not suffering from such a compulsion.<sup>26</sup> Even if these arguments are not compelling, they do show that courts are loathe to declare addiction, of any kind including marijuana, that renders consumption involuntary.

The next approach, argues that brain injuries can trigger violent reactions when the individual becomes intoxicated. This argument is often rejected because it is not the psychological issues that bring about temporary insanity but the use of the intoxicant.<sup>27</sup> Alcohol is consumed more broadly than marijuana, so more individuals are aware how alcohol's effects on psychological issues. The effects of marijuana on preexisting psychological conditions, however, are more ambiguous still. . Some courts have already begun considering brain damage to be a primary factor behind insanity, and, therefore, treat the outcome as voluntary intoxication.<sup>28</sup> If the individual is aware that marijuana will react violently with their psychological issues, then the court will likely treat the use as voluntary intoxication.<sup>29</sup>

And the last approach, while similar to the second, is slightly different. It argues that an individual's intoxication should be considered involuntary due to an extreme sensitivity to an intoxicant, or what the American Law Institute call "Pathological Intoxication."<sup>30</sup> The American Law Institute considers pathological intoxication to be an affirmative defense since the individual is not able to "appreciate" its criminal wrongness.<sup>31</sup> In *People v. Castillo*, the California Supreme Court agreed with the American Law Institute and held that there was sufficient evidence of diminished capacity after the defendant consumed half a beer.<sup>32</sup> In this case, the psychiatrist testified that individuals suffering from pathological intoxication react violently after having a small amount of intoxicant and will almost always report signs of amnesia.<sup>33</sup> Not all courts agree with the American Law Institute and will classify "pathological intoxication" as regular intoxication. Regardless of the approach taken for pathological intoxication, an individual knowledgeable of the effects of the intoxicant will be considered voluntarily intoxicated.

### C. Conclusion

In conclusion, while statutes and courts realize that involuntary intoxication occurs, they have also realized that it is uncommon. Courts have limited what can be considered involuntary,

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<sup>23</sup> See, *Powell v. Texas*, 392 U.S. 514 (1968).

<sup>24</sup> See, *See v State*, 296 Ark. 498 (Ark. 1988).

<sup>25</sup> See, *Vick v. State*, 453 P.2d 342 (Alaska 1969).

<sup>26</sup> See, *Ballard v. State*, 28 N.W. 271 (Neb. 1886).

<sup>27</sup> See, *Evilsizer v. State*, 487 S.W.2d 113 (Tex. Crim. App. 1972).

<sup>28</sup> See, *King v. U.S.*, 372 F.2d 383 (D.C. Cir. 1966)

<sup>29</sup> See, *U.S. v. Jewett*, 438 F.2d 495 (8th Cir. 1971).

<sup>30</sup> Phillip E. Hassman, Annotation, *When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge*, 73 A.L.R.3d 195, §2a (1976).

<sup>31</sup> Model Penal Code § 2.08 (2011).

<sup>32</sup> *People v. Castillo*, 70 Cal.2d 264, 266 (Cal. 1969).

<sup>33</sup> *Id.* at 268.

presumably to prevent abuse of this exception. There is no reason to believe that courts or legislatures will change their hardline approach to involuntary intoxication for marijuana.

### III. Effect on Murder

A majority of courts allow evidence of voluntary intoxication to reach the jury so that they may determine whether the requisite intent was formed.<sup>34</sup> For homicide, the requisite intent is determined by the degree of murder. Generally, first-degree murder, or capital murder involves elements such as deliberate planning or premeditation.<sup>35</sup> Second-degree murder is often defined as murder, but without premeditation or deliberation.<sup>36</sup> In other words, capital murder requires a specific intent, and if that specific intent is not found, then the degree and punishment are reduced. Many partial defense statutes focus on this intent. . And it is precisely this type of intent that marijuana intoxication might affect.

The degree of intoxication is quite important in negating specific intent. The effect a high or low degree of intoxication will have on the required mental states varies in each jurisdiction.<sup>37</sup> A majority of courts do not want defendant's escaping liability for their crimes so these courts set the bar rather high.<sup>38</sup> A majority require a high level of intoxication in order to be considered relevant to the specific intent.<sup>39</sup> For example, in *People v. Olson*, the court agreed that the defendant had the right to the defense of intoxication.<sup>40</sup> Yet the bar a defendant must pass in order to succeed on his intoxication defense was set high. The court required the defendant to show that the voluntary intoxication was "so extreme as to entirely suspend the defendant's power of reason."<sup>41</sup> The requirements surrounding the degree of intoxication are not likely to change when marijuana becomes involved. Courts and juries seem to prefer to hold people accountable for their actions whether they are intoxicated or not. Therefore, the degree of marijuana intoxication would have to be extremely high in order to have the intoxication defense work in their favor.

### IV. The Effect of Scientific Research

In the paragraphs above, some of the courts cited scientific findings as reasons to follow or change a given legal doctrine. However, many legal doctrines present in the United States regarding the mental elements of intoxication, specifically alcohol intoxication, are adverse with known scientific facts.<sup>42</sup> Admittedly, the law has been slow to change because in the past there have been a number of opinions regarding what "drunkenness" is and what percentage of criminals are "drunkards."<sup>43</sup> However, a majority of experts agree that excessive imbibing is

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<sup>34</sup> M. Christina Almanzor, *The Effect of Intoxication as a "Mitigating Factor" for Murder and Manslaughter*, 31 New Eng. L. Rev. 1079, 1082 (1997).

<sup>35</sup> 18 Pa. Cons. Stat. Ann. § 2502 (West 2013); Kan. Stat. Ann. § 21-5402 (West 2012)

<sup>36</sup> *Id.*

<sup>37</sup> M. Christina Almanzor, *The Effect of Intoxication as a "Mitigating Factor" for Murder and Manslaughter*, 31 New Eng. L. Rev. 1079, 84-85 (1997).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *People v. Olson*, 96 Ill.App.3d 193, 195 (Ill.App.Ct. 1981).

<sup>41</sup> *Id.*

<sup>42</sup> Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1072 (1944).

<sup>43</sup> *Id.* at 1072-73.

often a symptom of serious mental disease.<sup>44</sup> Furthermore, courts refuse to acknowledge temporary insanity brought on intoxication, even though experts agree that temporary insanity is a true mental disease.<sup>45</sup> While the psychological effects of alcohol and marijuana are not exactly parallel, it should be noted that courts are unlikely to change their opinion because of scientific arguments. They may use science as a reason to hold a particular opinion, but in all likelihood a number of courts will be expressing their moral disapproval rather than their belief in a scientific finding.

## V. Conclusion

The legal field's opinion on drug or alcohol intoxication's effect on mens rea has been around since the middle ages. While science has advanced our knowledge of addiction and effects of intoxication to the brain, these long held beliefs are hard to change. The introduction of legalized marijuana is not likely to change these long held beliefs either. In all likelihood, courts will become more entrenched in their ways as the possibility of diminished mens rea arguments rise.

If there is any change in how marijuana will effect diminished mens rea laws, it will probably be in the area of involuntary intoxication. These laws might become stricter. Proving that a defendant ingested marijuana without knowing what it was or its effects is difficult. Furthermore, if marijuana is prescribed by doctors the belief that a doctor would not prescribe an intoxicant would be turned on its head. Furthermore, the psychological effects of marijuana may not be as well known in the courts as alcohol, and they will be unlikely to change their long held beliefs just because marijuana has been newly legalized.

As many homicide cases show, even if intoxication is allowed to be used as a defense for the jury to hear, it is still unlikely that it will have an effect on the outcome of a case. The intoxication must be so severe that the individual's ability to use reason must be completely gone. In cases of marijuana use, it is unlikely that that threshold will ever be reached. Overall, while diminished mens rea may be used in some cases, it is unlikely to have a large impact for a defendant's case.

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<sup>44</sup> *Id.* at 1074.

<sup>45</sup> *Id.* at 1073-74.

## STATUTE 3

### STATUTE

- I. MARIJUANA MAY ONLY BE SOLD OR CONSUMED AT ESTABLISHMENTS THAT HAVE BEEN REGISTERED AND LICENSED WITH THE STATE OF TEXAS.
  - a. SUCH A LICENSE MUST BE RENEWED YEARLY WITH THE STATE OF TEXAS.
  - b. IN ORDER TO OBTAIN AND MAINTAIN SUCH A LICENSE, THE ESTABLISHMENT SHALL:
    - 1. OBTAIN ALL HARDWARE AND SOFTWARE NECESSARY TO COMPLY WITH THE TEXAS MARIJUANA REGISTRY SYSTEM.
    - 2. REQUIRE ALL EMPLOYEES TO UNDERGO STATE-APPROVED TRAINING ON USING THE TEXAS MARIJUANA REGISTRY SYSTEM.
    - 3. SCAN THE DRIVER'S LICENSE OR IDENTIFICATION CARD OF EACH PERSON PURCHASING OR USING MARIJUANA IN THE ESTABLISHMENT.
    - 4. STAMP THE HAND OF EACH PERSON AFTER HIS OR HER DRIVER'S LICENSE OR IDENTIFICATION CARD HAS BEEN SCANNED WITH A STATE-APPROVED AND PROVIDED STAMP.
    - 5. FORBID PERSONS TO LEAVE THE ESTABLISHMENT WITH MARIJUANA.
  - c. ANY PERSON LEAVING A REGISTERED ESTABLISHMENT WITH MARIJUANA IN HIS OR HER POSSESSION SHALL BE GUILTY OF A CLASS B MISDEMEANOR, WITH A MINIMUM TERM OF CONFINEMENT OF SEVENTY-TWO (72) HOURS.
  
- III. NO PERSON SHALL OPERATE A MOTOR VEHICLE (AS DEFINED IN § 49.01(3) OF THE TEXAS PENAL CODE) IN A PUBLIC PLACE WITHIN EIGHT (8) HOURS OF USING OR PURCHASING MARIJUANA.
  - A. ANY PERSON FOUND BY A PEACE OFFICER TO BE OPERATING A MOTOR VEHICLE IN A PUBLIC PLACE WITHIN EIGHT (8) HOURS OF USING OR PURCHASING MARIJUANA SHALL BE AUTOMATICALLY DEEMED INTOXICATED UNDER TEXAS PENAL CODE § 49.04.

## Commentary

If marijuana is legalized, people may fear that with an increase in the availability of the drug and that instances of driving under the influence of marijuana may increase. Thus, automobile accidents, injuries, and deaths may increase as well. This piece of legislation seeks to reduce instances of driving under the influence of marijuana if the drug is legalized by providing a system for documenting the use of marijuana—specifically, who used the drug and when. Ideally, this registration system will deter people from driving after using marijuana. This legislation also seeks to eliminate some of the problems involving accurate testing of persons who are suspected of driving under the influence of marijuana.

Marijuana use is often associated with impaired driving ability. The short-term effects of marijuana include: difficulty in thinking and solving problems, drowsiness, poor muscle coordination, poor judgment, a short attention span, and distorted perception<sup>46</sup>—all effects that can impair one’s ability to drive safely. And specifically, according to United States Drug Enforcement Administration, “[t]he effect of marijuana on perception and coordination are responsible for serious impairments in driving abilities.”<sup>47</sup>

Accordingly, in Texas, the crime of “Driving While Intoxicated” includes driving under the influence of marijuana. Driving While Intoxicated (DWI) occurs when a “person is intoxicated while operating a motor vehicle in a public place.”<sup>48</sup> The definition of *intoxicated* in the statute includes “not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body”<sup>49</sup> or, alternatively, “having an alcohol concentration of 0.08 or more.”<sup>50</sup> Marijuana is considered a controlled substance under the Texas Health and Safety Code, and thus, a substance that could cause someone to be “intoxicated” under the Driving While Intoxicated statute.

The DWI statute specifies a certain concentration of alcohol in a driver’s blood, breath, or urine that will result in the driver being considered intoxicated under the statute: 0.08 grams of alcohol per 210 liters of breath, 100 milliliters of blood, or sixty-seven milliliters of urine.<sup>51</sup> At any of these concentrations, the driver is considered legally intoxicated.

The DWI statute does not specify similar levels or concentrations of marijuana in a driver’s body that would constitute marijuana intoxication or impairment. So, how does the DWI statute actually determine marijuana intoxication? The DWI statute indicates that a person is intoxicated from marijuana if the person does not “hav[e] the normal use of mental or physical faculties by reason of the introduction of . . . a controlled substance.”<sup>52</sup> Accordingly, police

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<sup>46</sup> *Drug Fact Sheet: Marijuana*, U.S. DRUG ENFORCEMENT ADMIN., [http://www.justice.gov/dea/druginfo/drug\\_data\\_sheets/Marijuana.pdf](http://www.justice.gov/dea/druginfo/drug_data_sheets/Marijuana.pdf) (last visited April 27, 2013); *Short and Long Term Effects*, CT. INFO. CA., <http://www2.courtinfo.ca.gov/stopteendui/teens/resources/substances/marijuana/short-and-long-term-effects.cfm> (last visited April 27, 2013).

<sup>47</sup> *Drug Fact Sheet: Marijuana*, U.S. DRUG ENFORCEMENT ADMIN., [http://www.justice.gov/dea/druginfo/drug\\_data\\_sheets/Marijuana.pdf](http://www.justice.gov/dea/druginfo/drug_data_sheets/Marijuana.pdf) (last visited April 27, 2013).

<sup>48</sup> TEX. PENAL CODE ANN. § 49.04(a) (West 2012).

<sup>49</sup> *Id.* § 49.01(2)(A).

<sup>50</sup> *Id.* § 49.01(2)(B).

<sup>51</sup> *Id.* § 49.01(2)(A)–(B).

<sup>52</sup> *Id.* § 49.01(2)(A).

officers will perform a field sobriety test to determine if a driver has normal use of his mental or physical faculties. If the officer suspects the driver is under the influence of marijuana or any other drug, he will confirm his suspicions by performing a blood or urine test.

For instance, in *Weems v. State*, the defendant was arrested and convicted of a DWI.<sup>53</sup> The arresting police officer’s “testimony support[ed] the conclusion that [the defendant] had lost the normal use of his mental faculties as a result of his use of methamphetamine and marijuana. [The arresting officer] said that [defendant] stuttered, slurred his speech, and gave evasive answers at the hospital.”<sup>54</sup> At the hospital, the defendant tested positive for both methamphetamines and marijuana.<sup>55</sup>

This Commentary does not seek to analyze or speak on the merits of *Weems v. State*. The case is mentioned to show that blood (or urine) tests are frequently utilized as a means of confirming an officer’s suspicions of marijuana intoxication.

However, there are several problems with using blood or urine tests to confirm marijuana intoxication. It has been noted that blood or urine tests are not the most accurate measure of: 1) whether the person being tested is under the influence of marijuana at the time of the test; and 2) whether the person being tested is actually *impaired* at the time of the test. Additionally, unlike the breathalyzer test to determine the presence of alcohol, blood or urine tests cannot be performed roadside and can be rather invasive. Many people are uncomfortable with getting their blood drawn, and urine tests are very invasive because it is oftentimes required that the urine is collected in front of an observer to ensure that the specimen is not adulterated or changed.<sup>56</sup>

Legislation to set a strict blood-level limit for THC—the main ingredient in marijuana—has been suggested in several states.<sup>57</sup> Under these proposed laws (and similar to laws related to alcohol), any driver who tests over this strict limit would automatically be deemed guilty of driving under the influence.<sup>58</sup> This legislation has failed several times due to opposition from “marijuana advocates and defense lawyers, who claim a one-size-fits-all standard doesn’t work for marijuana because it affects the body differently than alcohol.”<sup>59</sup> These advocates argue that traces of THC can remain in the bloodstream “long after” a person has smoked marijuana.<sup>60</sup> Blood or urine tests can detect THC days—or possibly even weeks—after a person has smoked or eaten marijuana, and consequently a person might test positive for the drug when he is no longer impaired by it.<sup>61</sup> Thus, unlike the breathalyzer test for alcohol, which tests whether the

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<sup>53</sup> *Weems v. State*, 328 S.W.3d 172 (Tex. App.—Eastland 2010, no pet.).

<sup>54</sup> *Id.* at 178.

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

<sup>56</sup> *On-Site Test for Cannabinoids in Oral Fluid*, CLINICAL CHEMISTRY, [http://www.aacc.org/publications/clin\\_chem/podcast/Documents/ClinChem\\_201210\\_Huestis\\_Desrosiers.pdf](http://www.aacc.org/publications/clin_chem/podcast/Documents/ClinChem_201210_Huestis_Desrosiers.pdf) (last visited May 4, 2013).

<sup>57</sup> Brady Dennis & T.W. Farnam, *Too High to Drive? Marijuana-Friendly Colorado Debates Blood-Level Limits*, WASH. POST, Mar. 1, 2013,

[http://www.aacc.org/publications/clin\\_chem/podcast/Documents/ClinChem\\_201210\\_Huestis\\_Desrosiers.pdf](http://www.aacc.org/publications/clin_chem/podcast/Documents/ClinChem_201210_Huestis_Desrosiers.pdf).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

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

<sup>61</sup> Steve Elliott, *Attorney: Marijuana May Not Impair Driving Ability At All*, MARIJUANA AND CANNABIS NEWS (Mar. 17, 2010), [http://www.tokeofthetown.com/2010/03/attorney\\_marijuana\\_may\\_not\\_impair\\_driving\\_ability.php](http://www.tokeofthetown.com/2010/03/attorney_marijuana_may_not_impair_driving_ability.php).

person is currently intoxicated, a blood test for THC “can mistakenly suggest a person is high, especially in a regular smoker who has built up tolerance to the drug.”<sup>62</sup>

Marijuana functions in a physiologically different manner from alcohol.<sup>63</sup> Alcohol is water-soluble, while marijuana is lipid-soluble.<sup>64</sup> Therefore, alcohol is metabolized quickly, and tests measuring the amount of alcohol in a person’s system “can be correlated to actual impairment.”<sup>65</sup> THC, being lipid-soluble, is metabolized more slowly, and therefore levels of the drug can remain in the body long after use, even without impairment.<sup>66</sup> For example, *Denver Westword* medical marijuana critic, William Breathes, took a blood test approximately fifteen hours after last using marijuana.<sup>67</sup> Although he was declared “sober” by a physician, he had about 13.5 ng/ml worth of THC in his body, which is “nearly three times the legal amount proposed by Washington’s I-502 marijuana legalization bill.”<sup>68</sup> Even further, it has been shown that “[a]spects like tolerance, frequency of use and method of ingestions all make determining the relationship between nanogram amount and impairment difficult.”<sup>69</sup>

One blogger provides a helpful analogy: “Imagine if someone got pulled over to do a blood test for an alcohol DUI, and not only did the test show how much alcohol you had in your system then, but also how much alcohol you’ve had in the past month. That’s what [using a blood test for marijuana is] like.”<sup>70</sup> Overall, it seems that there is not yet a “universal standard on impairment” with marijuana use like there is with alcohol.<sup>71</sup>

This legislation seeks to eliminate some of the problems surrounding accurate testing of persons who are suspected of driving under the influence of marijuana. Under this proposed statute, marijuana can only be sold legally by establishments that have registered with and have been licensed by the state. In order to maintain their license, these establishments (coffee shops) must keep a record of who has purchased marijuana and when they purchased it.

These records will be maintained by scanning the driver’s license or identification card of each person purchasing or using marijuana in the coffee shop. Scanning the driver’s license of the purchasers and users will allow these records to be kept in electronic form and easily accessed by state officials—including police officers. (The scanning of driver’s licenses may also be helpful if an age requirement for the purchase of marijuana is put in place: the scanner could be equipped to detect fake or altered identification cards, thereby assuring that each person the coffee shop sells to is of legal age.) The coffee shop can stamp hands to evidence that the

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<sup>62</sup> Dennis & Farnam, *supra* note 12.

<sup>63</sup> Nick Vadala, *How Much THC Does It Take to Make a DUI?: Italian Market Tragedy Highlights Problems with Marijuana Blood Test*, PHILLY POST, June 19, 2012, [http://blogs.phillymag.com/the\\_philly\\_post/2012/06/19/max-drosi-marijuana-dui-blood-testing/](http://blogs.phillymag.com/the_philly_post/2012/06/19/max-drosi-marijuana-dui-blood-testing/).

<sup>64</sup> *Id.*

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

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

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Michael Roberts, *THC Driving Limits Could Cause More Innocent People to Spend Months in Jail, Attorney Says*, DENVER WESTWORD, Apr. 15, 2011, [http://blogs.westword.com/latestword/2011/04/thc\\_driving\\_limits\\_innocent\\_people\\_jail\\_test\\_results.php](http://blogs.westword.com/latestword/2011/04/thc_driving_limits_innocent_people_jail_test_results.php).

<sup>71</sup> Alex Moore, *States Developing a “Marijuana Breathalyzer” for Stoned Driving*, DEATH AND TAXES MAG., <http://www.deathandtaxesmag.com/180490/states-developing-a-marijuana-breathalyzer-for-stoned-driving/> (last visited May 4, 2013).

person stamped has been registered in the system—this will prevent people from having one person purchase the marijuana so that another can smoke it. Essentially, each person in the coffee shop who has purchased or is using marijuana must have a stamped hand. Through careful monitoring, the coffee shops must also require persons to dispose of or return any unused marijuana upon leaving the premises. In other words, marijuana use is only permitted in the coffee shops.

The goal of this system is to keep an accurate record of who has used marijuana and when they have used it so that if a driver is pulled over and is suspected of being under the influence of marijuana, the police officer can simply access the registry to determine if and when the driver last used marijuana. And because this system is linked to driver's licenses, when an officer obtains a driver's license during a traffic stop, as they routinely do, the officer will be able to determine if the driver has used marijuana recently—even if that person does not *appear* to be impaired.

It seems that the short-term effects of marijuana will wear off and it is safe for the user to drive around eight hours after smoking.<sup>72</sup> Therefore, under this proposed legislation, if a driver is found driving a motor vehicle less than eight hours after using marijuana (as determined by the registry system), the driver will automatically be liable under the Driving While Intoxicated statute.

This system eliminates the accuracy problems associated with blood and urine tests: a person is strictly liable for DWI if he drives within eight hours of using marijuana. It should be noted here that studies are currently being performed on using saliva tests to detect marijuana. Testing saliva can be a more accurate test of actual impairment and time of use than blood or urine tests, but scientists are still working out problems.<sup>73</sup>

It is also a goal of this statute to reduce instances of driving under the influence of marijuana after its legalization. It seems that people frequently drink and drive or use marijuana and drive thinking that even if they do get pulled over, they can simply “act sober” and not get arrested. This registry system, along with automatic liability for a DWI, will hopefully deter people from using marijuana and driving by eliminating the idea that they can simply act sober and not get arrested.

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<sup>72</sup> *On-Site Test for Cannabinoids in Oral Fluid*, CLINICAL CHEMISTRY, [http://www.aacc.org/publications/clin\\_chem/podcast/Documents/ClinChem\\_201210\\_Huestis\\_Desrosiers.pdf](http://www.aacc.org/publications/clin_chem/podcast/Documents/ClinChem_201210_Huestis_Desrosiers.pdf) (last visited May 4, 2013) (“[I]n general, many people believe that the period of impairment is in the neighborhood of 8 hours.”); R. Andrew Sewell, James Poling & Mehmet Sofuoglu, *The Effect of Cannabis Compared with Alcohol on Driving*, PUBMED.GOV, <http://www.ncbi.nlm.nih.gov/pubmed/19340636> (last visited May 6, 2013) (“[P]atients who smoke marijuana should be counseled . . . to wait at least three hours after smoking before driving.”); *Marijuana Use and Its Effects*, WEBMD, <http://www.webmd.com/mental-health/marijuana-use-and-its-effects> (last visited May 6, 2013) (lists the short-term medical effects of marijuana and says that “[t]hese effects are reduced after three or four hours.”).

<sup>73</sup> See generally *On-Site Test for Cannabinoids in Oral Fluid*, CLINICAL CHEMISTRY, [http://www.aacc.org/publications/clin\\_chem/podcast/Documents/ClinChem\\_201210\\_Huestis\\_Desrosiers.pdf](http://www.aacc.org/publications/clin_chem/podcast/Documents/ClinChem_201210_Huestis_Desrosiers.pdf) (last visited May 4, 2013).

## STATUTE 4

### I. LIABILITY FOR CRIMINAL OFFENSES WHEN INTOXICATED BY MARIJUANA<sup>74</sup>

A. EXCEPT FOR CASES AND SITUATIONS FALLING UNDER SUBSECTION (D) OF THIS SECTION, MARIJUANA INTOXICATION IS NOT A DEFENSE TO A CHARGED OFFENSE UNLESS IT NEGATES AN ELEMENT OF THAT OFFENSE CHARGED.

B. WHEN RECKLESSNESS OR NEGLIGENCE ESTABLISHES OR IS AN ELEMENT OF THE CHARGED OFFENSE, IF THE PERSON—DUE TO SELF-INDUCED MARIJUANA INTOXICATION—IS NOT AWARE OF A RISK HE WOULD HAVE BEEN AWARE OF HAD HE BEEN SOBER, THIS UNAWARENESS IS IMMATERIAL.

A. MARIJUANA INTOXICATION OR ADDICTION IS NOT IN ITSELF A MENTAL DISEASE WITHIN THE MEANING OF THIS CODE.

B. MARIJUANA INTOXICATION THAT IS NOT SELF-INDUCED IS AN AFFIRMATIVE DEFENSE TO AN OFFENSE CHARGED IF BY NON-SELF-INDUCED INTOXICATION THE PERSON AT THE TIME OF HIS OR HER CONDUCT LACKS SUBSTANTIAL CAPACITY EITHER TO APPRECIATE ITS CRIMINALITY [OR WRONGFULNESS] OR TO CONFORM HIS OR HER CONDUCT TO THE REQUIREMENTS OF THE LAW, UNLESS THE ACTOR KNOWINGLY PUT HIMSELF IN THE POSITION TO RECEIVE A “CONTACT HIGH” IN WHICH CASE THE INTOXICATION WILL BE CONSIDERED SELF-INDUCED.

C. THAT MARIJUANA IS INTOXICATING IS A LEGAL FACT, AN ARGUMENT THAT THE PERSON DID NOT KNOW OF THE INTOXICATING EFFECTS OF MARIJUANA OR OF ITS POTENCY IS NOT AN AFFIRMATIVE DEFENSE, EXCEPT UNDER (D)(2).

D. IN VERY LIMITED CASES WHEN A LEGALLY RECOGNIZED DISTRIBUTOR HAS FAILED TO PROPERLY NOTIFY THE PURCHASER OF THE POTENCY OF THE MARIJUANA THAT THE PERSON BOUGHT FROM THE DISTRIBUTOR, IT IS AN AFFIRMATIVE DEFENSE BASED ON THE UNEXPECTED OVER INTOXICATION SIMILAR TO COERCED INTOXICATION OR INTOXICATION BY FRAUD.

E. THIS EXCEPTION IS NOT EFFECTIVE WHEN A PERSON KNOWINGLY USES OTHER SUBSTANCES OF AN INTOXICATING OR INTOXICANT ENHANCING NATURE WITH MARIJUANA.

F. PATHOLOGICAL INTOXICATION IS AN AFFIRMATIVE DEFENSE AS A NON-SELF-INDUCED MARIJUANA INTOXICATION, AS LONG AS THERE WERE NO OTHER INTOXICATING SUBSTANCES OR INTOXICATION ENHANCING SUBSTANCES KNOWINGLY TAKEN WITH OR IN NEAR TEMPORAL PROXIMITY TO THE MARIJUANA.

G. DEFINITIONS IN THIS SECTION UNLESS A DIFFERENT MEANING PLAINLY IS REQUIRED.

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<sup>74</sup> Model Penal Code § 2.08 Intoxication p. 35-37 (Official Draft & Explanatory Notes 1962). The American Law Institute's Model Penal Code was the model and heavily influenced this statute. I used this Model Code since the few pieces of marijuana legislation I have found do not directly address the issue or not adequately.

- H. “MARIJUANA” MEANS ALL PARTS OF THE PLANTS IN THE GENUS CANNABIS (SATIVA, INDICA, RUDERALIS) AND ANY CROSSBREDS WHETHER CURRENTLY GROWN OR NOT, ITS SEEDS, THE RESIN EXTRACTED FROM ANY PART OF THE PLANT, AND EVERY COMPOUND, SALT, DERIVATIVE, MIXTURE, OR PREPARATION OF THE PLANT, ITS SEEDS, OR ITS RESIN INCLUDING MARIJUANA CONCENTRATE. MARIJUANA DOES NOT INCLUDE INDUSTRIAL HEMP.<sup>75</sup> (CANNABIS WITH A SUBSTANTIALLY LOW LEVEL OF THC,<sup>76</sup> WHICH IS NOT SUITABLE AS AN INTOXICANT). NOR DOES IT INCLUDE FIBER PRODUCED FROM THE STALKS, OIL, OR CAKE MADE FROM THE SEEDS, OR THE STERILIZED SEED OF THE HEMP PLANT, OR THE WEIGHT OF ANY OTHER INGREDIENT COMBINED WITH MARIJUANA TO PREPARE TOPICAL OR ORAL ADMINISTRATIONS, FOOD, DRINK, OR OTHER PRODUCT.<sup>77</sup>
- I. “INTOXICATION” MEANS A DISTURBANCE OF MENTAL OR PHYSICAL CAPACITIES RESULTING FROM THE INTRODUCTION OF MARIJUANA, WITH OR WITHOUT OTHER SUBSTANCES THAT CAUSE AN INTOXICATING EFFECT, INTO THE BODY.
- J. “SELF-INDUCED INTOXICATION” MEANS INTOXICATION CAUSED BY THE INTRODUCTION OF MARIJUANA—WITH OR WITHOUT OTHER SUBSTANCES THAT CAUSE AN INTOXICATING EFFECT—WHICH THE ACTOR KNOWINGLY AND PURPOSEFULLY INTRODUCES INTO THEIR BODY, UNLESS IT IS INTRODUCED PURSUANT TO MEDICAL ADVICE OR PRESCRIPTION, OR UNDER SUCH CIRCUMSTANCES AS WOULD AFFORD A DEFENSE TO THE CHARGED CRIME.
- K. “PATHOLOGICAL INTOXICATION” MEANS MARIJUANA INTOXICATION GROSSLY EXCESSIVE IN DEGREE CAUSED BY AN ATYPICAL PHYSIOLOGICAL REACTION THAT THE PERSON’S BODY HAS TO MARIJUANA INTOXICATION FOR WHICH THE PERSON HAS NO KNOWLEDGE OF, WITH OR WITHOUT OTHER LEGAL SUBSTANCES. PSYCHOLOGICAL SIDE EFFECTS INCLUDING PSYCHOSIS CAN ACCOMPANY GROSSLY EXCESSIVE INTOXICATION AND MAY BE AN ACTUAL PART OF THE PATHOLOGICAL INTOXICATION.
- L. “CONTACT HIGH” IS GIVEN ITS PLAIN & COMMON MEANING, WHICH IS WHEN A PERSON BECOMES INTOXICATED BY MARIJUANA—WITH OR WITHOUT OTHER SUBSTANCES THAT CAN BE SMOKED TO CAUSE AN INTOXICATING EFFECT—BY INHALING SECOND-HAND SMOKE.

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<sup>75</sup> The European Union has certified forty-one varieties of hemp for industrial purpose; typically, these are varieties of *Cannabis Sativa*. These varieties were selectively bred to have higher fiber content and low levels of THC. Hemp is also planted closer together than marijuana, to produce longer fibers. Harvesting of hemp occurs earlier than marijuana, because the fiber quality declines after the plant flowers. This early harvesting also declines the already low levels of THC, since THC levels are higher during maturity.

“Hemp” page, WIKIPEDIA, <http://en.wikipedia.org/wiki/Hemp> (last visited Apr. 29, 2013).

<sup>76</sup> “THC” is short for *Δ9-tetrahydrocannabinol*

<sup>77</sup> COLO. CONST. art. XVIII, § 16(2)(f) (Lexis Advance, LexisNexis current through Nov. 6, 2012). This definition is almost identical to the source, with a few changes made to it.

## II. PUBLIC MARIJUANA INTOXICATION OR INCAPACITATION<sup>78</sup>

- A. A PERSON IS GUILTY OF AN OFFENSE IF THEY ARE IN ANY PUBLIC PLACE, OBVIOUSLY INTOXICATED BY MARIJUANA, NOT ADMINISTERED FOR THERAPEUTIC PURPOSES, TO A DEGREE WHERE THEY MAY POSE A DANGER TO THEMSELVES, OTHERS, PROPERTY, OR ANNOY PERSONS IN THEIR VICINITY.
- B. THIS OFFENSE IS A PETTY MISDEMEANOR ONLY IF THE PERSON HAS TWO PRIOR CONVICTIONS OF PUBLIC MARIJUANA INTOXICATION WITHIN A PERIOD OF ONE YEAR, OTHERWISE IT IS A CITABLE VIOLATION.
- C. DEFINITIONS IN THIS SECTION UNLESS A DIFFERENT MEANING PLAINLY IS REQUIRED.
- D. A “PUBLIC PLACE” IS A PLACE OPEN TO THE PUBLIC, WHICH INCLUSIVELY INCLUDES SCHOOLS, GOVERNMENT BUILDINGS, BUSINESSES OPEN TO THE PUBLIC, AND PARKS. “PUBLIC PLACES,” FOR THIS STATUTE DOES NOT INCLUDE PRIVATE PROPERTY OF BUSINESS OR ORGANIZATIONS THAT HAVE OPENED THEMSELVES TO THE PUBLIC TO ALLOW THE USE OF MARIJUANA, OUTDOOR CONCERTS WERE THE USE OF MARIJUANA HAS BEEN AUTHORIZED, WILDERNESS AREAS—WHETHER PRIVATE OR PUBLIC—UNLESS PROHIBITED BY OTHER LAWS OR REGULATIONS.
- E. “ADMINISTERED FOR THERAPEUTIC PURPOSES” INCLUDES BOTH ADMINISTRATION BY MEDICAL PERSONNEL OR BY THE INDIVIDUAL PURSUANT TO THEIR PRESCRIPTION, OR THEIR DOCTOR’S RECOMMENDATION IF PRESCRIPTIONS ARE NOT NECESSARY FOR MEDICINAL MARIJUANA.
- F. “ANNOY PERSONS IN THEIR VICINITY,” MEANS TO IRRITATE OR DISTURB A PERSON, WHICH IS REASONABLY CLOSE IN SPACE TO THE PERSON ANNOYING THEM, BY THEIR ACT WHILE INTOXICATED ON MARIJUANA. IT DOES NOT INCLUDE FEIGNED ANNOYANCE, OR IN OTHER WORDS, FALSE CLAIMS OF ANNOYANCE BROUGHT FOR ULTERIOR REASONS.

MARIJUANA, SEE LIABILITY FOR CRIMINAL OFFENSES WHEN INTOXICATED BY MARIJUANA E(1)

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<sup>78</sup> Model Penal Code § 250.5 Public Drunkenness; Drug incapacitation, p. 193 (Official Draft & Explanatory Notes 1962). I heavily modeled this statute on this source. I used this Model Code since the few pieces of marijuana legislation I have found do not directly address the issue or not adequately.

## Commentary

### Section I<sup>79</sup>

1. Subsection (A). This subsection stands for the fact that marijuana intoxication is not a special excuse or defense for a crime, nor does it lessens the criminality of the person's conduct. This subsection follows the settled view on general intoxication as stated in the statutes of several states at the time of the drafting of this model code.<sup>80</sup> Justice Story stated that intoxication was not an excuse for crime but instead an aggravating factor.<sup>81</sup> *Hill v. Lockhart*, the judge could not believe the defendant would have gone to trial with a defense of intoxication, and acquittal based on an intoxication defense or that it would be useful in mitigating the sentence was doubtful.<sup>82</sup> This subsection creates no issues in an average crime involving marijuana intoxication, in that normally voluntary marijuana intoxication is not logically relevant to the existence or nonexistence of elements of an offense. A conviction is proper upon establishing all of the elements of an offense, even though the person is intoxicated on marijuana. This subsection is not a punishment for being intoxicated on marijuana, but only holds the person accountable for their conduct even if they would not have committed the conduct while sober. Marijuana intoxication does not typically make the person commit an act, but removes the person's internal inhibitions, which is a well-known side effect of marijuana and in some cases might be the reason why the person uses it in the first place. The mere effects of self-induced intoxication offer no reason for exculpation or adjustments in the grade of the crime then do other infirmities produced by a variety of other causes, which do not receive such benefits. If there is a beneficial effect given to persons due to their self-induced marijuana intoxication, it should be limited to the sentencing phase of the trial if such evidence is logically mitigating. *Parker v. Dugger*, The court held that when the applicable laws require the courts to consider all of the evidence in sentencing, the trial judge could not refuse to consider any mitigating evidence; the court held that the defendant's drug and alcohol intoxication was mitigating evidence.<sup>83</sup>

2. While Marijuana intoxication is not a defense to a charge on its own, if it's relevant, it can be used as evidence to negate an element of a charged offense (other than recklessness and negligence or other precluded elements). For example, if a person's marijuana intoxication is so acute as to prevent them from physically being able to commit the crime, then that is evidence that they did not commit the crime. Using marijuana intoxication as evidence to disprove elements of a charge like the person's mental state can be very difficult. In addition,

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<sup>79</sup> Model Penal Code § 2.08 Intoxication, Cmt.'s, p. 349-369 (Official Draft & Rev. Cmt.'s 1962). This source heavily influenced this model code's comments, and I considered all of the notes and comments when writing this sections comments.

<sup>80</sup> CAL. PENAL. CODE § 29.4(a) (Deering) (Lexis Advance, current with urgency Legis. through ch. 1 of the 2013 Reg. Sess. of the 2013-2014 Leg.); TEX. PENAL. CODE § 8.04(a) (LexisNexis, Lexis Advance, current through the 2011 first called Sess.); N.Y. PENAL. LAW § 15.25 (Consol.) (Lexis Advance, current through 2013 released ch. 1-16); GA. CODE ANN. § 16-3-4(c) (Lexis Advance, current through the 2012 Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/6-3 (LexisNexis, Lexis Advance, current through Pub. Act 98-6 of the 2013 Legis. Sess.)

<sup>81</sup> *United States v. Cornell*, 25 F. Cas. 650, 658 (C.C.D.R.I. 1820) (No. 14,868).

<sup>82</sup> 474 U.S. 52, 59. (1985).

<sup>83</sup> 498 U.S. 308, 314-315 (1991).

other laws of the governments that adopt this model code may restrict the admissibility of marijuana intoxication as evidence to disprove elements of a charge. Generally, California's penal code only allows evidence of voluntary intoxication to disprove specific intent.<sup>84</sup> However, for murder charges it allows voluntary intoxication as evidence to disprove premeditation, deliberation, of harboring of express malice aforethought.<sup>85</sup> The Texas penal code only allows evidence of voluntary intoxication to prove the affirmative defense of temporary insanity.<sup>86</sup> On the other hand, New York's penal code allows it as evidence when it is relevant to negate an element of the crime charged.<sup>87</sup>

3. There is some disagreement on whether intoxication is admissible to negate voluntariness of a person's conduct. This model code takes the position that self-induced intoxication does not negate voluntariness, unless the action happens when the person is unconscious. Nevertheless, a voluntary action prior to the unconsciousness may make the person culpable for the offense, like when a person goes into a state of unconsciousness while driving under the influence and kills someone in an auto accident. The person in that case did not voluntarily kill the other person, but since he or she voluntarily drove intoxicated then he or she is still culpable for the death of the other person. The definition of unconsciousness, "A state of impaired consciousness in which one shows no responsiveness to environmental stimuli but may respond to deep pain with involuntary movements,"<sup>88</sup> may not be suitable for the law and may need to be redefined by the governments who adopt this model code. The definition can be read as pertaining to those who only respond to deep pain involuntarily but it can be read more liberally as pertaining to those who cannot respond to just some external stimuli, this model code goes with the prior understanding. The question for those who adopt this model code, is a person who is ambulatory and showing responses to some environmental stimuli, but not to all or most stimuli, considered unconscious? Alternatively, are only those with the most severe unconsciousness, shown by the strictest reading of the definition, considered unconscious (severe intoxication where the person loses most of the control of their body and responses)?

4. If a person uses self-induce intoxication with the intent to disprove a mens rea element, the governments that adopt this model code need to determine whether they will allow this evidence under their laws. The old common law would not allow the use of intoxication as evidence to disprove elements of mens rea. In *United States v. Cornell*, Justice Story stated that this is the first time he could "remember it to have been contended, that the commission of one crime was an excuse for another."<sup>89</sup> While the use of marijuana is no longer a crime, this statement still has weight since most crimes committed by persons intoxicated on marijuana would have followed a violation of the public intoxication law in section II. In fact, Story was referring to the defendant's public drunkenness as the crime that the defendant offered as a defense. *Montana v. Egelhof* cited this case among other authorities when the opinion said, "The historical record does not leave room for the view that the common law's rejection of

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<sup>84</sup> CAL. PENAL. CODE § 29.4 (b)

<sup>85</sup> *Id.*

<sup>86</sup> TEX. PENAL. CODE § 8.04(b)

<sup>87</sup> N.Y. PENAL. LAW § 15.25

<sup>88</sup> HOUGHTON MIFFLIN CO., THE AMERICAN HERITAGE MEDICAL DICTIONARY (2007) (As posted on the internet by thefreedictionary.com) <http://medical-dictionary.thefreedictionary.com/unconsciousness> (last visited Apr. 25, 2013).

<sup>89</sup> 25 F. Cas. 650, 658 (C.C.D.R.I. 1820) (No. 14,868).

intoxication as an ‘excuse’ or ‘justification’ for crime would nonetheless permit the defendant to show that intoxication prevented the requisite mens rea.”<sup>90</sup> Many states and the federal government follow this view. *Egelhof* also held that, even though allowing the jury to consider voluntary intoxication as evidence to disprove mens rea “has gained considerable acceptance” it is too new and is not “sufficiently uniform and permanent” to be “fundamental.”<sup>91</sup> States such as Virginia will allow self-induced intoxication as evidence to disprove mens rea elements. Most of these states will only allow the evidence be used to disprove specific intent<sup>92</sup> but not general intent elements. *Hatcher v. Commonwealth* held that voluntary intoxication was not an affirmative defense to second-degree murder but it is a material element of premeditation, possibly negating premeditation.<sup>93</sup> Specific intent means that the person had the required purpose or knowledge as an element of a crime; an ulterior purpose for the actor’s conduct is usually involved in specific intent but not always determinative. Therefore, if it is logically relevant that the person can prove their intoxication prevented them from forming the required purpose or having the required knowledge then they can disprove the specific intent. General intent usually requires that the person be reckless or negligent in their conduct even if it is not specifically stated. Recklessness or negligence is all that is necessary to establish mens rea in most offenses. If a person charged with first-degree murder, for a murder committed while intoxicated by marijuana, and it is logically relevant, then they can use the evidence of marijuana intoxication to negate the required specific intent of premeditation or intent. This would drop the charge to one of the lesser-included offense of second-degree murder, voluntary manslaughter, or involuntary manslaughter depending on the facts of the case. It should be noted that the “[U.S. Supreme Court] has never articulated a general constitutional doctrine of mens rea.”<sup>94</sup> Therefore, it is unlikely you can bring a case to the U.S. Supreme Court for a state court’s non-consideration of marijuana intoxication as evidence disproving the specific intent element of mens rea.

5. Subsection (B). Since traditionally self-induced intoxication is precluded from being used to negate recklessness and negligence the model code included subsection (B). This subsection establishes that self-induced marijuana intoxication is not useable as evidence to disprove recklessness or negligence. If a person would have been aware of the risk of their conduct when sober, then there is no logical reason to make his unawareness due to self-induced marijuana intoxication material to the judicial process. Since smoking marijuana is legal, it is not in and of itself reckless or negligent. Nevertheless, consuming it in connection with other activities (driving, etc.) can be reckless or create liability for negligence. The marijuana user must bear the risk that he or she may commit reckless or negligent acts while on marijuana. This subsection does not apply to non-self-induced marijuana intoxication.

6. Subsection (C). Marijuana intoxication is not in and of itself a mental disease like insanity; it is the foreseen result of an activity. This subsection does not mean that marijuana addiction is not actually a disease, or that marijuana intoxication cannot cause a disease, or be a symptom of a disease. Instead, the subsection stands for proposition that even though marijuana

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<sup>90</sup> 518 U.S. 37, 45 (1996).

<sup>91</sup> *Id.* at 51.

<sup>92</sup> Illinois allows intoxication to disprove specific intent. See, *Bute v. Illinois*, 333 U.S. 640, 682 (note 5.) (1948) [Citing, *People v. Klemann*, 48 N.E.2d 957 (Ill. 1943)].

<sup>93</sup> 241 S.E.2d 756 (Va. 1978)

<sup>94</sup> *Powell v. Texas*, 392 U.S. 514, 535 (1968).

addiction is a disease it still would not make it a defense to a criminal charge. While a person addicted to marijuana may feel compelled to use marijuana, it does not mean they are compelled to commit a crime, at least any crime not based solely on the use of marijuana like public marijuana intoxication or use of marijuana in an unauthorized location. The model code is concerned that people who commit crimes while intoxicated on marijuana will claim they are addicted to secure leniency or acquittal. In *Powell v. Texas*, the U.S. Supreme Court denied a claim that people with chronic alcoholism are not subject to public drunkenness laws, since in their case it is cruel and unusual punishment pursuant to the eighth amendment to the U.S. Constitution. The court's reasoning was that there is no agreement among members of the medical profession about whether alcoholism is a disease. If it were a disease then the person would have to show that, then they were unable to abstain from drinking and that they lost control of themselves. The requirements were unmet in this case.<sup>95</sup> *Powell* was decided in 1968, it is now widely accepted in the medical community that drug addiction is a treatable disease. Given that fact if a person could prove that he or she was addicted and unable to abstain from marijuana, he or she could argue that intoxication was involuntary if the person could prove the loss of control required under that defense. While it unclear whether you can become so addicted to marijuana as to be unable to not use, society cannot afford to leave a loop hole to prosecuting criminals by allowing them to claim addiction in this way.

7. There is no preclusion of a person's disease as a defense to a crime in its own right, just because marijuana intoxication caused the disease or because self-induced marijuana intoxication is a symptom of the person's disease. The fact a person consumes marijuana does not change whether the person has an underlying mental or physical disease, nor should it prevent them from raising a defense just because they were intoxicated on marijuana when they committed the crime. When a person raises such a mental disease as a defense, they must substantially prove that they have the mental disease using medical evidence. This is to prevent the use of these affirmative defenses as a backdoor to a marijuana intoxication defense. The marijuana intoxication is useable as evidence of a disease itself, but it cannot be the only or primary evidence of the disease. Further, a person cannot use evidence of marijuana intoxication with evidence of the disease as a defense for acts that do not typically flow from or are not part of the syndrome of the disease.<sup>96</sup> This does not prevent marijuana intoxication from being a mitigating factor in the sentencing phase of the case, irrespective of whether the court allowed it as evidence in a defense.

8. During sentencing, it would be better practice to treat marijuana addiction as a mitigating factor, but it is up to the legislatures and the courts of the governments that adopt the code whether to allow marijuana addiction as a mitigating factor. If they take this approach, then the court will reduce or modify the person's punishment depending on the person's ability to prove their addiction, its severity, and that it made him or her less culpable. Whether there is a modification of the person's punishment or not, the court must consider a required rehab program (merely a long prison sentence is not rehab) when the person brings up addiction to marijuana as a mitigating factor.

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

<sup>96</sup> *Id.* at 559, note 2

9. Subsection (D). If a person becomes intoxicated by marijuana by honest mistake, outside force (including duress, fraud, etc.), or pathological intoxication to an extent that their mental and physical capacities prevent them from having the substantial ability to appreciate the criminality of their conduct or to conform their conduct to the requirements of the law, they cannot be held criminally liable. This is an affirmative defense to the same extent as irresponsibility due to mental disease or defect<sup>97</sup>. However, if a person knowingly puts himself or herself in the position where they will become intoxicated by second hand marijuana-smoke, then the individual should not be able to claim that marijuana intoxication was involuntary. It is difficult to raise a non-self-induced intoxication defense since courts are often exceedingly restrictive in determining what pressures overcome the will of the person not to become intoxicated, and if the altered mental state of the person is to a lesser extent then required that person would still be responsible for their violations of the law.

### Examples

- A. A person forced, whether by physical or non-physical force, to smoke marijuana against his or her will (for whatever reason), is not culpable for their conduct if they meet impairment requirements above.
- B. A person who is not familiar with marijuana smoke walks into a friend's house and honestly does not know they are smoking marijuana instead of tobacco. The person receives a contact high, leaves and commits a crime. Then that person is not culpable for their conduct if his or her state of mind meets the above requirements.
- C. If the person is familiar with marijuana and receives a contact high then the individual is culpable for any subsequent criminal conduct, since they voluntarily became intoxicated.
- D. If a minor is in their house while the minor's parents smoke marijuana and cause the minor to receive a contact high, then depending on the circumstances they may not be culpable for their criminal conduct.

10. Subsection (D)(1). A person cannot claim to be unaware of marijuana's intoxicating effects in order to claim an affirmative defense when marijuana was knowingly consumed it since its intoxicating nature is so well known. Not counting the exclusions, the only foreseeable reasons why this may not be true is if the person is severely mentally deficient to the point where the person is incompetent to stand trial, in which case, intoxication would not matter. It is also possible if the person had no cultural exposure that would give the person knowledge of the effects of marijuana. If the person proves in court that he or she really did not have the cultural exposure to marijuana, which is hard to believe,<sup>98</sup> this factor may affect the

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<sup>97</sup> Insanity, etc.

<sup>98</sup> Marijuana was originally indigenous to central and south Asia. Evidence of people smoking it goes back to the third millennium BCE with preserved marijuana found from that time in northwest China to at least as far west as Romania, there is reason to believe that most of the old world had marijuana very early on. It is also known to have been used by ancient Hindus, other ancient peoples for religious purposes, and various Muslim Sufi orders. Marijuana has also had a long history of recreational use. Pipes with trace amounts of marijuana have been dug up out of Shakespeare's garden, and some believe he referenced the drug in some of his sonnets. Marijuana did not begin to be illegalized until the beginning of the twentieth century. Finally, given the current national debate on

sentencing phase as a mitigating factor. It is the duty of the person using the marijuana to know its potency. For that reason, the individual cannot claim over-intoxication and avoid take responsibility for resulting actions. If the actor grows his own marijuana, even if he manipulates the marijuana to make it more potent, then the person has taken the risk of extreme over intoxication on himself or herself. Likewise, if people purchase the marijuana from an illegal source they too take the risk that it may cause excessive over-intoxication. This should not be construed as negating an honest mistake, but it is only here to show that it is not a honest mistake to be unaware that marijuana is intoxicating or that you are unaware of the potency of the marijuana that you use, except for cases covered under (D)(2).

11. Subsection (D)(2) The reason for this exception is that, if a legal distributor fails to properly notify the purchaser of the marijuana's potency and then the person becomes excessively intoxicated and meets the required mental state, then it is not that person's fault she or he committed the offense. The laws and regulations governing the packaging and selling of marijuana would dictate proper notification for the potency of the marijuana; they could involve labeling or oral notifications by sellers or distributors. The one covered situation despite its appearance of non-coverage by the exception, is when a seller legally sells marijuana—without packaging and there is no oral notice requirement—as a mild strain but it is actually a high potency strain. If the actor asks and pays for a weak strain and receives a very strong strain, then the person should not be held liable since he had a right to rely on the distributors representation that he received the desired strain.

12. Subsection (D)(2)(a). Different intoxicating substances taken together or in close temporal proximity can have varying effects. They can increase the effects of one or both substances. They can counter act each other. They can even cause unknown effects that drug experts would not have foreseen. The other substance most likely intensified the marijuana; when a person takes an intoxicating substance with or in near temporal proximity to marijuana, he or she should not be able to claim non-self-induced intoxication because the marijuana purchased was too potent. People often join marijuana, particularly low grades, with other substances, such as Phencyclidine (PCP), Cocaine, or even Viagra. It would be adverse to the good of society to allow people to argue this exception when they use marijuana with other intoxicating substances. The intent behind using the term “knowingly” in the exclusion to the exception is to exclude unforeseen interactions with substances that unexpectedly causes excessive over-intoxication or an unexpected interaction with marijuana. These substances with unknown interactions can be anything ingested including over the counter medicine that do not make people drowsy, prescription drugs—even some neurologically active prescription drugs—that are non-intoxicating and are not believed to have adverse interactions with marijuana. It would not follow the spirit of the law to hold otherwise. People on prescription drugs may argue that they did not knowingly use their prescription drug and marijuana, as it pertains to this part, if the doctor did not inform the person and if the person lacked independent knowledge of the

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marijuana legalization it is hard to believe that anyone in this country is completely unaware of marijuana's intoxicating effects.

“Cannabis (drug)” page, WIKIPEDIA, [http://en.wikipedia.org/wiki/Cannabis\\_%28drug%29](http://en.wikipedia.org/wiki/Cannabis_%28drug%29) (last visited Apr. 26, 2013). (Most of this information I had already learned over several years from other sources, I just used this site because it is all in one place.)

possible adverse interaction. This model code leaves it to the governments that adopt the code to decide whether merely being on prescription drugs is enough notice of potential interactions.

13. Subsection (D)(3). In exceptionally rare cases, a person may knowingly take marijuana resulting in intoxication of an extreme and unanticipated degree. The interaction of an intoxicant and an abnormality of the person's physiology can cause a case of pathological intoxication; other symptoms of the atypical reaction including psychosis may accompany it. Other ingested substances can also partially cause pathological intoxication or make it more severe. Pathological intoxication is most commonly associated with alcohol intoxication and there have not been any publicized reports of it caused by marijuana. However, unforeseeable interactions are possible when ingesting any substance, so the model code added this part in case such occurrences happen. Since the person did not know that his or her physiology would create an atypical reaction to marijuana, it would go against the spirit of the law to hold the person accountable for resulting offenses when they did have other severe symptoms and not know excessive intoxicated due to the reaction. To prove pathological intoxication the person must prove that it was indeed pathological and that it rose to a standard generally applicable to this section. This does not include self-induced intoxication caused by the co-intoxication of marijuana and other substances that are illegal or that the person should have known would cause an adverse reaction given their known physiological abnormalities. However, this does not preclude an argument that a person's use of over-the-counter or prescription drugs created in part or intensified the atypical physiological reaction. The line between whether a reaction is an atypical physiological reaction or an unknown reaction [as discussed in section I comment 12], can be blurred. It is often unclear whether the reactions are entirely caused by the ingestion of different substances, regardless of the particular person's physiology, or if it is the result of the person's physiology and the ingestion of one or more substances.

14. It is beneficial to discuss atypical physiological reactions in general. The physiological abnormalities that cause atypical reactions can be of the person's organs, cells, bio-molecules, or even a chemical imbalance. Atypical physiological reactions can occur after ingestion of just about any substance. Allergies<sup>99</sup> are the most common form of atypical reaction. There is some debate in the medical community as to whether allergies are purely a physical reaction or whether they can also cause psychological reactions (hallucinations, paranoia, psychosis) as well. This is outside the scope of the code but examining how allergies occur is a good way to show how atypical reactions happen. In the traditional view, allergies are a hypersensitivity to usually organic compounds called antigens; antigens are intrinsically harmless but the individual's immune system has identified the substance as a threat. The immune system aggressively attacks the antigen in an effort to eliminate the threat, resulting in allergy symptoms, which can be as severe as anaphylaxis and sometimes result in death. Intolerance is another category of atypical reaction. This is the inability of your body to absorb or metabolize a substance, either, entirely or at a much reduced rate. Intolerance can cause a person's body to retain the substance to dangerous levels. The human body is a complex

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<sup>99</sup> MOSBY, MOSBY'S MEDICAL DICTIONARY, (8th ed. 2009). (As posted on the internet by thefreedictionary.com) <http://medical-dictionary.thefreedictionary.com/allergy> (last visited Apr. 25, 2013). A hypersensitive state acquired through exposure to a particular allergen, re-exposure bringing to light an altered capacity to react.

interconnected system, so it is reasonable to think that many different factors can contribute to an unforeseen atypical reaction.

15. One study showed that female rats exposed to a high fat diet are less sensitive to THC.<sup>100</sup> The reason behind it is that THC is a fat soluble substance and is absorbed by fat cells, the more fat cells and the higher content of fat in the diet the faster the THC is absorbed, requiring more THC to get the same effect as a rat with a less fat intensive diet. While this is not conclusive, there is no reason to believe that the same is not true of humans. Assuming the study is correct, it may also mean that people with very low body fat and low fat intake would be susceptible to more intense and longer lasting intoxication than a relatively normal person. Whether such circumstances could ever cause a person to be so heavily intoxicated as to count as pathological intoxication is unknown. It is likely that a person in this situation would stop smoking earlier than other users since they will feel the effects of marijuana faster, but this may not hold true for others methods of use. Oral use of marijuana takes quite a bit longer for the intoxication to begin and it causes the intoxication to be stronger and longer lasting. If a person uses marijuana orally and does not know the difference in effect of taking it orally opposed to smoking it, the person may ingest a much larger quantity than usual, making him or her more intoxicated. If an individual is on a low fat diet, it would most likely only exacerbate the effects. This may also exacerbate a person's atypical reactions.

16. The American Law Institute commentaries include an example of a case from England.<sup>101</sup> The five days prior to the incident, the man had eaten irregular meals. On the day of the accident, he had been acting unusual and he had his last carbohydrate meal at noon. Between 9:00 and 10:30 p.m., he drank four pints of beer. At 11:00 p.m., he had an altercation with his mother, with whom he lived. He went to the kitchen since he was suddenly thirsty to get a bottle opener and instead he picked up a knife, because ““something came over’ him.”<sup>102</sup> The man killed his mother, “I was like a homicidal maniac.”<sup>103</sup> He proceeded to clean the knife and himself before leaving the house. There was a 7-hour gap in his memory, but the next day he turned himself in and gave a full statement. His family physician two years before found that he had a tendency to be hypoglycemic. Other doctors performed several test on him, which showed that he was definitely hypoglycemic. One of the tests was to give him four pints of beer and tested his blood sugar; the test showed that alcohol would lower his blood sugar to a dangerous degree. A test with an electroencephalograph showed that when he had reduced blood sugar, the impulses from his brain were erratic and abnormal. Their opinion was that at the time of the murder his blood sugar was so low that his brain was functioning abnormally and that his judgment was impaired at the time. The court found him guilty of the murder but insane. From the excerpt, it is clear the man in this case exhibited impaired judgment, combativeness, rage, personality change, and automatism. These are all neuroglycopenic manifestations. Marijuana can cause similar interactions with brain chemistry. Marijuana has anti-anxiety effects, but it can also cause anxiety and psychosis. The symptoms of schizophrenia have been shown to possibly

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<sup>100</sup>Jenny L. Wiley et al., *Exposure to a high-fat diet decreases sensitivity to Δ9-tetrahydrocannabinol-induced motor effects in female rats*, *Neuropharmacology* vol. 60, Issues 2–3, p. 274–283, (February–March 2011) (DOI: 10.1016/j.neuropharm.2010.09.010). Found online at National Center for Biotechnology Information webpage, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3014410/>. (last visited Apr. 27, 2013)

<sup>101</sup> Model Penal Code § 2.08 Intoxication, cmt.’s p. 364-365 (Official Draft & Rev. Cmt.’s, 1962).

<sup>102</sup> *Id.* at 365.

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

increase with Marijuana use. One study<sup>104</sup> using human subjects showed that THC tends to cause psychotic symptoms, but it also showed that the other active ingredient in marijuana, cannabidiol (CBD), tends to suppress psychotic symptoms. Different strands of marijuana contain different amounts of THC and CBD, and this may explain why the effects of marijuana can vary. A person who has a form of psychosis (whether known or not) may use a strain of marijuana that has a very high THC content and a very low CBD content. This could cause a very serious psychotic episode. Most studies on marijuana's neurological effects are only concerned with intoxication and its possible medical applications. There have been no thorough studies on how marijuana interacts with preexisting neurological/psychological conditions or how it may cause atypical reactions.

17. Subsection (E). Definitions (2) and (3) include the phrase, "with or without other substances that cause an intoxicating effect." This phrase was included to show that whether or not the person used other intoxicants with or within close proximity to marijuana, it does not affect the legal status of either intoxicant or how they are treated. If the co-intoxicant were illegal, that would be a separate crime, the crime committed after the co-intoxication can be treated as if the person had only used the illegal drug when considering whether it can be a defense under the applicable law.

18. Subsection (E)(3). It is not self-induced intoxication if a doctor recommends or prescribes (whichever the law requires) the use of marijuana, and the prescription is used as prescribed. There should be separate statutes and regulations on the use of medical marijuana, if the person does not follow these laws or the marijuana prescription then it is self-induced intoxication, despite the doctor's recommendation or prescription. But, it is self-induced intoxication if the person consumes marijuana with substances that were not doctor prescribed or recommended to accompany the marijuana. If the cause of the intoxication is by the fraud or coercion of another, then it is not self-induced intoxication.

19. Subsection (E)(4). The phrase, "with or without other legal substances" was added to this definition. This is because there may be another substance that helps causes an unexpected reaction resulting in pathological intoxication.

20. Subsection (E)(5). Since marijuana is the first legal drug, this phrase applies to and is in common usage for this situation, the definition of "contact high" is the common meaning of the phrase. The phrase "with or without other substances that can be smoked to cause an intoxicating effect" was added to show that even if the marijuana was smoked with other drugs that can cause a contact highs that it would still have the same legal effect as if it were just marijuana. A person is not culpable for the other drugs smoked with the marijuana, unless the person receiving the contact high knows that it is laced marijuana. There are two ways to treat this situation: the intoxication is only marijuana intoxication or as involuntary intoxication by the second intoxicant.

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<sup>104</sup> Alice G. Walton, *The Neuroscience of Pot: Researchers Explain Why Marijuana May Bring Serenity Or Psychosis*, FORBES (Jan. 11, 2012, 10:49AM), <http://www.forbes.com/sites/alicegwalton/2012/01/11/the-neuroscience-of-pot-researchers-explain-why-marijuana-may-bring-serenity-or-psychosis/> (last visited Apr. 27, 2013)

## Section II<sup>105</sup>

1. Subsection (A). This section precludes a public marijuana intoxication charge in private areas and removes the threat of penal sanctions from private intoxication that does not lead to conduct that is more serious. If the person committed a crime in a private home, the person would still be liable for it.

2. This section makes it a requirement that the person is not only intoxicated by marijuana in a public place, but that the intoxication has to be severe enough to make the person dangerous to themselves, others, property, or that to annoy other people.

3. Subsection (B). This section lessens the punishment of public marijuana intoxication than what it used to be, which was a typically misdemeanor. Public marijuana intoxication is no longer enough on its own to arrest a person and slight marijuana intoxication is not enough to cite a person; intoxication must be severe. The model code permits arrest if the offense is a misdemeanor pursuant to this subsection and the government deems this an arrestable offense.

4. Subsection (C)(1). The model code contracted the definition of “public places” for the protection of guest and patrons of certain establishments that cater to marijuana users. It keeps the police from deciding on their own whether they can cite people who are in places like marijuana clubs or concerts who they think may be a danger or may annoy someone. This is not to say that police officer cannot cite a person if they observe from a public vantage point or are called due to actually dangerous behavior or actual annoyance. This would follow the standard to that typically observed in bars. Police officers do not usually go into bars and start citing drunken people who are at the point where the officer thinks they might be a danger or annoying. The reason for excluding wilderness areas, even public wilderness areas, is that the person intoxicated in the wilderness is unlikely to meet other members of the public and the nature of the place is not actually public despite its designation. It may be dangerous for individuals to be intoxicated on marijuana in the wilderness, but it is no more dangerous than people who are drinking and smoking tobacco; all of the same dangers are present. Some public wilderness areas allow drinking and tobacco smoking; these areas should allow marijuana smoking as well. Finally, the definition makes exceptions for public wilderness that do not allow drinking and smoking, since the reason for allowing it are no longer present.

5. Subsection (C)(2). The model code meant for the definition to protect those people who self-administer their medication or those that have it administered by a professional. If the person has the marijuana administered by a professional, they will most definitely be in a public place, even if they travel directly from the physician’s office to their home. There is no reason to hold the person as culpable as a person without a prescription. Governments who adopt this model code may want to consider a requirement that there is responsible party present when a person who has medically administered marijuana intoxication is in public.

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<sup>105</sup> Model Penal Code § 250.5 Public Drunkenness; Drug incapacitation, cmt.’s p. 374-382 (Official Draft & Rev. Cmt.’s 1962). The commentary on this statute was influenced by this source from the American Law Institute.

6. Subsection (C)(3). This definition excludes feigned annoyance. This is to prevent people who are intoxicated by marijuana from being harassed for reasons other than actually or possibly annoying people. It would not serve the spirit of the law and would misuse the police, to allow people to exercise their personal animosity against a person, if they personally dislike them or just dislike marijuana smokers. For example, a man is sitting on a park bench minding his own business smoking marijuana, where local law says its legal, and a person who dislikes pot smokers sees him. The person observing the man motions for an officer to come over to him, and when the officer arrives, the person tells the officer the marijuana smoker is annoying him. Another example would be between two neighbors who had personal and documented animosity towards each other. One neighbor sees the other neighbor walking down the sidewalk towards a store; he knows that his neighbor only walks to the store after he smokes marijuana. Therefore, he calls the police and tells them his neighbor is intoxicated and causing a public annoyance, not because of anything his neighbor is doing but solely because he dislikes him. In these cases, there is no reason to cite the person consuming marijuana. The problem is that it will often be difficult to show that the annoyance is feigned, so officers will have a lot of discretion on whether they should cite the person or not. Unless the person fights the citation, there is little chance that the annoyance will be determined feigned, which is not going to happen often since most people would likely rather pay the citation than go to court.

7. How the statute applies to people suffering marijuana addiction. This statute does not make a marijuana addiction an affirmative defense to this violation and is in line with subsections A & C of Liability for Criminal Offenses when Intoxicated by Marijuana, in that the marijuana intoxication is considered self-induced and the addiction is not a mental disease. The marijuana addict may be compelled to use marijuana, which makes his use in a sense not voluntary, and this makes the person different from people who chose not to restrain themselves from using. In *Robinson v. California*<sup>106</sup> held that laws created to punish the status of being addicted to narcotics constituted cruel and unusual punishment under the eighth amendment. This case barred criminal conviction for any offence resulting from an act caused by an involuntary condition and many courts held that public drunkenness statutes were not constitutional as applied to chronic alcoholics. *Powell v. Texas*<sup>107</sup> limited this; a majority of a divided Supreme Court agreed the constitution forbids a conviction based upon an involuntary act.<sup>108</sup> The court upheld the conviction despite a lower court finding of chronic alcoholism because there was no evidence the defendant was compelled to be drunk in public.<sup>109</sup> The discoverable evidence required by this case to prove compulsion to drink is more than will likely be found in a public-drunkenness case. There has been very little in advancement in limiting application of penal statutes to addicts or chronic alcoholics. Nevertheless, some jurisdictions like Delaware have allowed alcoholism as an affirmative defense to public intoxication when the defendant consents to undergo treatment.<sup>110</sup> Delaware leaves it to the discretion of the court; the

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<sup>106</sup> 370 U.S. 660 (1962). This case and the next one were discussed in the Model Penal Code § 250.5 (Public Drunkenness; Drug incapacitation, cmt.'s p. 374-382 (Official Draft & Rev. Cmt.'s 1962) to the same effect as my section of the comments. I looked but could not find any newer or better cases, so I reviewed these cases and applied them to this section. I really only re-trampled the same ground, and it was practically impossible for me to really bring in new insight to this.

<sup>107</sup> 392 U.S. 514 (1968)

<sup>108</sup> *Id.* at 535

<sup>109</sup> *Id.*

<sup>110</sup> DEL. CODE ANN. Tit. 11, § 4210 (Lexis Advance, current through 79 Del. Laws)

court must first be satisfied the person is a chronic alcoholic. Then, the court can either release them from custody or temporarily release them from custody for up to a year provided they follow the courts conditions of treatment.<sup>111</sup> However, Connecticut repealed a similar statute.<sup>112</sup> Some jurisdictions, like Florida, have statutes allowing police officers to send or take intoxicated persons to treatment facilities instead of arresting and incarcerating them, the officer has complete discretion over this.<sup>113</sup> Florida's statute also allows commitment to treatment center as an appropriate disposition of the offender following conviction.<sup>114</sup> The court has discretion over whether to do this and the treatment can be up to 60 days.<sup>115</sup> Nevertheless, non-penal alternatives can prove inadequate or nonexistent, and this is the view taken by the American Legal Institute in their model penal code and by several other states such as Alabama, whose statute makes no such provisions.<sup>116</sup> This does not preclude the government, courts, or individual judges from pursuing a policy of lenity during sentencing. If they choose to, they can follow these policies to a degree where there might as well be an affirmative defense. If they do this, they should make sure that there are adequate treatment facilities in the area and consider whether the person should be in an inpatient or outpatient program. This model code takes the position of denying an affirmative defense while promoting leniency as a better method than allowing it as a defense or precluding lenity. It allows the courts to adjust to particular cases based on the resources of the locality as well as keeping the possible deterrent effect of having the conviction on the person's record instead of acquittal like Delaware.<sup>117</sup>

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

<sup>112</sup> CONN. GEN. STAT. § 53a-184 (Repealed) (Lexis Advance, current through P.A. 13-4, pending certain technical changes from the Legis. Comm'r Office). The statute might be reinstated considering the information LexisNexis provided.

<sup>113</sup> FLA. STAT. § 856.011 (LexisNexis, Lexis Advance, updated through the 2012 Reg. & 2012 Spec. Sess. B)

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

<sup>115</sup> *Id.*

<sup>116</sup> ALA. CODE § 13A-11-10 (LexisNexis, Lexis Advance, current through 2012 Reg. & fist Spec. Sess.)

<sup>117</sup> 11 DEL. C. § 4210 (see footnote 37)

## STATUTE 5

### MARIJUANA LEGALIZATION/DECRIMINALIZATION ACT

#### §1) PERSONAL USE OF MARIJUANA:

THE FOLLOWING ACTS ARE NOT UNLAWFUL AND SHALL NOT BE A CRIMINAL OR CIVIL VIOLATION UNDER STATE LAW FOR PERSONS TWENTY-ONE YEARS OF AGE OR OLDER:

- A) POSSESSION AND PURCHASE WITHIN STATE BOUNDARIES OF UP TO AND NO MORE THAN ONE OUNCE OF MARIJUANA. MARIJUANA AND MARIJUANA ACCESSORIES MUST BE PURCHASED FROM STATE LICENSED RETAIL SELLERS.
- B) PRIVATE USE OR CONSUMPTION OF MARIJUANA WITHIN STATE BOUNDARIES. MARIJUANA CANNOT BE PUBLICLY USED, CONSUMED OR DISPLAYED BY ANY PERSON OF ANY AGE.
- C) TRANSFER OF UP TO ONE OUNCE OF MARIJUANA WITHIN STATE BOUNDARIES.

#### §2) LAWFUL OPERATION OF STATE LICENSED MARIJUANA-RELATED FACILITIES:

THE FOLLOWING ACTS ARE NOT UNLAWFUL AND SHALL NOT BE A CRIMINAL OR CIVIL VIOLATION UNDER STATE LAW FOR PERSONS TWENTY-ONE YEARS OF AGE OR OLDER:

- A) PURCHASING, TRANSPORTING, DISPLAYING, ADVERTISING, STORING, PACKAGING, LABELING, AND SELLING OF MARIJUANA OR MARIJUANA ACCESSORIES BY STATE LICENSED RETAILERS. LICENSED RETAILERS ARE LEGALLY ALLOWED TO SELL UP TO ONE OUNCE OF MARIJUANA PER INDIVIDUAL PURCHASER OR CONSUMER. THE SELLING OF MORE THAN ONE OUNCE OF MARIJUANA TO ONE INDIVIDUAL PURCHASER OR CONSUMER IS PROHIBITED.
- B) GROWING, CULTIVATING, HARVESTING, PROCESSING, STORING, PACKAGING, LABELING, TRANSPORTING, DISPLAYING, ADVERTISING, POSSESSING, AND SELLING OF MARIJUANA OR MARIJUANA ACCESSORIES BY STATE LICENSED MANUFACTURERS.
- C) SALE OF MARIJUANA OR MARIJUANA ACCESSORIES FROM STATE LICENSED MANUFACTURERS TO STATE LICENSED RETAILERS. STATE LICENSED RETAILERS ARE PROHIBITED FROM PURCHASING MARIJUANA OR MARIJUANA ACCESSORIES FROM NON-STATE LICENSED MANUFACTURERS. STATE LICENSED MANUFACTURERS ARE PROHIBITED FROM SELLING MARIJUANA OR MARIJUANA ACCESSORIES TO NON-STATE LICENSED RETAILERS.

§3) DISCRIMINATION:

THE FOLLOWING ACTS ARE NOT UNLAWFUL AND SHALL NOT BE A CRIMINAL OR CIVIL VIOLATION UNDER STATE LAW FOR PERSONS TWENTY-ONE YEARS OF AGE OR OLDER:

- A) NO EMPLOYER MAY REFUSE TO HIRE A POTENTIAL EMPLOYEE BASED ON THE POTENTIAL EMPLOYEE'S PRIVATE USE OF MARIJUANA. THIS SECTION, HOWEVER, DOES NOT PROHIBIT AN EMPLOYER FROM DISCIPLINING, PENALIZING, OR TERMINATING AN EMPLOYEE FOR USING OR BEING UNDER THE INFLUENCE OF MARIJUANA WHILE PERFORMING EMPLOYMENT-RELATED TASKS. THIS SECTION ALSO DOES NOT PROHIBIT AN EMPLOYER FROM DISCRIMINATING IF FAILURE TO DO SO WOULD CAUSE AN EMPLOYER TO SUFFER A MONETARY LOSS OR LOSE A LICENSING RELATING BENEFIT UNDER FEDERAL LAW OR REGULATION.
- B) NO SCHOOL, UNIVERSITY, OR COLLEGE MAY REFUSE TO ENROLL A PERSON FOR PRIVATE MARIJUANA USE. THIS SECTION, HOWEVER, DOES NOT PROHIBIT A SCHOOL, UNIVERSITY, OR COLLEGE FROM DISCIPLINING, PENALIZING, SUSPENDING, OR DISMISSING A STUDENT FOR USING OR BEING UNDER THE INFLUENCE OF MARIJUANA WHILE ATTENDING SCHOOL, UNIVERSITY, OR COLLEGE SPONSORED FUNCTIONS ON SCHOOL, UNIVERSITY, OR COLLEGE OWNED GROUNDS.
- C) NO LANDLORD MAY REFUSE TO LEASE TO A POTENTIAL TENANT BASED ON THE TENANT'S PRIVATE MARIJUANA USE. HOWEVER, A LANDLORD MAY REFUSE TO LEASE TO A POTENTIAL TENANT WHO GROWS OR MANUFACTURES MARIJUANA IN COMPLIANCE WITH THE SECTIONS OF THIS STATUTE. THIS SECTION DOES NOT PROHIBIT A LANDLORD FROM PROHIBITING A TENANT FROM SMOKING MARIJUANA ON PROPERTY OWNED BY THE LANDLORD. THIS SECTION ALSO DOES NOT PROHIBIT A LANDLORD FROM EVICTING A TENANT IF TENANT'S PRIVATE MARIJUANA USE, CULTIVATION, OR MANUFACTURING CAUSES A NUISANCE TO OTHER TENANTS IN THE SAME FACILITY OR CAUSES THE LANDLORD MONETARY LOSS RELATED TO TENANT'S MARIJUANA ACTIVITIES.

§4) PUBLIC INTOXICATION AND DRIVING UNDER THE INFLUENCE:

THE FOLLOWING ACTS ARE UNLAWFUL AND SHALL BE CRIMINAL AND/OR CIVIL VIOLATIONS UNDER STATE LAW FOR PERSONS OF ANY AGE:

- A) THIS STATUTE PROHIBITS ANY PERSON FROM ENTERING ANY PUBLIC PLACE, GROUNDS, OR VENUE WHILE UNDER THE INFLUENCE OF MARIJUANA. A PERSON IS DEEMED TO HAVE GIVEN CONSENT TO A TEST OR TESTS OF HIS OR HER BREATH, AND POSSIBLY BLOOD IN CERTAIN CIRCUMSTANCES, FOR THE PURPOSE OF DETERMINING THC CONCENTRATION IF THE ARRESTING OFFICER HAS

REASONABLE GROUNDS TO SUSPECT A PERSON HAS ENTERED A PUBLIC PLACE, GROUNDS, OR VENUE WHILE UNDER THE INFLUENCE OF MARIJUANA. A PERSON WILL BE DEEMED TO BE UNDER THE INFLUENCE OF MARIJUANA IF THAT PERSON'S BLOOD THC CONCENTRATION IS GREATER THAN 5.00NG.

- B) THIS STATUTE PROHIBITS ANY PERSON FROM OPERATING A MOTOR VEHICLE WITHIN THIS STATE WHILE UNDER THE INFLUENCE OF MARIJUANA. A PERSON IS DEEMED TO HAVE GIVEN CONSENT TO A TEST OR TESTS OF HIS OR HER BREATH, AND POSSIBLY BLOOD IN CERTAIN CIRCUMSTANCES, FOR THE PURPOSE OF DETERMINING THC CONCENTRATION IF THE ARRESTING OFFICER HAS REASONABLE GROUNDS TO BELIEVE THE PERSON HAD BEEN DRIVING OR WAS IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF MARIJUANA. A PERSON WILL BE DEEMED TO BE UNDER THE INFLUENCE OF MARIJUANA IF THAT PERSON'S BLOOD THC CONCENTRATION IS GREATER THAN 5.00NG.

5) LICENSING AND REGULATION OF MARIJUANA PRODUCERS, PROCESSORS AND RETAILERS:

- A) THERE SHALL BE REQUIRED A LICENSE TO MANUFACTURE OR PRODUCE MARIJUANA AND MARIJUANA ACCESSORIES FOR SALE TO LICENSED RETAIL SELLERS, REGULATED BY THE STATE ALCOHOL AND LIQUOR CONTROL BOARD AND SUBJECT TO ANNUAL RENEWAL. THE MANUFACTURE AND SALE OF MARIJUANA IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT SHALL NOT BE A CRIMINAL OR CIVIL OFFENSE UNDER STATE LAW.
- B) THERE SHALL BE REQUIRED A LICENSE TO PACKAGE AND LABEL MARIJUANA AND MARIJUANA ACCESSORIES FOR SALE TO MARIJUANA RETAILERS AND CONSUMERS, REGULATED BY THE STATE ALCOHOL AND LIQUOR CONTROL BOARD AND SUBJECT TO ANNUAL RENEWAL. THE PACKAGING AND LABELING OF MARIJUANA AND MARIJUANA ACCESSORIES IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT SHALL NOT BE A CRIMINAL OR CIVIL OFFENSE UNDER STATE LAW.
- C) THERE SHALL BE REQUIRED A RETAIL LICENSE TO SELL MARIJUANA AND MARIJUANA ACCESSORIES IN RETAIL STORES, REGULATED BY THE STATE ALCOHOL AND LIQUOR CONTROL BOARD AND SUBJECT TO ANNUAL RENEWAL. THE POSSESSION AND SALE OF MARIJUANA AND MARIJUANA ACCESSORIES IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT SHALL NOT BE A CRIMINAL OR CIVIL OFFENSE UNDER STATE LAW.
- D) ALL LICENSES REFERRED TO UNDER THIS PROVISION SHALL BE ISSUED UNDER THE NAME OF THE APPLICANT, AND SHALL STATE THE LOCATION OF ANY MARIJUANA RELATED OPERATION OR

ACTIVITY. ANY LICENSED MARIJUANA OPERATION OR ACTIVITY MUST BE CONDUCTED WITHIN THE BOUNDARIES OF THIS STATE.

- E) ALL INITIAL AND ANNUAL LICENSING APPLICATION FEES, FOR ANY LICENSE REFERRED TO UNDER THIS PROVISION, SHALL BE DETERMINED BY THE STATE ALCOHOL AND LIQUOR CONTROL BOARD.
- F) NO ONE UNDER THE AGE OF TWENTY-ONE MAY APPLY FOR ANY LICENSE REFERRED TO UNDER THIS STATUTE.

§6) DEFINITIONS:

1. MARIJUANA – MEANS ANY PART OF THE PLANT CANNABIS WITH A DETECTABLE THC CONCENTRATION.
2. MARIJUANA ACCESSORIES – MEANS ANYTHING SOLD FOR THE PURPOSE OF USING, CONSUMING, MAINTAINING, OR MODIFYING MARIJUANA. THIS INCLUDES BUT IS NOT LIMITED TO PIPES MADE FROM ANY MATERIAL, BONGS MADE FROM ANY MATERIAL, ROLLING PAPERS DESIGNED FOR THE USE OF MARIJUANA, AND ANY STORAGE DEVICES DESIGNED SPECIFICALLY FOR HOLDING, MAINTAINING, OR MODIFYING MARIJUANA.
3. CONSUMPTION – THE EATING, DRINKING, OR INGESTING OF MARIJUANA. THIS DEFINITION DOES NOT INCLUDE INTRAVENOUS ADMINISTRATION OF MARIJUANA.
4. POSSESSION – THE STATE OF HAVING, OWNING, OR CONTROLLING MARIJUANA.
5. TRANSFER – TO MOVE MARIJUANA FROM ONE PLACE OR PHYSICAL LOCATION TO ANOTHER.
6. MANUFACTURE – MEANS PRODUCTION, CULTIVATION, HARVESTING, PREPARATION, PROPAGATION, COMPOUNDING, CONVERSION, OR PROCESSING OF MARIJUANA.
7. PRODUCTION – MEANS THE MANUFACTURE, CULTIVATION, HARVESTING, PREPARATION, PROPAGATION, COMPOUNDING, CONVERSION, OR PROCESSING OF MARIJUANA.
8. EMPLOYMENT RELATED TASK – ANY DEFINED WORK, TASK, OR DUTY ASSIGNED TO, FALLING TO, OR EXPECTED OF AN EMPLOYEE WITHIN A PARTICULAR JOB DESCRIPTION.
9. MARIJUANA RETAILER (ALSO RETAILER) – MEANS A PERSON LICENSED BY THE STATE ALCOHOL AND LIQUOR CONTROL BOARD TO SELL MARIJUANA AND MARIJUANA ACCESSORIES TO CONSUMERS.
10. MARIJUANA MANUFACTURER – MEANS A PERSON LICENSED BY THE STATE ALCOHOL AND LIQUOR CONTROL BOARD TO MANUFACTURE OR PRODUCE MARIJUANA OR MARIJUANA ACCESSORIES.

Commentary:

Section 1 of the statute closely follows enacted legislation in Colorado and Washington. (See Amendment 64: The Regulate Marijuana like Alcohol Act of 2012, § 16(3) and 2013 Wash. Legis. Serv. Ch. 3, § 15(1-3) (I.M. 502) (WEST)). The general ideas and policies behind private marijuana legalization include alleviation of the burdens imposed on state law enforcement resources, generation of new state tax revenue, and regulation of marijuana through a state licensing system similar to that for controlling alcohol. According to the FBI's Uniform Crime Reporting Data (<http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested>), there were about 1.5 million drug arrests made in 2011. And of those arrested, about half were for a marijuana-related crime. While legalization up to one ounce for personal use will not alleviate all the burdens marijuana imposes on state law enforcement resources, it is the belief of the people of this state and of this legislature that legalization will have a significant impact by decreasing the number of arrests for simple possession of marijuana. By decreasing the number of arrests for possession of up to one ounce of marijuana, state law enforcement agencies can focus their resources on more serious offenses and crimes.

The state alcohol and liquor control board will be charged with the regulation and collection of taxes imposed by legalized marijuana activities. It is not the purpose of this statute to specify or detail the various taxes and tax amounts imposed for legal marijuana activity.

Limiting possession to one ounce has been proposed and enacted in the both Colorado and Washington. (See Amendment 64: The Regulate Marijuana like Alcohol Act of 2012, § 3(a) and 2013 Wash. Legis. Serv. Ch. 3, § 15(1-3) (I.M. 502) (WEST)) The purpose of the one ounce limitation is to prevent private users from illegally selling or distributing marijuana obtained through legal means. One individual possessing up to one ounce of marijuana is sufficient for private recreational use without tempting the purchaser to engage in illegal selling or distribution. This statute is meant to limit legal possession of marijuana up to one ounce by one individual at any given time. One individual may not legally possess more than one ounce at any given time unless authorized under a state's medical marijuana statute. None of the conditions imposed by this state are meant to alter or affect any state medical marijuana regulation.

This statute is intended to legalize and regulate marijuana like alcohol. The minimum drinking age in this state is twenty-one years of age. Twenty-one has been determined as appropriate age for young adults to legally start drinking. While this state has decided to legalize marijuana, marijuana is still recognized as an intoxicant and should only be used by responsible adults. Twenty-one is the age this state has used to determine when an average young adult is physically and mentally ready to handle an intoxicant such as alcohol. The state has therefore determined twenty-one should be the minimum age at which individuals should be allowed to possess and use marijuana.

Any transportation or sale of marijuana outside the boundaries of this state is strictly prohibited. Licensed manufacturers and retailers are prohibited from selling marijuana or marijuana related products to any retailer or consumer outside the boundaries of this state. Manufacturers and retailers are also prohibited from selling marijuana or marijuana accessories to consumers in this state if the manufacturer or retailer has knowledge the consumer will take that product outside the boundaries of this state.

Section 2 is modeled closely after Colorado Amendment 64. (Amendment 64: The Regulate Marijuana Like Alcohol Act of 2012, § 16(4)). Section 2(A) is intended to address what licensed retail sellers of marijuana and marijuana accessories are permitted to do under this statute. Retail sellers can sell up to one ounce of useable or consumable marijuana per individual purchaser or consumer. This statute does not intend to classify or establish different classifications for marijuana based on potency or THC concentration. Licensed retail sellers are only allowed to purchase marijuana or marijuana accessories from state licensed marijuana manufactures. This statute does not intend to guide, prohibit, or address concerns over the type of marijuana licensed manufacturers may produce.

Section 2(B) is intended to address what state licensed manufactures are permitted to do under this statute. Licensed manufacturers are only permitted to sell marijuana or marijuana accessories, produced by that individual manufacturer, to state licensed retailers. Licensed manufacturers are not permitted to sell directly to consumers.

Section 2(C) clarifies that licensed manufacturers may only sell marijuana to licensed retailers and only licensed retailers may purchase marijuana from licensed manufacturers. Licensed manufacturers cannot sell directly to consumers without obtaining a marijuana retail license and licensed retailers cannot produce marijuana or marijuana accessories without obtaining a license to manufacture.

Section 3(A) of this provision is designed to prohibit employers from discriminating against potential and current employees based on private marijuana use. This provision is a bar to employers, within the boundaries of this state, from drug testing potential or current employees for marijuana and denying employment based solely on private marijuana use. This type of discrimination would all but guarantee only a specific segment of the population would be free to possess and consume marijuana. In many cases, only employees obtaining low income employment from employers who do not drug test for marijuana would be able to consume marijuana. This is not the purpose or idea behind the enactment of this statute. Part of the goal of legalization and decriminalization is to allow all segments of the population, regardless of socio-economics, the opportunity to engage in private, recreational consumption of marijuana. This serves the purpose of driving marijuana out of economically disparaged areas and aids in the state's regulatory control by driving out the demand for the illegal selling and purchasing of marijuana. However, this section does not bar an employer from denying or terminating employment based on an employee being under the influence of marijuana during an employment-related task or activity.

Section 3(B) is designed to prohibit schools, universities, and colleges, within the boundaries of this state, from discriminating against students engaged in the private use of marijuana. Students legally complying with the provisions of this act will be able to attend places of higher education without fear of discrimination. However, this section does not prohibit a university or college from barring marijuana use while students are on school grounds. This section also does not prohibit a university or college from prohibiting and disciplining a student from attending any school function under the influence of marijuana.

Section 3(C) is designed to prevent landlords from discriminating against potential or current tenants based solely on private marijuana use. However, this section is not designed nor does it prohibit a landlord from prohibiting marijuana from being smoked on property owned and leased by the landlord. This section is not designed to give greater rights to marijuana than the

state law gives to tobacco. This state allows landlords to prohibit tenants from smoking tobacco and therefore allows landlords to prohibit tenants from smoking marijuana. However, a landlord cannot prohibit a tenant from possessing or consuming marijuana through other legally accepted means of consumption.

Section 4(A) is intended to prohibit individuals from entering into the public at large while under the influence of marijuana. This provision intends to legalize marijuana for private use. Public use of marijuana is strictly prohibited. A person will be determined to be publicly intoxicated if their blood THC concentration is 5.00ng or higher. The penalty imposed for being publicly intoxicated under the influence of marijuana will be the same for penalty for being publicly intoxicated under the influence of alcohol. The normal test administered to determine if one is under the influence will be a breath test. However, in certain circumstances such as incapacitation, a blood test may be administered by a qualified person as provided under state law.

Section 4(B) closely follows the driving under the influence provision in the Washington Initiative 502. (See 2013 Wash. Legis. Serv. Ch. 3, § 31(1-4, 6) (I.M. 502) (WEST)) This section is intended to prohibit individuals from operating motor vehicles on public roads or highways while under the influence of marijuana. Driving under the influence of marijuana will be treated as the same offense as driving under the influence of alcohol. The penalty imposed for driving under the influence of marijuana will be the same as those imposed for driving under the influence of alcohol. A driver with a blood THC concentration of 5.00ng or more will be treated the same as a driver having a blood alcohol content of 0.08. The normal test administered to determine if one is under the influence will be a breath test. However, in certain circumstances such as incapacitation, a blood test may be administered by a qualified person as provided under state law. A driver under the age of twenty-one with any detectable blood THC concentration will be deemed to be driving under the influence and will be treated the same as a person driving under the age of twenty-one with a blood alcohol concentration of 0.02 or higher.

Currently the detection of marijuana by breath test is in its infancy. The only real way to test for THC concentrations is through blood tests. However, it is not the intention of this statute to impose mandatory blood tests for suspected marijuana intoxication unless situations arise under state law which allow or warrant it. The legislature may make amendments to section 4 as technological advancements are made with regards to marijuana detection.

This provision is modeled closely after Washington Initiative 502. (See 2013 Wash. Legis. Serv. Ch. 3, § 4(1-3)(I.M. 502)(WEST)). Section 5(A) is intended to require any producer or manufacturer of marijuana to acquire a license in order to legally manufacture or produce marijuana within the boundaries of this state. The license is to be acquired from the state alcohol and liquor control board for a fee to be determined by the state alcohol and liquor control board. An initial fee is required to start producing or manufacturing marijuana. The initial fee is a one-time payment and is valid for only one person or legal entity. Subsequent annual fees are required to continue producing or manufacturing marijuana or marijuana accessories. Annual fees will be determined by the state alcohol and liquor control board.

Section 5(B) is intended to require a license for any manufacturer or producer of marijuana or marijuana accessories to legally package and label marijuana within the boundaries of this state. The license is to be acquired from the state alcohol and control board for a fee to be determined by the state alcohol and liquor control board. An initial fee is required to begin

packaging and labeling marijuana and marijuana related accessories. The initial fee is a one-time payment and is valid for only one person or legal entity. Subsequent annual fees are required to continue packaging and labeling marijuana and marijuana accessories.

Section 5(C) is intended to require a license for any retailer to sell marijuana or marijuana accessories within the boundaries of this state. The license is to be acquired from the state alcohol and liquor control board for fee to be determined by the state alcohol and liquor control board. An initial fee is required to begin the retail sell of marijuana or marijuana related accessories. The initial fee is a one-time payment and is valid for only one person or legal entity. Subsequent annual fees are required to continue the retail sale of marijuana and marijuana related products.

It is the intention of this statute to require three different licenses regarding marijuana activity. A manufacturing, packaging-and-labeling, and a retail license are required individually to engage in any of these activities. A manufacturing license is not a license to package and label nor is it a retail license to sell marijuana to consumers. A packaging-and-labeling license is not a license to manufacture or sell at retail. A retail license is not a license to manufacture marijuana or marijuana accessories nor is it a license to package and label. A manufacturing license is a license to manufacture or produce either marijuana or marijuana accessories or both. A retail license does not permit the manufacturing of marijuana accessories, only the license to sell marijuana accessories to consumers.

Section 5(D) requires an application to the state alcohol and liquor control board to state the name of the individual applicant or legal entity. The application must also state the exact location of any marijuana related operation or activity.

The term legal entity referred to in this provision includes but is not limited to any legally recognized corporation, business, or partnership.

The state alcohol and liquor control board will review each license application. The board reserves the right conduct any type of background check relevant to the licensing process. This includes but is not limited to criminal background and credit checks.

Section 6 definitions are specific to this statute in its entirety as they relate to marijuana. The definitions listed are to be given the meaning as defined in this statute. Any term not defined in this statute is to be given it ordinary and plain meaning. It is the intent of this statute that any ambiguity be submitted to the state legislature for clarification.

The state alcohol and liquor control board may establish a detectable THC threshold or amount for determining what is considered part of the Cannabis plant under section 6(1). Section 6(1) is meant to include seeds, resin, extract, hashish, oil, and any compound or derivative of the plant Cannabis with a detectable THC percentage. The state alcohol and liquor control board may add to, alter, or modify what is included under the definition of marijuana in section 6(1) or what is meant by marijuana accessory(s) in section 6(2).

Section 6(3) does not provide for intravenous THC use. The use of hypodermic needles to administer marijuana is strictly prohibited. Health concerns related to the illegal and medically unsupervised use of illicit drugs by intravenous administration compel this state to strictly prohibit the use of hypodermic needles in the administration and consumption of marijuana.

Hypodermic needles found in connection with the intravenous use of marijuana will be treated as drug paraphernalia.

Section 6(4) includes not only physical possession, but constructive possession as well. Constructive possession includes but is not limited to possessing marijuana in a motor vehicle or place of residence. Any enhancement penalties associated with a crime involving illegal marijuana activity are not to be altered by any of the provisions in this statute.

Manufacture and production are to be given the same meaning under this statute. They are to be used interchangeably.

Section 6(8) is meant to mean any work, task, or duty associated with a particular employee at a specific place of employment. If an employee performs any of his work, tasks, or duties under the influence of marijuana, an employer is permitted to discipline the employee. This can include termination of employment.

**STATUTE 6: DECRIMINALIZATION-RECRIMINALIZATION**

ENDING DAMAGING UNDERAGE USES OF CANNABIS AND TAXING FOR EDUCATION ACT  
AKA THE “EDUCATE ACT”

AN ACT RELATING TO THE REGULATION OF THE SALE, DISTRIBUTION, AND USE OF CANNABIS, LIKE TOBACCO

ARTICLE 1. DISTRIBUTION OF CANNABIS OR CANNABIS PRODUCTS

SECTION A: THE HEALTH AND SAFETY CODE, IS AMENDED TO READ AS FOLLOWS:

SUBCHAPTER V. DISTRIBUTION [SALE] OF CANNABIS OR CANNABIS PRODUCTS

SEC. 1 SALE OF CANNABIS OR CANNABIS PRODUCTS TO PERSONS YOUNGER THAN 21 YEARS OF AGE PROHIBITED; PROOF OF AGE REQUIRED.

(A) A PERSON COMMITS AN OFFENSE IF THE PERSON, WITH CRIMINAL NEGLIGENCE [AS A COMMERCIAL ENTERPRISE]:

(1) SELLS, GIVES, OR CAUSES TO BE SOLD OR GIVES CANNABIS OR CANNABIS PRODUCTS TO SOMEONE WHO [THE PERSON KNOWS] IS YOUNGER THAN 21 YEARS OF AGE; OR

(2) SELLS, GIVES, OR CAUSES TO BE SOLD OR GIVEN CANNABIS OR CANNABIS PRODUCTS TO ANOTHER PERSON WHO, KNOWING THAT THE PERSON RECEIVING THE CANNABIS OR CANNABIS PRODUCT PRODUCT] INTENDS TO DELIVER IT TO SOMEONE WHO IS YOUNGER THAN 21 YEARS OF AGE.

(B) IF AN OFFENSE UNDER THIS SECTION OCCURS IN CONNECTION WITH A SALE BY AN EMPLOYEE OF THE OWNER OF A STORE IN WHICH CANNABIS OR CANNABIS PRODUCTS ARE SOLD AT RETAIL, THE EMPLOYEE IS CRIMINALLY RESPONSIBLE FOR THE OFFENSE AND IS SUBJECT TO PROSECUTION.

(C) AN OFFENSE UNDER THIS SECTION IS A CLASS C MISDEMEANOR.

(D) [(C)] IT IS A DEFENSE TO PROSECUTION UNDER SUBSECTION (A)(1) [THIS SECTION] THAT THE PERSON TO WHOM THE CANNABIS OR CANNABIS PRODUCTS WAS SOLD OR GIVEN PRESENTED TO THE DEFENDANT [AN] APPARENTLY VALID PROOF OF [TEXAS DRIVER'S LICENSE OR AN] IDENTIFICATION.

(E) A PROOF OF IDENTIFICATION SATISFIES THE REQUIREMENTS OF SUBSECTION (D) IF IT CONTAINS [CARD, ISSUED BY THE DEPARTMENT OF PUBLIC SAFETY AND CONTAINING] A PHYSICAL DESCRIPTION AND PHOTOGRAPH

CONSISTENT WITH THE PERSON'S APPEARANCE, PURPORTS [THAT PURPORTED] TO ESTABLISH THAT THE PERSON IS [WAS] 21 YEARS OF AGE OR OLDER, AND WAS ISSUED BY A GOVERNMENTAL AGENCY. THE PROOF OF IDENTIFICATION MAY INCLUDE A DRIVER'S LICENSE ISSUED BY THIS STATE OR ANOTHER STATE, A PASSPORT, OR AN IDENTIFICATION CARD ISSUED BY A STATE OR THE FEDERAL GOVERNMENT.

## SEC. 2 NOTIFICATION OF EMPLOYEES AND AGENTS.

(a) EACH PERMIT HOLDER SHALL NOTIFY EACH INDIVIDUAL EMPLOYED BY THAT PERMIT HOLDER WHO IS TO BE ENGAGED IN RETAIL SALES OF CANNABIS OR CANNABIS PRODUCTS THAT STATE LAW:

(1) PROHIBITS THE SALE OR DISTRIBUTION OF CANNABIS OR CANNABIS TO ANY PERSON WHO IS YOUNGER THAN 21 YEARS OF AGE AND THAT A VIOLATION OF THAT SECTION IS A CLASS C MISDEMEANOR; AND

(2) REQUIRES EACH PERSON WHO SELLS CIGARETTES OR CANNABIS PRODUCTS AT RETAIL OR BY VENDING MACHINE TO POST A WARNING NOTICE, REQUIRES EACH EMPLOYEE TO ENSURE THAT THE APPROPRIATE SIGN IS ALWAYS PROPERLY DISPLAYED WHILE THAT EMPLOYEE IS EXERCISING THE EMPLOYEE'S DUTIES, AND PROVIDES THAT AN INTENTIONAL VIOLATION IS A CLASS C MISDEMEANOR.

(B) THE NOTICE REQUIRED BY SUBSECTION (A) MUST BE PROVIDED WITHIN 72 HOURS OF THE DATE AN INDIVIDUAL BEGINS TO ENGAGE IN RETAIL SALES OF CANNABIS PRODUCTS. THE INDIVIDUAL SHALL SIGNIFY THAT THE INDIVIDUAL HAS RECEIVED THE NOTICE REQUIRED BY SUBSECTION (A) BY SIGNING A FORM STATING THAT THE LAW HAS BEEN FULLY EXPLAINED, THAT THE INDIVIDUAL UNDERSTANDS THE LAW, AND THAT THE INDIVIDUAL, AS A CONDITION OF EMPLOYMENT, AGREES TO COMPLY WITH THE LAW.

(C) EACH FORM SIGNED BY AN INDIVIDUAL UNDER THIS SECTION SHALL INDICATE THE DATE OF THE SIGNATURE AND THE CURRENT ADDRESS AND SOCIAL SECURITY NUMBER OF THE INDIVIDUAL. THE PERMIT HOLDER SHALL RETAIN THE FORM SIGNED BY EACH INDIVIDUAL EMPLOYED AS A RETAIL SALES CLERK UNTIL THE 60TH DAY AFTER THE DATE THE INDIVIDUAL HAS LEFT THE EMPLOYER'S EMPLOY.

(D) A PERMIT HOLDER REQUIRED BY THIS SECTION TO NOTIFY EMPLOYEES COMMITS AN OFFENSE IF THE PERMIT HOLDER FAILS, ON DEMAND OF A PEACE OFFICER OR AN AGENT OF THE COMPTROLLER, TO PROVIDE THE NOTICE PRESCRIBED BY THIS SECTION. AN OFFENSE UNDER THIS SECTION IS A CLASS C MISDEMEANOR.

(E) IT IS A DEFENSE TO PROSECUTION UNDER SUBSECTION (D) TO SHOW PROOF THAT THE EMPLOYEE DID COMPLETE, SIGN, AND DATE THE NOTICE REQUIRED BY SUBSECTION (A). PROOF MUST BE SHOWN TO THE COMPTROLLER OR AN AGENT OF THE COMPTROLLER WITHIN 72 HOURS OF THE OFFENSE.

SEC. 3. VENDOR ASSISTED SALES REQUIRED; VENDING MACHINES. A RETAILER OR PERSON MAY NOT:

(1) OFFER CANNABIS OR CANNABIS PRODUCTS FOR SALE IN A MANNER THAT PERMITS A CUSTOMER DIRECT ACCESS TO THE CIGARETTES OR CANNABIS PRODUCTS; OR

(2) INSTALL OR MAINTAIN A VENDING MACHINE CONTAINING CANNABIS OR CANNABIS PRODUCTS.

CHAPTER 154, TAX CODE, AND SUBCHAPTER E, CHAPTER 155, TAX CODE.

(D) A PERSON COMMITS AN OFFENSE IF THE PERSON VIOLATES SUBSECTION (A). AN OFFENSE UNDER THIS SUBSECTION IS A CLASS C MISDEMEANOR.

SEC. 4 DISTRIBUTION OF CANNABIS OR CANNABIS PRODUCTS.

(A) A PERSON MAY NOT DISTRIBUTE TO PERSONS YOUNGER THAN 21 YEARS OF AGE:

(1) A FREE SAMPLE OF A CANNABIS OR CANNABIS PRODUCT; OR

(2) A COUPON OR OTHER ITEM THAT THE RECIPIENT MAY USE TO RECEIVE A FREE OR DISCOUNTED CIGARETTE OR CANNABIS PRODUCT OR A SAMPLE CANNABIS OR CANNABIS PRODUCT.

(B) EXCEPT AS PROVIDED BY SUBSECTION (C), A PERMIT HOLDER MAY NOT ACCEPT OR REDEEM, OFFER TO ACCEPT OR REDEEM, OR HIRE A PERSON TO ACCEPT OR REDEEM A COUPON OR OTHER ITEM THAT THE RECIPIENT MAY USE TO RECEIVE A FREE OR DISCOUNTED CANNABIS OR CANNABIS PRODUCT OR A SAMPLE CIGARETTE OR CANNABIS PRODUCT IF THE RECIPIENT IS YOUNGER THAN 21 YEARS OF AGE. A COUPON OR OTHER ITEM THAT SUCH A RECIPIENT MAY USE TO RECEIVE A FREE OR DISCOUNTED CIGARETTE OR CANNABIS PRODUCT OR A SAMPLE CIGARETTE OR CANNABIS PRODUCT MAY NOT BE REDEEMABLE THROUGH MAIL OR COURIER DELIVERY.

(C) SUBSECTIONS (A)(2) AND (B) DO NOT APPLY TO A TRANSACTION BETWEEN PERMIT HOLDERS UNLESS THE TRANSACTION IS A RETAIL SALE.

(D) A PERSON COMMITS AN OFFENSE IF THE PERSON VIOLATES THIS SECTION. AN OFFENSE UNDER THIS SUBSECTION IS A CLASS C MISDEMEANOR.

SEC. 6. ENFORCEMENT; UNANNOUNCED INSPECTIONS.

(A) THE COMPTROLLER SHALL ENFORCE THIS SUBCHAPTER IN PARTNERSHIP WITH COUNTY SHERIFFS AND MUNICIPAL CHIEFS OF POLICE AND WITH THEIR COOPERATION AND SHALL ENSURE THE STATE'S COMPLIANCE WITH SECTION 1926 OF THE FEDERAL PUBLIC HEALTH SERVICE ACT (42 U.S.C. SECTION 300X-26) AND ANY IMPLEMENTING REGULATIONS ADOPTED BY THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. EXCEPT AS EXPRESSLY AUTHORIZED BY LAW, THE COMPTROLLER MAY NOT ADOPT ANY RULES GOVERNING THE SUBJECT MATTER OF THIS SUBCHAPTER OR SUBCHAPTER K, N, OR O.

(B) THE COMPTROLLER MAY MAKE BLOCK GRANTS TO COUNTIES AND MUNICIPALITIES TO BE USED BY COUNTY SHERIFFS AND MUNICIPAL CHIEFS OF POLICE TO ENFORCE THIS SUBCHAPTER IN A MANNER THAT CAN REASONABLY BE EXPECTED TO REDUCE THE EXTENT TO WHICH CANNABIS OR CANNABIS PRODUCTS ARE SOLD OR DISTRIBUTED TO PERSONS WHO ARE YOUNGER THAN 21 YEARS OF AGE. AT LEAST ANNUALLY, RANDOM UNANNOUNCED INSPECTIONS SHALL BE CONDUCTED AT VARIOUS LOCATIONS WHERE CANNABIS OR CANNABIS PRODUCTS ARE SOLD OR DISTRIBUTED TO ENSURE COMPLIANCE WITH THIS SUBCHAPTER. THE COMPTROLLER SHALL RELY, TO THE FULLEST EXTENT POSSIBLE, ON SHERIFFS OR CHIEFS OF POLICE OR THEIR EMPLOYEES TO ENFORCE THIS SUBCHAPTER.

(C) TO FACILITATE THE EFFECTIVE ADMINISTRATION AND ENFORCEMENT OF THIS SUBCHAPTER, THE COMPTROLLER MAY ENTER INTO INTERAGENCY CONTRACTS WITH OTHER STATE AGENCIES, AND THOSE AGENCIES MAY ASSIST THE COMPTROLLER IN THE ADMINISTRATION AND ENFORCEMENT OF THIS SUBCHAPTER.

(D) THE USE OF A PERSON YOUNGER THAN 21 YEARS OF AGE TO ACT AS A DECOY TO TEST COMPLIANCE WITH THIS SUBCHAPTER SHALL BE CONDUCTED IN A FASHION THAT PROMOTES FAIRNESS. A PERSON MAY BE ENLISTED BY THE COMPTROLLER TO ACT AS A MINOR DECOY ONLY IF THE FOLLOWING REQUIREMENTS ARE MET:

- (1) WRITTEN PARENTAL CONSENT IS OBTAINED FOR THE USE OF A PERSON YOUNGER THAN 21 YEARS OF AGE TO ACT AS A MINOR DECOY TO TEST COMPLIANCE WITH THIS SUBCHAPTER;
- (2) AT THE TIME OF THE INSPECTION, THE MINOR DECOY IS YOUNGER THAN 17 YEARS OF AGE;
- (3) THE MINOR DECOY HAS AN APPEARANCE THAT WOULD CAUSE A REASONABLY PRUDENT SELLER OF CIGARETTES OR CANNABIS PRODUCTS TO REQUEST IDENTIFICATION AND PROOF OF AGE;

(4) THE MINOR DECOY CARRIES EITHER THE MINOR'S OWN IDENTIFICATION SHOWING THE MINOR'S CORRECT DATE OF BIRTH OR CARRIES NO IDENTIFICATION, AND A MINOR DECOY WHO CARRIES IDENTIFICATION PRESENTS IT ON REQUEST TO ANY SELLER OF CIGARETTES OR CANNABIS PRODUCTS; AND

(5) THE MINOR DECOY ANSWERS TRUTHFULLY ANY QUESTIONS ABOUT THE MINOR'S AGE.

SEC. 6. PREEMPTION OF LOCAL LAW. THIS SUBCHAPTER DOES NOT PREEMPT A LOCAL REGULATION OF THE SALE, DISTRIBUTION, OR USE OF CANNABIS OR CANNABIS PRODUCTS OR AFFECT THE AUTHORITY OF A POLITICAL SUBDIVISION TO ADOPT OR ENFORCE AN ORDINANCE OR REQUIREMENT RELATING TO THE SALE, DISTRIBUTION, OR USE OF CIGARETTES OR CANNABIS PRODUCTS IF THE REGULATION, ORDINANCE, OR REQUIREMENT:

- (1) IS COMPATIBLE WITH AND EQUAL TO OR MORE STRINGENT THAN A REQUIREMENT PRESCRIBED BY THIS SUBCHAPTER; OR
- (2) RELATES TO AN ISSUE THAT IS NOT SPECIFICALLY ADDRESSED BY THIS SUBCHAPTER OR CHAPTER 154 OR 155, TAX CODE.

SEC. 7. REPORTS OF VIOLATION. A LOCAL OR STATE LAW ENFORCEMENT AGENCY OR OTHER GOVERNMENTAL UNIT SHALL NOTIFY THE COMPTROLLER, ON THE 10TH DAY OF EACH MONTH, OR THE FIRST WORKING DAY AFTER THAT DATE, OF ANY VIOLATION OF THIS SUBCHAPTER THAT OCCURRED IN THE PRECEDING MONTH THAT THE AGENCY OR UNIT DETECTS, INVESTIGATES, OR PROSECUTES.

SEC. 8. REPORT OF OFFICE OF SMOKING AND HEALTH.

(A) NOT LATER THAN JANUARY 5TH OF EACH ODD-NUMBERED YEAR THE OFFICE OF SMOKING AND HEALTH OF THE DEPARTMENT SHALL REPORT TO THE GOVERNOR, LIEUTENANT GOVERNOR, AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES ON THE STATUS OF SMOKING AND THE USE OF CANNABIS OR CANNABIS PRODUCTS IN THIS STATE.

(B) THE REPORT MUST INCLUDE, AT A MINIMUM:

(1) A BASELINE OF STATISTICS AND ANALYSIS REGARDING RETAIL COMPLIANCE WITH THIS SUBCHAPTER, SUBCHAPTER K, AND CHAPTERS 154 AND 155, TAX CODE;

(2) A BASELINE OF STATISTICS AND ANALYSIS REGARDING ILLEGAL CANNABIS SALES, INCLUDING:

- (A) SALES TO MINORS;
- (B) ENFORCEMENT ACTIONS CONCERNING MINORS; AND
- (C) SOURCES OF CITATIONS;

(3) CANNABIS CONTROLS AND INITIATIVES BY THE OFFICE OF SMOKING AND HEALTH OF THE DEPARTMENT, OR ANY OTHER STATE AGENCY, INCLUDING AN EVALUATION OF THE EFFECTIVENESS OF THE CONTROLS AND INITIATIVES;

(4) THE FUTURE GOALS AND PLANS OF THE OFFICE OF SMOKING AND HEALTH OF THE DEPARTMENT TO DECREASE THE USE OF CANNABIS AND CANNABIS PRODUCTS;

(5) THE EDUCATIONAL PROGRAMS OF THE OFFICE OF SMOKING AND HEALTH OF THE DEPARTMENT AND THE EFFECTIVENESS OF THOSE PROGRAMS; AND

(6) THE INCIDENCE OF USE OF CANNABIS OR CANNABIS PRODUCTS BY REGIONS IN THIS STATE, INCLUDING USE OF CANNABIS OR CANNABIS PRODUCTS BY ETHNICITY.

### ARTICLE 3. YOUTH CANNABIS USE

SECTION 9. HEALTH AND SAFETY CODE, IS AMENDED BY ADDING SUBCHAPTERS N AND O TO READ AS FOLLOWS:

#### SUBCHAPTER N. CANNABIS USE BY MINORS

SEC. 10. POSSESSION, PURCHASE, CONSUMPTION, OR RECEIPT OF CANNABIS OR CANNABIS PRODUCTS BY MINORS PROHIBITED.

(A) AN INDIVIDUAL WHO IS YOUNGER THAN 21 YEARS OF AGE COMMITS AN OFFENSE IF THE INDIVIDUAL:

- (1) POSSESSES, PURCHASES, CONSUMES, OR ACCEPTS A CANNABIS OR CANNABIS PRODUCT; OR
- (2) FALSELY REPRESENTS HIMSELF OR HERSELF TO BE 21 YEARS OF AGE OR OLDER BY DISPLAYING PROOF OF AGE THAT IS FALSE, FRAUDULENT, OR NOT ACTUALLY PROOF OF THE INDIVIDUAL'S OWN AGE IN ORDER TO OBTAIN POSSESSION OF, PURCHASE, OR RECEIVE CANNABIS OR CANNABIS PRODUCT.

(B) IT IS AN EXCEPTION TO THE APPLICATION OF THIS SECTION THAT THE INDIVIDUAL YOUNGER THAN 21 YEARS OF AGE POSSESSED THE CANNABIS OR CANNABIS PRODUCT IN THE PRESENCE OF:

(1) AN ADULT PARENT, A GUARDIAN, OR A SPOUSE OF THE INDIVIDUAL;  
OR

(2) AN EMPLOYER OF THE INDIVIDUAL, IF POSSESSION OR RECEIPT OF THE CANNABIS OR CANNABIS PRODUCT IS REQUIRED IN THE PERFORMANCE OF THE EMPLOYEE'S DUTIES AS AN EMPLOYEE.

(C) IT IS AN EXCEPTION TO THE APPLICATION OF THIS SECTION THAT THE INDIVIDUAL YOUNGER THAN 21 YEARS OF AGE IS PARTICIPATING IN AN INSPECTION OR TEST OF COMPLIANCE IN ACCORDANCE WITH THIS LAW

(D) AN OFFENSE UNDER THIS SECTION IS PUNISHABLE BY A FINE NOT TO EXCEED \$250.

SEC. 11 CANNIBIS AWARENESS PROGRAM; COMMUNITY SERVICE.

(A) ON CONVICTION OF AN INDIVIDUAL FOR AN OFFENSE UNDER THIS LAW, THE COURT SHALL SUSPEND EXECUTION OF SENTENCE AND SHALL REQUIRE THE DEFENDANT TO ATTEND A CANNABIS AWARENESS PROGRAM APPROVED BY THE COMMISSIONER. THE COURT MAY REQUIRE THE PARENT OR GUARDIAN OF THE DEFENDANT TO ATTEND THE CANNABIS AWARENESS PROGRAM WITH THE DEFENDANT.

(B) ON REQUEST, A CANNABIS AWARENESS PROGRAM MAY BE TAUGHT INLANGUAGES OTHER THAN ENGLISH.

(C) IF THE DEFENDANT RESIDES IN A RURAL AREA OF THIS STATE OR ANOTHER AREA OF THIS STATE IN WHICH ACCESS TO A CANNABIS AWARENESS PROGRAM IS NOT READILY AVAILABLE, THE COURT SHALL REQUIRE THE DEFENDANT TO PERFORM EIGHT TO 12 HOURS OF OR CANNABIS –RELATED COMMUNITY SERVICE INSTEAD OF ATTENDING THE OR CANNABIS AWARENESS PROGRAM.

(D) THE CANNABIS AWARENESS PROGRAM AND THECANNABIS – RELATED COMMUNITY SERVICE ARE REMEDIAL AND ARE NOT PUNISHMENT.

(E) NOT LATER THAN THE 90TH DAY AFTER THE DATE OF A CONVICTION UNDER THIS LAW, THE DEFENDANT SHALL PRESENT TO THE COURT, IN THE MANNER REQUIRED BY THE COURT, EVIDENCE OF SATISFACTORY COMPLETION OF THE CANNABIS AWARENESS PROGRAM OR THE OR CANNABIS -RELATED COMMUNITY SERVICE.

(F) ON RECEIPT OF THE EVIDENCE REQUIRED UNDER SUBSECTION

(E), THE COURT SHALL:

(1) IF THE DEFENDANT HAS BEEN PREVIOUSLY CONVICTED OF AN OFFENSE THIS LAW, EXECUTE THE SENTENCE, AND AT THE DISCRETION OF THE COURT, REDUCE THE FINE IMPOSED TO NOT LESS THAN HALF THE FINE PREVIOUSLY IMPOSED BY THE COURT; OR

(2) IF THE DEFENDANT HAS NOT BEEN PREVIOUSLY CONVICTED OF AN OFFENSE UNDER THIS LAW, DISCHARGE THE DEFENDANT AND DISMISS THE COMPLAINT OR INFORMATION AGAINST THE DEFENDANT.

(G) IF THE COURT DISCHARGES THE DEFENDANT UNDER SUBSECTION

(F)(2), THE DEFENDANT IS RELEASED FROM ALL PENALTIES AND DISABILITIES RESULTING FROM THE OFFENSE EXCEPT THAT THE DEFENDANT IS CONSIDERED TO HAVE BEEN CONVICTED OF THE OFFENSE IF THE DEFENDANT IS SUBSEQUENTLY CONVICTED OF AN OFFENSE THIS LAW COMMITTED AFTER THE DISMISSAL UNDER SUBSECTION (F)(2).

#### SEC. 12 DRIVER'S LICENSE SUSPENSION OR DENIAL.

(A) IF THE DEFENDANT DOES NOT PROVIDE THE EVIDENCE REQUIRED UNDER THIS LAW WITHIN THE PERIOD SPECIFIED BY THAT SUBSECTION, THE COURT SHALL ORDER THE DEPARTMENT OF PUBLIC SAFETY TO SUSPEND OR DENY ISSUANCE OF ANY DRIVER'S LICENSE OR PERMIT TO THE DEFENDANT. THE ORDER MUST SPECIFY THE PERIOD OF THE SUSPENSION OR DENIAL, WHICH MAY NOT EXCEED 180 DAYS AFTER THE DATE OF THE ORDER.

(B) THE DEPARTMENT OF PUBLIC SAFETY SHALL SEND TO THE DEFENDANT NOTICE OF COURT ACTION UNDER SUBSECTION (A) BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED. THE NOTICE MUST INCLUDE THE DATE OF THE ORDER AND THE REASON FOR THE ORDER AND MUST SPECIFY THE PERIOD OF THE SUSPENSION OR DENIAL.

SEC. 13 EXPUNGEMENT OF CONVICTION. AN INDIVIDUAL CONVICTED OF AN OFFENSE UNDER THIS LAW MAY APPLY TO THE COURT TO HAVE THE CONVICTION EXPUNGED. IF THE COURT FINDS THAT THE INDIVIDUAL SATISFACTORILY COMPLETED THE CANNABIS AWARENESS PROGRAM OR CANNABIS-RELATED COMMUNITY SERVICE ORDERED BY THE COURT, THE COURT SHALL ORDER THE CONVICTION AND ANY COMPLAINT, VERDICT, SENTENCE, OR OTHER DOCUMENT RELATING TO THE OFFENSE TO BE EXPUNGED FROM THE INDIVIDUAL'S RECORD AND THE CONVICTION MAY NOT BE SHOWN OR MADE KNOWN FOR ANY PURPOSE.

SEC. 14. JURISDICTION OF COURTS. A JUSTICE COURT OR MUNICIPAL COURT MAY EXERCISE JURISDICTION OVER ANY MATTER IN WHICH A COURT UNDER THIS SUBCHAPTER MAY:

(1) IMPOSE A REQUIREMENT THAT A DEFENDANT ATTEND A CANNABIS AWARENESS PROGRAM OR PERFORM CANNABIS-RELATED COMMUNITY SERVICE; OR

(2) ORDER THE SUSPENSION OR DENIAL OF A DRIVER'S LICENSE OR PERMIT.

## SEC. 15. EXCISE TAX

(1) THE STATE LEGISLATURE SHALL ENACT AN EXCISE TAX TO BE LEVIED UPON CANNABIS SOLD OR OTHERWISE TRANSFERRED TO A RATE NOT TO EXCEED FIFTEEN PERCENT PRIOR TO JANUARY 1, 2017, AND AT A RATE TO BE DETERMINED BY THE STATE LEGISLATURE THEREAFTER, AND SHALL DIRECT THE TEXAS COMPTROLLER TO ESTABLISH A PROCEDURE FOR THE COLLECTION OF ALL TAXES LEVIED.

(2) THE STATE LEGISLATURE SHOULD ENSURE THAT THE FIRST ONE HUNDRED MILLION DOLLARS IN REVENUE RAISE ANNUALLY FROM SUCH EXCISE TAX SHALL BE DESIGNATED TO ASSIST TEXAS PUBLIC SCHOOLS.

## Commentary

### I. Climate for Marijuana Legalization Nationally

An exceptional opportunity has presented itself to correct the flawed policy of punishing adults for the use of a substance that is less destructive than alcohol or tobacco.<sup>118</sup> With eighteen states and the District of Columbia having legalized marijuana for medicinal purposes,<sup>119</sup> fifteen states having decriminalized non-medical marijuana in small amounts,<sup>120</sup> and two states having legalized recreational marijuana,<sup>121</sup> the momentum to stimulate substantial drug law reform is nearly unstoppable. Support for change in marijuana policy has also arisen from the medical community as highlighted by the American Medical Association position on marijuana, which calls for rescheduling marijuana as a non-Schedule I drug.<sup>122</sup>

Further strengthening the push to rethink marijuana illegality is public opinion in favor of legalization, which according to a Rasmussen Poll has reached 56 percent in favor of regulation of the substance.<sup>123</sup> Prominent members of the legal community, such as the prolific Judge Richard Posner, have also voiced their support for legalization of the substance.<sup>124</sup> Acclaimed civil rights organizations such as the NAACP<sup>125</sup> and the ACLU<sup>126</sup> have advocated for marijuana

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<sup>118</sup> <http://www.drugfree.org/join-together/other/report-marijuana-less>

<sup>119</sup> <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>

<sup>120</sup> <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized>

<sup>121</sup> <http://www.cnn.com/2012/11/07/politics/marijuana-legalization/index.html>

<sup>122</sup> [www.ama-assn.org/resources/doc/csaph/csaph-report3-i09.pdf](http://www.ama-assn.org/resources/doc/csaph/csaph-report3-i09.pdf)

<sup>123</sup> [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/may\\_2012/56\\_favor\\_legalizing\\_regulating\\_marijuana](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/may_2012/56_favor_legalizing_regulating_marijuana)

<sup>124</sup> [http://www.huffingtonpost.com/2012/09/11/richard-posner-marijuana-drug-laws\\_n\\_1874768.html](http://www.huffingtonpost.com/2012/09/11/richard-posner-marijuana-drug-laws_n_1874768.html)

<sup>125</sup> <http://www.rawstory.com/rs/2012/08/23/drug-wars-racial-disparity-moves-naacp-to-embrace-marijuana-legalization/>

decriminalization to help combat racially disproportionate punishment for illegal drug possession. Social and political conservatism has had a noticeable history of supporting marijuana reform as shown by thinkers like William F. Buckley<sup>127</sup> and Barry Goldwater.<sup>128</sup> On almost a regular basis, contemporary social and political conservatives, such as Pat Robertson<sup>129</sup> and Tom Tancredo,<sup>130</sup> are coming out in favor of marijuana legalization.

## **II. Marijuana Needs to be Legalized Nationally to Solve Student Loan Issues**

### **A. Federal Student Loan Denial**

Under federal law, a marijuana conviction would bar a student from receiving federal student loans, grants, and work assistance.<sup>131</sup> President Barack Obama,<sup>132</sup> along with numerous United States presidents,<sup>133</sup> has admitted using marijuana recreationally. He has also stated that he took advantage of student loans to fund his education,<sup>134</sup> which was crucial to his ascension to the presidency. If the president, as an adolescent, were subject to conviction for possession of a drug classified as a controlled substance, under current law he would have likely lost his eligibility to receive student loans. Such a loss may have stifled his opportunity to receive a Harvard education and would have been detrimental to becoming a United States President. One cannot help but wonder how many Americans, who did not have the good fortune to elude prosecution and conviction, the federal government has deprived of opportunities to receive a highly beneficial education.

Recently, Barbara Walters asked the president whether he thinks the federal government should legalize marijuana. His response was that, though he would not go as far as to favor legalization, he does recognize that the voters in Washington and Colorado have spoken on this issue. Moreover, the president noted how nonsensical it would be for the federal government to prosecute individuals in states where the substance is legal.<sup>135</sup> By implying a federal allowance, or at least tolerance, for states that have legalized marijuana, the president has sparked for the many proponents of drug law reform who desire a true change in federal policy.<sup>136</sup> Perhaps as a result of reformed federal drug policy, students who have been caught with the substance will not be deprived of their opportunity to attain the academic and professional highs that come with an education.

### **B. Harmfulness of Student Loan Denial**

Students affected by a federal law that prohibits federal financial assistance to those convicted of drug crimes, including possession of marijuana, are reportedly 60 percent more likely to receive a conviction of another drug crime in the three years after high school

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<sup>126</sup> <http://www.aclu.org/criminal-law-reform/marijuana-law-reform>

<sup>127</sup> <http://old.nationalreview.com/buckley/buckley200406291207.asp>

<sup>128</sup> <http://reason.com/archives/1997/02/01/prescription-drugs>

129???

<sup>130</sup> [http://www.huffingtonpost.com/2012/09/25/tom-tancredo-backs-legal-\\_n\\_1913192.html](http://www.huffingtonpost.com/2012/09/25/tom-tancredo-backs-legal-_n_1913192.html)

<sup>131</sup> <http://www.stateuniversity.com/blog/permalink/Drug-Convictions-How-They-Affect-Your-Financial-Aid.html>

<sup>132</sup> <http://swampland.time.com/2012/05/25/audacity-of-dope-ales-of-a-toking-teenage-obama/>

<sup>133</sup> [http://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_politicians\\_who\\_admit\\_to\\_cannabis\\_use](http://en.wikipedia.org/wiki/List_of_United_States_politicians_who_admit_to_cannabis_use)

<sup>134</sup> <http://web.archive.org/web/20080413020043/http://elections.foxnews.com/2008/04/09/michelle-obama-baracks-book-sales-paid-off-our-student-loans/>

<sup>135</sup> <http://abcnews.go.com/GMA/video/president-michelle-obama-interview-preview-barbara-walters-marijuana-17972451>

<sup>136</sup> [http://www.dailybulletin.com/clippers/ci\\_22199894/pro-marijuana-groups-others-mixed-meaning-obamas-apparent](http://www.dailybulletin.com/clippers/ci_22199894/pro-marijuana-groups-others-mixed-meaning-obamas-apparent)

graduation. Researchers at the National Bureau of Economic Research have shown that education, especially college education, strongly correlates with ending criminal behavior. If the federal government prevents students convicted with a drug crime from attaining an education because of the lack of financial assistance, they are more likely to return to criminal activity. The research also found that the federal law preventing financial aid does not deter young people from committing drug felonies in the first place.<sup>137</sup>

Federal law only prohibits students with drug convictions from receiving federal financial aid, while those convicted for manslaughter, burglary, arson, and other crimes may still receive aid. The federal law ensures excessive punishment for students with drug convictions. The criminal justice system already dispenses a punishment after a drug conviction and the deprivation of federal financial aid effectively acts as a double penalty.<sup>138</sup> Congress intended to give educational opportunities to low income students with The Higher Education Act.<sup>139</sup> The result of the amended Higher Education Act, which creates the double penalty, is to deny educational opportunities to many financially disadvantaged students.

Even the Government Accountability Office, a research arm of Congress, has not found evidence that the double penalty actually helps stop drug use. Also indicating to the federal government that a change in drug policy is required, a congressionally created Advisory Committee recommended that Congress eliminate the drug conviction question from the financial aid application, because that question should be irrelevant to aid eligibility.<sup>140</sup>

Despite the remedies<sup>141</sup> a student is able to explore after suspension from financial aid, research continues to show that the double penalty “has a large negative impact on the college attendance of students with drug convictions.” The research suggests that affected students are less likely to enroll in college at any point in their lives.<sup>142</sup> The double penalty harms society by causing fewer students to attend college and consequently encouraging such students to return to criminal activities.

### **III. Need for Marijuana Legalization Nationally and in Texas:**

#### **A. To Prevent further Deterioration of Fourth Amendment Protections**

The fourth amendment was born out of the founding fathers’ intense opposition to unrestricted searches and seizures conducted by the British crown. The fourth amendment limits searches and seizures by requiring good cause for such government action. On the surface, the probable cause requirement for search and seizure seems to satisfy the good cause requirement. However, a deeper look into marijuana cases reveals that dubious law enforcement beliefs can satisfy the probable cause requirement, leading to the highly permissive searches and seizures that the founding fathers opposed.

A law enforcement officer only needs to believe he or she has smelled marijuana, in order to restrain a person through stop or arrest.<sup>143</sup> An officer can invasively search<sup>144</sup> the arrested

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<sup>137</sup> <http://www.human.cornell.edu/pam/people/upload/Finaid-2-22-2012.pdf>

<sup>138</sup> <http://ssdp.org/issues/the-higher-education-act/talking-points/>

<sup>139</sup> <http://connection.ebscohost.com/c/articles/10992006/bill-would-expand-higher-ed-access-minorities-low-income-students>

<sup>140</sup> <http://www.slingshotsolutions.net/view-from-the-hill/view-from-the-hill/>

<sup>141</sup> <http://studentaid.ed.gov/eligibility/criminal-convictions>

<sup>142</sup> <http://www.freakonomics.com/2013/02/07/financial-aid-for-college-students-with-drug-convictions/>

<sup>143</sup> <http://supreme.justia.com/cases/federal/us/448/98/>

<sup>144</sup> [http://www.nytimes.com/2012/04/03/us/justices-approve-strip-searches-for-any-offense.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/04/03/us/justices-approve-strip-searches-for-any-offense.html?pagewanted=all&_r=0)

individual, even if the basis for arrest is a probable cause like marijuana odor. One of the many ways marijuana illegality undermines civil liberties is by allowing law enforcement to search and seize a person for suspicious odor alone. If an officer detects marijuana odor from a vehicle, the officer does not even need to arrest in order to conduct a stop<sup>145</sup> and search.<sup>146</sup> If an officer suspects that marijuana odor is present in a room, the suspicion could supply probable cause for a more extensive search<sup>147</sup> than would otherwise be acceptable. The law permits these deprivations of privacy and liberty despite empirical studies that show law enforcement's detection of marijuana odor is not reliable in indicating the plant's presence.

Empirical studies, published in the journal of Law and Human Behavior, examined<sup>148</sup> the ability of humans to discern marijuana odor in replicated real-life circumstances experienced by law enforcement. The studies suggest the odor of marijuana is not reliably detectable by even those who possess an excellent sense of smell. Furthermore, dogs used by law enforcement are unreliable in detecting drugs in general.<sup>149</sup> If marijuana possession became legal, law enforcement would no longer need to utilize ineffective methods that result in the drastic reduction of one's freedom and privacy.

One only needs to look to Supreme Court history to recognize that marijuana illegality has led to a restriction of one's civil liberties. For the past fifty years, the Supreme Court has mainly used cases involving marijuana as vehicles to restrain fourth amendment protections against unreasonable searches and seizures. For example, in decisions involving marijuana, the Supreme Court allowed for more extensive<sup>150</sup> frisking of automobiles, established more<sup>151</sup> exceptions<sup>152</sup> to the warrant requirement, and permitted drug testing<sup>153</sup> without suspicion of drug use. Marijuana Supreme Court cases also established that department policies, which set guidelines for inventory searches, may be so broad<sup>154</sup> as to offer few real limitations. Moreover, the Supreme Court used marijuana cases to increase<sup>155</sup> greatly the ability of officers to make custodial arrests solely for minor infractions. Additionally, using marijuana cases, the Supreme Court authorized prolonged detentions<sup>156</sup> of occupants of residences while officers pursue search warrants and failed to label extended traffic stops properly as an arrests.<sup>157</sup>

The possibility exists that, if marijuana had been legal, the Supreme Court could nonetheless have shrunken fourth amendment protections through case decisions regarding drugs other than marijuana. However, review<sup>158</sup> of fourth amendment cases still shows marijuana illegality has led to a more rapid diminishment of fourth amendment protections than non-marijuana cases would have allowed. If marijuana remains illegal, such frequent and drastic

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<sup>145</sup> <http://supreme.justia.com/cases/federal/us/470/675/case.html>

<sup>146</sup> [http://www.leagle.com/xmlResult.aspx?xmlDoc=2005867415F3d452\\_1812.xml&docbase=CSLWAR2-1986-2006](http://www.leagle.com/xmlResult.aspx?xmlDoc=2005867415F3d452_1812.xml&docbase=CSLWAR2-1986-2006)

<sup>147</sup> <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/mcglr43&div=5&id=&page=>

<sup>148</sup> <http://link.springer.com/article/10.1023%2FB%3ALAHU.0000022324.13389.ea?LI=true>

<sup>149</sup> [http://www.ucdmc.ucdavis.edu/welcome/features/2010-2011/02/20110223\\_drug\\_dogs.html](http://www.ucdmc.ucdavis.edu/welcome/features/2010-2011/02/20110223_drug_dogs.html)

<sup>150</sup> <http://supreme.justia.com/cases/federal/us/463/1032/>

<sup>151</sup> <http://supreme.justia.com/cases/federal/us/443/31/>

<sup>152</sup> <http://supreme.justia.com/cases/federal/us/469/325/case.html>

<sup>153</sup> <http://supreme.justia.com/cases/federal/us/489/656/>

<sup>154</sup> [http://scholar.google.com/scholar\\_case?case=6670284356456275543&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=6670284356456275543&hl=en&as_sdt=2&as_vis=1&oi=scholar)

<sup>155</sup> <http://supreme.justia.com/cases/federal/us/532/318/case.html>

<sup>156</sup> <http://supreme.justia.com/cases/federal/us/531/326/case.html>

<sup>157</sup> <http://www.law.cornell.edu/supct/html/03-923.ZO.html>

<sup>158</sup> <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/mcglr43&div=5&id=&page=>

reductions to one's liberty and privacy are bound to continue. One of the best ways to end the erosion of one's fourth amendment protections is to legalize marijuana.

If courts became more hesitant to permit marijuana odor to act as probable cause for search and seizure, our fourth amendment protections would not be so susceptible to dilution. Defendants have been petitioning courts to be more critical of probable cause standards for decades with little success. A better way to strengthen the fourth amendment is to legalize marijuana. Marijuana legalization would certainly lead to a less rapid diminishment of fourth amendment protections. With less reason for law enforcement to employ ineffective and intrusive methods, like stopping and searching based on marijuana odor, an individual will receive greater protections to his liberty and privacy. Once marijuana possession becomes lawful, Americans may challenge high court decisions that have previously used marijuana illegality to curtail fourth amendment protections, and courts could restore greater guarantees against unreasonable searches and seizures.

### **B. To Prevent Utilization of Ineffective Law Enforcement Tools, namely Drug Dogs**

Officers often use drug-sniffing dogs to find the "probable cause" that allows law enforcement to search cars without a warrant. However the chances of a drug dog falsely alerting law enforcement, which often leads to searches that would otherwise be unconstitutional, seems shockingly high. In a study, published by University of California, Davis researchers in the journal of *Animal Cognition*, it was shown that trained drug dogs falsely alerted to the presence of drugs hundreds of times in areas where drugs were in fact not present and were not likely to have been present in the past.<sup>159</sup> This study suggests that drug dogs are not just responding to smells when alerting, but in a large part responding to unjustified beliefs held by drug dog handlers that drugs are present.

Because drug dogs are extremely responsive to subtle cues given by their handlers, a drug dog is likely to alert that drugs are present regardless of whether it does or does not actually smell drugs. Drug dog experts point to the fact that drug dogs and their handlers are at times poorly trained which explains this lack of accuracy in drug detection. A possible reason for the poor training is the almost total absence of national standards for drug dog training.<sup>160</sup>

Further analysis conducted by the Chicago Tribune, using three years' worth of drug dog data, discovered that drug dogs were wrong more often than they were right when alerting to police that vehicles contained drugs or drug paraphernalia.<sup>161</sup> Also troubling, the Tribune study showed that if a driver was Hispanic, drug dogs were more likely to falsely alert on him or her. Anti-discrimination groups have asserted that drug dogs often alert as a response to the racial biases of the drug dog handlers, which leads to officers searching disproportionately large amounts of minorities for illegal drug use.<sup>162</sup>

In Texas, officers frequently use trained dogs to assist in finding evidence against those suspected of committing crimes. A 2010 decision from a Texas's highest criminal court showed that Judges do not always think evidence obtained from the assistance of trained dogs is enough to find a criminal defendant guilty.<sup>163</sup> In that case, the court overturned a criminal conviction

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<sup>159</sup> [http://www.ucdmc.ucdavis.edu/welcome/features/2010-2011/02/20110223\\_drug\\_dogs.html](http://www.ucdmc.ucdavis.edu/welcome/features/2010-2011/02/20110223_drug_dogs.html)

<sup>160</sup> [http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105\\_1\\_drug-sniffing-dogs-alex-rothacker-drug-dog\\_](http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog_)

<sup>161</sup> [http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105\\_1\\_drug-sniffing-dogs-alex-rothacker-drug-dog](http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog)

<sup>162</sup> <http://www.rawstory.com/rs/2011/01/06/false-positives-police-canines-searches/>

<sup>163</sup> <http://www.leagle.com/xmlResult.aspx?xmlDoc=in%20txco%2020100922571.xml&docbase=csllwar3-2007-curr>

because the court deemed the primary method used by police to identify the criminal defendant, trained dog identification, as inadequate to find a person guilty. Perhaps the Court of Criminal Appeals in Texas understands that trained dog assistance alone is not reliable enough to justify a criminal conviction. Despite drug dog inadequacy, the law still allows drug dog utilization to search a person's vehicle. The prosecution may still use any evidence discovered from drug dog searches as evidence at trial. If the government legalized marijuana, officers would have less opportunity to utilize unreliable drug dogs against suspects and defendants.

#### **IV. Climate for Marijuana Legalization in Texas**

##### **A. Legislative Trend towards Decriminalization and Political Support of Legalization**

Instead of the officers automatically arresting individuals caught with less than four ounces of marijuana, Texas counties may allow police to issue citations to such individuals.<sup>164</sup> Though possession is still a crime, the citation law was conceivably a step taken by the 2007 Texas Legislature to alleviate the punishments associated with marijuana possession and perhaps laid the groundwork for decriminalization of the substance. In the current (2013) legislative session, State Representative Harold Dutton, Jr., has proposed another law that would improve Texas drug policy by reducing possession of one ounce of Marijuana to a Class C misdemeanor that could include a \$500 dollar fine.<sup>165</sup>

A sharp reduction in the prosecution and incarceration of the estimated 75,000 people arrested for marijuana yearly in Texas (with more than 90 percent of those arrests for possession only) would translate into time and money better spent for courts, prosecutors, and police departments and a much-needed reduction of overcrowding in jails.<sup>166</sup> Rep. Dutton is a member of the Texas Democratic party that, as a part their official platform, has endorsed the total decriminalization of marijuana<sup>167</sup> and that has possibly increased in popularity since the endorsement as seen by Democrats being elected in to the current Texas Legislature in numbers which ended the Republican supermajority in the House of Representatives.<sup>168</sup> Apart from politicians supporting Marijuana law reform, Texas voters have also shown support for rethinking marijuana policy at the ballot box. Voters could have demonstrated this support not only by continuously re-electing the former Texas Congressman, pro-legalization Ron Paul, but also by the election of Beto O'Rourke. In 2012, voters chose O'Rourke, a proponent of marijuana legalization, over an eight-term incumbent and opponent of legalization, Silvestre Reyes for Texas's 16th congressional district.<sup>169</sup>

##### **B. Trial Court precedent on Medical Marijuana and Legislative Support thereof**

As shown by the results in two<sup>170</sup> recent<sup>171</sup> Texas criminal cases, Texas residents charged with marijuana possession may successfully argue medical necessity as a defense at trial or pre-trial. In addition to Texas judges showing some favor to a medical defense, State Representative

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<sup>164</sup> [http://austinist.com/2007/08/28/texas\\_relaxes\\_w.php](http://austinist.com/2007/08/28/texas_relaxes_w.php)

<sup>165</sup> <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB184>

<sup>166</sup> <http://texasnorml.org/2013/01/action-alert-marijuana-decriminalization-bill-introduced-in-texas-legislature/>

<sup>167</sup> [http://www.huffingtonpost.com/2012/06/18/texas-democratic-party-marijuana\\_n\\_1606217.html](http://www.huffingtonpost.com/2012/06/18/texas-democratic-party-marijuana_n_1606217.html)

<sup>168</sup> <http://dfw.cbslocal.com/2012/11/07/texas-democrats-end-gop-house-supermajority/>

<sup>169</sup> [http://www.huffingtonpost.com/2012/05/29/beto-orourke-marijuana\\_n\\_1554661.html](http://www.huffingtonpost.com/2012/05/29/beto-orourke-marijuana_n_1554661.html).

<sup>170</sup> <http://reason.com/blog/2008/03/27/successful-medical-necessity-d>

<sup>171</sup> <http://texasnorml.org/2012/05/texas-multiple-sclerosis-patient-receives-deferred-adjudication-term-of-one-day-for-possession-of-marijuana/>

Eliot Naishtat has also championed such a medical defense as indicated by his sponsorship of a proposed law in the Texas Legislature, which would allow patients to use an affirmative defense against charges of possessing marijuana.

If the bill is successfully passed, the Texas Legislature would rightfully respect Texas' traditional ideal of promoting individual liberty against an overreaching federal government—a federal government that disallows any medical use of Marijuana.<sup>172</sup> In addition, if Texas legalizes medical marijuana, Texas would proudly join every other state that borders Mexico as a state that has some form of reformed marijuana law. Each of Texas' fellow border-states have passed reformed marijuana laws possibly because such a close proximity to Mexico has given the states first-hand experience of the ineffectual and often deadly results that a total criminalization of Marijuana creates. Other border-states have realized that by taking new approaches to marijuana policy, including creating a legal market for patients, they would undercut a thriving black market on both sides of the border. If the Texas Legislature fully legalized marijuana, then Texas patients would immensely benefit by obtaining greater access to the substance.

### **C. High Criminal Court and Legislative Trends towards Taxation**

A recent investigation by Fox 7 of Austin, Texas discovered that a legal loophole may exist which would allow a person caught with more than four ounces of marijuana to argue successfully against imprisonment.<sup>173</sup> This possible loophole arises by Texas having a Marijuana Tax Law in place, which taxes marijuana at \$3.50 an ounce, with a minimum of 4 ounces needed.<sup>174</sup> Because legislators enacted the tax to provide an additional punishment to those criminally charged with marijuana possession, in 1996 the Texas Court of Criminal of Appeals, in *Stennett v. State*, stated that both criminal and tax penalties violate double jeopardy and thus *Stennett* was set free.<sup>175</sup>

According to the Fox 7 investigation, if a defendant charged with possession pays the marijuana tax at the Texas Comptroller's office, gets a receipt, attaches it to an application for a writ of Habeas Corpus for violation of the Double Jeopardy Clause, he may be released from criminal prosecution, as *Stennett* was in the 1996 court decision.

Texas has a great need for new sources of state income, as well as a need to reduce government spending in certain areas. The 1996 Court decision gave Texas a wonderful opportunity to fulfill both needs. By taxing adults who use marijuana for industrial, medicinal, or recreational purposes, Texas would gain more revenue to pay for its obligations like educating children or funding police departments.<sup>176</sup> If the payment of the tax prevented the criminal justice system from processing and imprisoning adult marijuana users, Texas could save a large amount of money by not having to pay for items like prosecutions, court fees, and living costs for imprisoned nonviolent offenders.

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<sup>172</sup> <http://www.whitehouse.gov/ondcp/federal-laws-pertaining-to-marijuana>

<sup>173</sup> <http://www.myfoxaustin.com/story/20929640/marijuana-illegal-but-taxable-in-texas>

<sup>174</sup> [http://www.window.state.tx.us/taxinfo/contr\\_sub/index.html](http://www.window.state.tx.us/taxinfo/contr_sub/index.html)

<sup>175</sup> <http://www.ndsn.org/nov96/drugtax.html>

<sup>176</sup> <http://thinkprogress.org/justice/2011/07/06/260801/budget-cuts-force-texas-town-to-lay-off-entire-police-force-mayor-warns-bolt-your-doors/?mobile=nc>

## **V. Need to Regulate Marijuana especially in Texas**

### **A. To Increase State Revenue, and Decrease State Expenditures**

The state government is preventing adults who use marijuana from complying with Texas tax laws because Texas has not legalized marijuana yet.<sup>177</sup> By threatening such adults with arrest and imprisonment, the state government is causing Texas to miss the opportunity to benefit from the most profitable crop in the United States.<sup>178</sup>

As seen by a recent court decision where the court ruled that Texas' inadequate funding of schools was unconstitutional, Texas is certainly in need of greater resources to finance its obligations toward Texas children. In 2011, the Texas Legislature voted to deprive Texas schools of \$5.4 billion in funding, despite soaring school enrollments, because the state government simply did not have the budget for additional funding.<sup>179</sup> The current Texas Legislature has the opportunity to lessen the massive hardships it previously put upon Texas schools by borrowing the ideas of Colorado.

A study by the Colorado Center on Law and Policy showed that Colorado's new law, which regulates and taxes marijuana, would produce \$60 million in new revenue and savings for that state within five years.<sup>180</sup> According to the submission clause of the law itself, the first \$40 million raised would go to funding public schools in Colorado.<sup>181</sup> Because the population of Texas is about five times greater than the population of Colorado, Texas would reap even greater financial benefits than Colorado if Texas ends prohibition on marijuana. If the Texas Legislature grants adults in Texas the liberty to decide for themselves whether they want use the substance for hemp products, recreation, or medicine, rather than have the government dictate what Texans can and cannot use, Texas could fix some of its financial troubles through increasing revenues. Further, by reducing costs related to criminalizing users of the marijuana, Texas could better spend limited government resources on truly important, and constitutionally mandated, projects like adequately educating Texas children. The current Texas Legislature is fortunate in that prior Texas lawmakers have already put a Marijuana Tax framework in place, which the current Texas Legislature can expand upon.<sup>182</sup>

### **B. To Reduce Adolescent Marijuana Use**

In spite of the harsh criminal penalties associated with marijuana possession, a study by the American Journal of Public Health has not found any evidence to support the belief that criminalization of marijuana use actually reduces marijuana usage.<sup>183</sup> The problem of marijuana remaining the most popular drug of abuse among teenagers, despite decades of enforcing a policy that criminally punishes marijuana possession, obviously cannot be solved by continuing the failed policy of outlawing marijuana use.<sup>184</sup> Many concerned parents, such as the parent group Guarding Our Children Against Marijuana Prohibition have recognized the failure of

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<sup>177</sup> [http://www.window.state.tx.us/taxinfo/contr\\_sub/index.html](http://www.window.state.tx.us/taxinfo/contr_sub/index.html)

<sup>178</sup> <http://abcnews.go.com/Business/story?id=2735017&page=1>(<http://www.cannabissearch.com/articles/cannabis/>

<sup>179</sup> <http://www.austinchronicle.com/news/2013-02-08/dietz-rules-against-school-finance-system/>)

<sup>180</sup> [http://www.cclponline.org/postfiles/amendment\\_64\\_analysis\\_final.pdf](http://www.cclponline.org/postfiles/amendment_64_analysis_final.pdf)

<sup>181</sup> <http://www.regulatemarijuana.org/s/regulate-marijuana-alcohol-act-2012>

<sup>182</sup> <http://www.statutes.legis.state.tx.us/Docs/TX/htm/TX.159.htm>

<sup>183</sup> <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448346/>

<sup>184</sup> [http://www.internalmedicineneeds.com/single-view/marijuana-most-popular-drug-of-abuse-among-teens/43f43a120a133728e7efcda59a6d40b7.html?tx\\_ttnews%5BsViewPointer%5D=1](http://www.internalmedicineneeds.com/single-view/marijuana-most-popular-drug-of-abuse-among-teens/43f43a120a133728e7efcda59a6d40b7.html?tx_ttnews%5BsViewPointer%5D=1)

marijuana prohibition to deter marijuana access and have pointed out statistics which show that, for many high school students, marijuana is “very easy” or “fairly easy” to get.<sup>185</sup>

Even though cigarette use is legal, the long-term trend of teenage cigarette use has been dropping dramatically.<sup>186</sup> The long-term trend for teenage marijuana use, on the other hand, has been increasing significantly.<sup>187</sup> The regulation of tobacco has created effective barriers, which prevent tobacco access for adolescents, and thus successfully reduced tobacco use for those who are not adults. Tobacco vendors, if they want to stay in business, must abide by laws prohibiting adolescent tobacco use. No such form of control exists for marijuana dealers; therefore, they do not have any financial incentive or commercial obligation to refrain from selling to teenagers. Simply put, marijuana dealers do not ask for ID. By regulating marijuana like tobacco or other legal drugs, the law would more effectively reduce teenage marijuana.

Reform of marijuana laws has been successful in reducing teenage marijuana use in Portugal.<sup>188</sup> The Cato Institute found that five years after Portugal made personal possession no longer criminal, illegal drug use as whole among teenagers dropped. One does not necessarily have to look to another country to see the reduction in teenage marijuana use because of reformed marijuana law. A 2012 report from the Center on Juvenile & Criminal Justice discovered that, because of marijuana law reform in California, simple marijuana possession arrests of California juveniles fell from 14,991 in 2010 to 5,831 in 2011, a 61 percent decrease.<sup>189</sup>

In 1997, the Texas Legislature passed tobacco laws, which limited minors’ access to tobacco and thus prevented many young people from developing a lifetime of tobacco addiction and possible disease and death.<sup>190</sup> If the Texas Legislature wishes to also limit adolescent use of marijuana and thereby prevent any possible addictions or health detriments associated with marijuana, the legislature would be wise to regulate the substance away from outlaw dealers and into the hands of responsible vendors. Texas Legislature could expand tobacco regulations to include marijuana, and doing so would better ensure that children and teenagers are successfully discouraged from using the substance. Thus, the model marijuana legislation utilizes Texas’ tobacco laws<sup>191</sup> to posit the appropriate legislation for marijuana. In addition, similar to Colorado marijuana legislation,<sup>192</sup> the model legislation requires the first \$100 million in revenue to assist Texas public education. The Marijuana legalization successes in Colorado, Washington, and possibly Texas, may lead to the federal government following the trend towards legalization.

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<sup>185</sup> <http://www.saferchoice.org/content/view/307/38/>

<sup>186</sup> [http://www.alternet.org/story/18959/why\\_more\\_kids\\_smoke\\_marijuana\\_than\\_cigarettes](http://www.alternet.org/story/18959/why_more_kids_smoke_marijuana_than_cigarettes)

<sup>187</sup> <http://www.nih.gov/news/health/dec2012/nida-19.htm>

<sup>188</sup> <http://www.time.com/time/health/article/0,8599,1893946,00.html>

<sup>189</sup> <http://www.publicintegrity.org/2012/11/26/11842/marijuana-decriminalization-law-brings-down-juvenile-arrests-california>

<sup>190</sup> <http://texasbaccolaw.org/>

<sup>191</sup> <http://www.statutes.legis.state.tx.us/Docs/HS/htm/HS.161.htm#H>

<sup>192</sup> <http://www.regulatemarijuana.org/s/regulate-marijuana-alcohol-act-2012>