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Shifting Marijuana Laws and Policies: Implications for Alaska

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Marijuana regulation continues to be a pressing criminal justice and social policy issue both in Alaska and across the nation. Nearly one-third of the states have decriminalized possession of small amounts of marijuana and nearly half have legalized marijuana for medical use. (See Figure 1.) Recently, voters in Colorado and Washington further shifted the marijuana law paradigm by approving ballot measures that legalized recreational marijuana use and established comprehensive licensing and regulatory frameworks for the production and commercial sale of marijuana.

Changes to state drug laws that allow commercial marijuana transactions and relax or eliminate criminal penalties for marijuana

use and possession raise constitutional issues (see Table 1, p. 18). Such laws conflict with the Controlled Substances Act (CSA), the federal law that makes all marijuana use, possession, and sale illegal. Since 1996, when California became the first state to enact a medical marijuana law, numerous federal prosecutions have been filed against medical marijuana providers who were operating under valid state laws. But following legalization in Colorado and Washington, the federal government's approach to marijuana enforcement has shifted. The U.S. Department of Justice recently announced a new policy that respects state efforts to legalize and decriminalize marijuana, the U.S. Treasury Department issued guidelines intended to make it easier for banks to work

with marijuana-related business, and Congress is considering several bills aimed at reforming the federal marijuana prohibition.

Such changes to other states' marijuana laws and to federal marijuana enforcement policies are of particular relevance to Alaska because these changes could have consequences for Alaska's existing medical and recreational marijuana laws. And, although Alaska does not currently have a regulated commercial marijuana market like Colorado and Washington, it soon may. A ballot measure that would legalize, tax, and regulate marijuana in Alaska will be before the state's voters at the November 2014 general election.

This article summarizes Alaska's current marijuana laws, identifies recent changes to other state laws and federal policies related to marijuana use and possession, and discusses the impact of those changes on Alaska's marijuana laws.

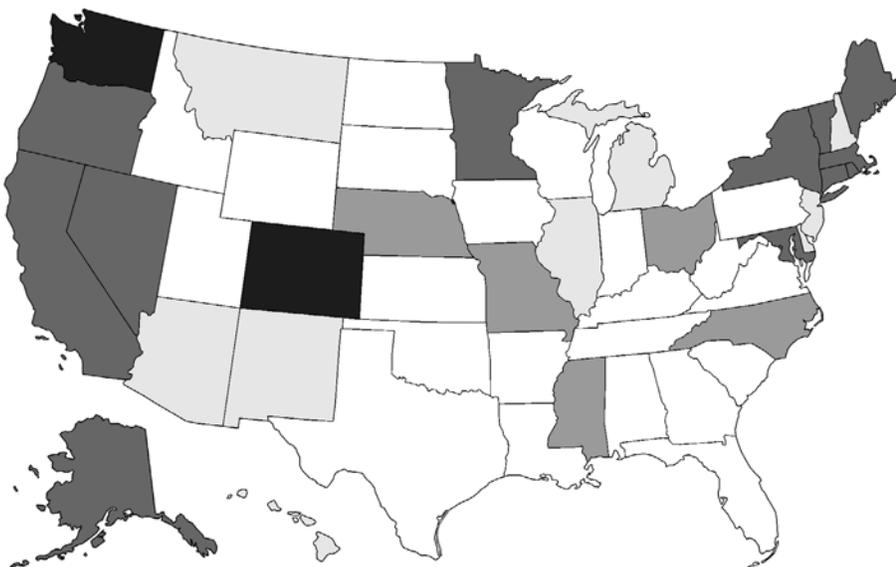
Decriminalization, Legalization, and Alaska's Unique Marijuana Laws

A state is considered to have decriminalized marijuana if it has removed the threat of jail or prison time for the lowest-level marijuana offenses, generally personal possession of small amounts of marijuana. Such possession often still carries a penalty, but instead of imprisonment, the sanction is a civil fine. Jurisdictions that continue to classify marijuana possession as a crime, but do not impose prison time for first offenses (but do so for subsequent offenses), can also

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Figure 1. State-Level Marijuana Legalization and Decriminalization

- Legalized medical marijuana laws
- Legalized medical marijuana and decriminalized marijuana possession laws
- Decriminalized marijuana possession laws (generally, jail time removed for possession of small amounts)
- Legalized medical and recreational marijuana laws



Note: The Alaska Supreme Court has found that the state constitution's right to privacy protects an adult's ability to possess modest amounts of marijuana in the home for personal use.

Sources of data: New York Times; National Organization for the Reform of Marijuana Laws; Marijuana Policy Project; National Conference of State Legislatures; news reports

HIGHLIGHTS INSIDE THIS ISSUE

- Statistics for homelessness in Alaska and the U.S. (page 2).
- SB64 and the Alaska Criminal Justice Commission (page 11).
- The Alaska Court System's Early Resolution Program for family law cases (page 13).

Table 1. State Marijuana Legalization and Decriminalization Laws¹

State	Legalized medical use of marijuana	Decriminalized possession of small amounts of marijuana	Legalized recreational use of marijuana	Legalized medical use of marijuana	Decriminalized possession of small amounts of marijuana	Legalized recreational use of marijuana
Alaska	Yes	Yes ²		Montana	Yes	
Arizona	Yes			Nebraska		Yes
California	Yes	Yes		Nevada	Yes	Yes
Colorado	Yes		Yes	New Hampshire	Yes	
Connecticut	Yes	Yes		New Jersey	Yes	
Delaware	Yes			New Mexico	Yes	
Hawaii	Yes			New York	Yes	Yes
Illinois	Yes			North Carolina		Yes
Maine	Yes	Yes		Ohio		Yes
Maryland	Yes	Yes		Oregon	Yes	Yes
Massachusetts	Yes	Yes		Rhode Island	Yes	Yes
Michigan	Yes			Vermont	Yes	Yes
Minnesota	Yes	Yes		Washington	Yes	Yes
Mississippi		Yes		Washington, DC	Yes	Yes
Missouri		Yes				

Note: Some laws have yet to take effect.

1. States which have not enacted marijuana decriminalization or legalization laws include: Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

2. The Alaska Supreme Court has found that the state constitution's right to privacy protects an adult's ability to possess modest amounts of marijuana in the home for personal use.

Sources of data: *New York Times*; *National Organization for the Reform of Marijuana Laws*; *Marijuana Policy Project*; *National Conference of State Legislatures*; news reports

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be said to have decriminalized marijuana. Applying this broad definition, one-third of the states and Washington, D.C. have decriminalized possession of small amounts of marijuana. What constitutes possession of a small amount of marijuana for personal use (i.e., no intent to distribute) varies from state to state, as do the corresponding fines. Amounts range from 10 to 100 grams, but a one ounce (approximately 28 grams) limit is most common. Fines for a first offense fall between \$25 and \$650.

Decriminalization differs from legalization, where certain types of marijuana possession and use are not subject to any criminal or civil penalties. In recent years, legalization of marijuana for medical use has become common. Since 1996, nearly half of the states (including Alaska in 1998) and Washington, D.C. have enacted medical marijuana laws. In these states, qualifying patients can use and possess limited amounts of marijuana without punishment under state law, as long as they comply with strict regulatory guidelines. In Alaska, for example, such permissible use requires a physician's certification that the patient suffers from a "debilitating medical condition" and that the patient might benefit from the medical use of marijuana. The patient must then formally register with the state, which will issue an identification card and maintain a registry of all authorized users. Registered medical marijuana patients may possess up to one ounce of marijuana and can designate a caregiver to assist with cultivation and

production of the plant. Alaska law does not permit dispensaries to sell marijuana to patients.

In addition to its medical marijuana statute, Alaska has a common law rule that permits adults to possess modest amounts of marijuana in their homes for personal use. This rule was established with the 1975 Alaska Supreme Court decision *Ravin v. State of Alaska*. In *Ravin*, the court balanced the Alaska Constitution's right of privacy against the state's interest in promoting public health and safety by banning all marijuana use. The court found that any potential negative impacts of recreational marijuana use by adults in the privacy of their homes were not harmful enough to justify a blanket marijuana ban. This was a noteworthy ruling in favor of personal autonomy and privacy, but the activity protected by the *Ravin* Doctrine (which includes *Ravin* and several subsequent opinions further interpreting the Alaska right of privacy as it applies to personal marijuana use) is quite narrow. The *Ravin* Doctrine only applies to personal use and possession of small amounts of marijuana in the privacy of the home (an amount currently understood by the Alaska courts as less than four ounces). It does not permit transporting marijuana in public, commercial marijuana activity, any marijuana use by minors, or driving under the influence of marijuana.

The *Ravin* Doctrine occupies a unique space in marijuana legalization and decriminalization jurisprudence for several reasons. To begin, *Ravin* was the first—and remains the only—state or federal court opinion to announce a constitutional privacy right that

protects some level of marijuana use and possession. Next, as a judicially created common law rule, the *Ravin* Doctrine is not readily subject to being undone by shifting political winds. Though several legislative efforts have been made to limit *Ravin*, the decision will stand unless the state constitution is amended or a court determines that marijuana use has created a substantial threat to public health and welfare that justifies the state's intrusion into the home. This is a very high bar to meet, and the *Ravin* precedent has rested undisturbed for nearly forty years. Finally, the *Ravin* Doctrine shares elements of both legalization and decriminalization paradigms. *Ravin* clearly legalized certain conduct—under the rule adults are not subject to civil or criminal penalties for possession or use of small amounts of marijuana in the home. But the Alaska Statutes—the "laws on the books"—punish all non-medical marijuana use and possession, though some offenses, such as first or second offenses for simple possession in the home, are subject only to fines. In this way, Alaska's statutes are more indicative of a decriminalization state, as opposed to a legalized jurisdiction. Thus, for purposes of this article, Alaska is included among states that have decriminalized marijuana use.

The Federal Controlled Substances Act

The *Ravin* Doctrine, Alaska's medical marijuana statute, and other state decriminalization and legalization laws fall under the shadow of the federal Controlled Substances Act (CSA). The CSA, enacted in 1970, governs the manufacture, possession, use, and distribution of certain substances.

The CSA classifies marijuana as a Schedule I substance—a drug that is dangerous, highly addictive, and with no medical value. Other Schedule I substances include heroin, LSD, ecstasy, and peyote. The CSA makes all marijuana possession, use, and sale illegal, and violations of the CSA’s marijuana provisions carry steep criminal penalties. Thus, those who use, possess, or sell marijuana in compliance with state laws that authorize medical or recreational marijuana use still violate federal law.

This is a complicated and confusing concept. Our government structure allows state and federal laws to develop and operate independently along parallel tracks. When there is a conflict, the federal law controls. This means that the federal government could pursue and prosecute marijuana users, growers, and retailers who are operating in accordance with a valid state law. However, the federal government may not require states to use their resources to enforce federal drug laws, or compel states to enact and enforce drug laws that mirror the federal standards. States can therefore experiment with different legalization and decriminalization programs, but the experiments may lead to a complicated and potentially antagonistic state-federal relationship.

Colorado, Washington, and the Federal Response

In November 2012, voters in Colorado and Washington approved ballot measures to legalize personal recreational marijuana use for adults 21 years old and over and allow the licensed commercial sale of marijuana. These laws require strict regulatory frameworks to control the cultivation, distribution, and taxation of marijuana. The Colorado and Washington legalization laws, known as “tax and regulate” laws, were the most sweeping changes to state drug laws in the United States since California became the first state to legalize marijuana for medical use in 1996. In 2014, Colorado and Washington became the first states to allow adults to legally purchase and sell marijuana for recreational purposes in retail establishments.

Strict enforcement of the federal CSA could have been fatal to these efforts. But the federal government has thus far been supportive of the Colorado and Washington plans. The United States Department of Justice (DOJ) announced that while it remains committed to enforcing the federal marijuana prohibition, it would not immediately take legal action to have the Colorado and Washington laws overturned. Instead it would take a “trust but verify” approach. This approach respects state sovereignty and allows the states to function in their traditional capacity as “laboratories of de-

mocracy,” a phrase popularized by former Supreme Court Justice Louis Brandeis, and understood to mean that states may “try novel social and economic experiments without risk to the rest of the country.”

United States Deputy Attorney General James M. Cole explained the new federal marijuana enforcement policy in an August 2013 guidance memo to federal prosecutors. Cole’s memo outlined several key points: it allowed the Colorado and Washington recreational marijuana legalization laws to go into effect; permitted medical marijuana distributors and suppliers operating in compliance with state laws to continue; and reiterated that federal resources should not be used to prosecute seriously ill medical marijuana patients, their caregivers, or individuals who possess small amounts of marijuana for other personal uses.

The linchpin of the policy is that it requires state governments to take an active role in creating and implementing “strong and effective regulatory and enforcement systems” to mitigate the potential harm legalization and decriminalization could pose to public health, safety, and other law enforcement efforts. If state regulatory protocols are eventually found to be ineffective, DOJ could challenge the regulatory structure itself and bring individual enforcement actions, including criminal prosecutions.

The memo also identified eight instances where federal marijuana laws would still be enforced by DOJ, irrespective of state laws, in order to prevent:

- distribution of marijuana to minors;
- revenue from marijuana sales going to criminal enterprises;
- exportation of marijuana from states where it is legal to states where it is not;
- the use of state-authorized marijuana activity as a cover or pretext for other illegal activity;
- violence and use of firearms in the cultivation and distribution of marijuana;
- driving under the influence of marijuana and other public health consequences associated with marijuana use;
- growing marijuana on public lands; and
- marijuana use or possession on federal property.

In addition to the Cole Memo’s criminal enforcement guidelines, DOJ and the Department of Treasury Financial Crimes Enforcement Network (FinCEN) issued guidance intended to make it easier for marijuana-related businesses to operate. FinCEN’s 2014 guidelines allow banks to

legally provide financial services to state-licensed marijuana businesses without fear of federal punishment. Much like the Cole Memo requirements, under this policy, banks must vigorously monitor their marijuana-industry customers to ensure compliance with FinCEN’s guidelines and that the DOJ enforcement priorities do not suffer.

The Cole Memo and the FinCEN guidelines are policy statements that reflect the Obama administration’s current enforcement priorities. They instruct federal prosecutors, but they do not formally amend the CSA or federal sentencing laws. These policies remain subject to the prerogatives of the executive branch, may change without much notice or deliberation, and will not necessarily be extended by the next administration. Congress, however, could codify and secure an individual’s ongoing ability to act in concert with state marijuana laws without risk of federal penalty. Several such marijuana law reform bills are beginning to work their way through Congress, including bills that would assign marijuana to a less severe CSA schedule category; remove marijuana from the CSA entirely and thereby end federal marijuana prohibition; amend the CSA so that its marijuana provisions would not apply to anyone acting in compliance with state marijuana laws; provide additional protection for banking institutions; and prohibit the Drug Enforcement Administration (DEA) from spending federal funds to arrest state-licensed medical marijuana patients or from targeting medical marijuana operations that are in compliance with state laws.

The Impact of Shifting State Laws and Federal Enforcement Policies in Alaska

The creation of regulated commercial marijuana industries in Colorado and Washington is significant for Alaska. Though the Colorado and Washington laws themselves do not have any direct bearing on the rights of Alaskans or on Alaska law, these new laws do raise important considerations. First, marijuana cannot be transported between those states and Alaska. Individuals traveling to or from Alaska remain subject to federal law and individual state jurisdiction. Next, Alaskans will have the opportunity to vote on a similar tax and regulate law (Ballot Measure 2, “An Act To Tax And Regulate The Production, Sale, And Use Of Marijuana”) at the November 2014 general election. Ballot Measure 2 seeks to make the non-public use and possession of up to one ounce of marijuana legal for adults 21 and over and would establish a regulated system of marijuana cultivation, licensed retail sale, and taxation. The ballot language



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gives the state nine months to establish the necessary regulatory framework. Voters in Alaska can therefore look to the experiences in Colorado and Washington to help inform their decisions. If the initiative passes, the regulations implemented in Colorado and Washington could guide the Alaska agencies charged with creating the new programs.

The impact of the new DOJ enforcement policies and changes to banking and business regulations can be viewed in a similar way: there is not much immediate impact on current Alaska laws, but there are some important implications. Alaska was one of the first states to legalize marijuana for medicinal use, so any changes to federal marijuana enforcement are relevant to Alaska's registered medical marijuana users and to the state agencies that oversee the program. On this matter, the Cole Memo confirms that medical marijuana patients and those caring for them in compliance with state laws are not an enforcement priority. As for the *Ravin* Doctrine, which permits the possession of small amounts of marijuana on private property for recreational use, DOJ has historically left such "lower-level or localized activity" within the purview of state and local authorities. The Cole Memo reaffirms that restricting conduct protected by *Ravin* is still not a priority of the federal government. Finally, the Cole Memo provides leeway for states to rethink marijuana laws without fear of an immediate federal crackdown. Absent additional direction from DOJ or further ac-

tion by Congress or the courts, the policies announced in the Cole Memo would apply to a new legal marijuana industry in Alaska.

Conclusion

Federal law currently prohibits all marijuana use and possession, but many states have made changes to their criminal marijuana laws which directly contradict the federal statutes. A total of 28 different states and Washington, D.C. have either decriminalized personal marijuana use or passed a medical marijuana law. Some states have done both. Colorado and Washington State recently created tax and regulate programs for recreational marijuana use and sale. The majority of Americans now live in jurisdictions that have liberalized marijuana laws.

This trend is continuing. Legalization measures will be on the ballot in Alaska, Oregon, and Washington, D.C., this year. Similar measures appear likely to be voted on in Arizona, California, Maine, and Nevada in 2016, and legalization lobbying efforts are underway in several other state legislatures. During the past year another ten states that do not otherwise permit medical marijuana use passed laws that allow for the use of low-THC marijuana extracts (tetrahydrocannabinol, the psychoactive component in marijuana) to treat certain seizure disorders.

This trend has been attributed to a number of factors: growing displeasure with the social costs of the criminalization of marijuana, including the discrepancy between the amount of time and money spent on criminal enforcement relative to the negative

health effects of marijuana; racial imbalance in marijuana arrest rates, which disproportionately impact people of color; clearer understanding of the collateral consequences of marijuana arrests, including the impacts on employment opportunities, and access to housing, student loans, and public benefits; increased acceptance and understanding of the medicinal benefits of marijuana; and the potential positive economic impact of taxing and regulating marijuana like alcohol and tobacco.

The federal government has thus far tolerated the recent substantial changes to state marijuana laws, announcing that it would not interfere with state laws that legalize marijuana use so long as states maintain rigorous regulatory standards. The United States Department of Justice and the Treasury Department have also issued guidelines intended to make it easier for individuals and businesses acting in accordance with state marijuana laws to operate. These policies do not provide immunity from prosecution, but they allow marijuana legalization experiments to continue by dampening the risk of federal prosecution. This is the case in Alaska, where the state's longstanding personal use and medical marijuana laws remain in effect, and where voters may approve one of the country's next legalized, taxed, and regulated marijuana plans this fall.

Jason Brandeis, J.D., is a member of the Justice Center faculty. In his private law practice he provided legal representation in administrative agency proceedings to the Campaign to Regulate Marijuana Like Alcohol in Alaska.