# AFTER THE CHEERING STOPPED: DECRIMINALIZATION AND LEGALISM'S LIMITS

*Wayne A. Logan**

*To the great relief of many, American criminal law, long known for its harshness and expansive prohibitory reach, is now showing signs of softening. A prime example of this shift is seen in the proliferation of laws decriminalizing the personal possession of small amounts of marijuana: today, almost twenty states and dozens of localities have embraced decriminalization in some shape or form, with more laws very likely coming to fruition soon. Despite enjoying broad political support, the decriminalization movement has, however, failed to curb a core feature of criminalization: police authority to arrest individuals suspected of possessing marijuana. Arrests for marijuana possession have skyrocketed in number in recent years, including within decriminalization jurisdictions. This Article examines the chief reasons behind this disconnect, centering on powerful institutional incentives among police to continue to make arrests, enabled by judicial doctrine that predates the recent shift toward decriminalization. The Article also identifies ways to help ensure that laws decriminalizing simple marijuana possession, as well as other low-level offenses, better achieve decriminalization's goal of limiting police arrest authority and the many negative personal consequences flowing from arrests.*



* Gary & Sallyn Pajcic Professor of Law, Florida State University College of Law. Thanks to Josh Bowers, Jeffrey Fagan, Chris Slobogin, and Ron Wright for their very helpful comments on prior drafts; thanks also to AnnaLaura Rehwinkel and Elizabeth Farrell for their excellent research and library support.

## INTRODUCTION

It seems that when it comes to criminal justice, as Bob Dylan once put it, "the times they are a-changing."[1] After a several-decades-long experiment in harsh penality, state and federal governments alike are rethinking their reliance on lengthy prison terms[2] and the collateral consequences flowing from conviction.[3] They also are showing greater willingness to except from the common "one-way ratchet" of criminalization,[4] taking steps to shrink their criminal codes and decriminalize conduct once classified as criminal.[5]

A notable example of this latter shift is found in legislative efforts to decriminalize the personal possession of small amounts of marijuana. While marijuana decriminalization first took root early in the nation's war on drugs, in 1973,[6] it has garnered increasing interest of late. Today,

---

1 Bob Dylan, *The Times They Are a-Changin'*, *on* THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

2 *See* NICOLE D. PORTER, THE SENTENCING PROJECT, ON THE CHOPPING BLOCK, 2013: STATE PRISON CLOSURES (2013), *available at* http://sentencingproject.org/doc/publications/inc_On%20the%20Chopping%20Block%202013.pdf.

3 *See* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013); The Editorial Bd., *In Search of Second Chances*, N.Y. TIMES, May 31, 2014, http://www.nytimes.com/2014/06/01/opinion/sunday/in-search-of-second-chances.html?_r=0.

4 William J. Stuntz, *The Pathological Politics of the Criminal Law*, 100 MICH. L. REV. 505, 509 (2001). *See also* Mary Fan, *Legalization Conflicts and Reliance Defenses* 92 WASH. U. L. REV (forthcoming) ("Criminalization is much easier to achieve than decriminalization."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437535.

5 *See* THE SPANGENBERG PROJECT, AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_aba_tsp_reclassification_report.authcheckdam.pdf; American Bar Association, Recommendation 102C, at 8 (adopted Feb. 8–9, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/102C.authcheckdam.pdf ("In place of criminal sanctions, jurisdictions should instead implement a system of civil fines and remedies to address minor offenses that pose no threat to society."); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225 (2007) (noting efforts including "repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions"). While most such efforts occur at the state level, localities have also embraced decriminalization. *See, e.g.*, CITY OF PROVO, UTAH CODE § 9.17.010 (2013) (enacting "Chapter . . . with the intent to decriminalize, where possible, violations of municipal law which have traditionally been regulated by the criminal, laws. This is done to assist residents of Provo City, and others, by expediting the resolution of cases and to remove the social stigma attached to criminal actions.").

6 *See infra* Part I.A.

public opinion polls show unprecedented support for decriminalization,[7] and eighteen states, the District of Columbia and multiple localities have to some extent decriminalized possession,[8] with other jurisdictions seemingly poised to do the same.[9]

Although the political significance of the shift is not to be discounted, it has become increasingly apparent that public sentiment is at odds with a countervailing empirical reality: despite ongoing decriminalization, arrests for marijuana possession have skyrocketed in number in recent years, increasing by several orders of magnitude since 2001.[10] In 2012 alone, there were almost 750,000 marijuana-related arrests in the U.S., more than 87% of which were for simple possession.[11] Even more curious, several states adopting decriminalization boast among the nation's highest per capita arrest rates for possession,[12] and cities in which decriminalization was adopted—New York and Chicago in particular—continued to boast very high numbers of possession arrests.[13]

This Article seeks to explain this legal-empirical disconnect and offer some cautionary observations if, as expected, the nation continues to embrace marijuana decriminalization and decriminalization more generally. Part I examines efforts by state and local governments to decriminalize possession of small amounts of marijuana for personal use and highlights how the political shift has not resulted in the expected dramatic decrease in possession arrests. Part II considers several of the possible reasons for this, focusing first on the critical role played by arrests for low-level offenses, including marijuana possession,[14] in modern

---

7 *See, e.g.*, *Poll: More than Two-Thirds of Delaware Voters Support Removing Criminal Penalties for Marijuana Possession and Replacing Them with a Civil Fine*, MARIJUANA POLICY PROJECT, http://www.mpp.org/media/press-releases/poll-more-than-two-thirds-of.html (last visited Dec. 26, 2014) (noting that 68% of Delaware and 63% of Illinois registered voters favor decriminalization).

8 David Firestone, Op-Ed, *Let States Decide on Marijuana*, N.Y. TIMES, July 26, 2014, http://www.nytimes.com/2014/07/27/opinion/sunday/high-time-let-states-decide-on-marijuana.html?op-nav.

9 *Id.*

10 *See infra* Part I.B.

11 *See Crime in the United States 2012*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested (last visited Dec. 26, 2014).

12 *See infra* Part I.B.

13 *See infra* Part I.B.

14 For discussion of the modern preoccupation with possession offenses, especially involving drugs, see Markus Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001).

policing.[15] Arrests, which have major impact on physical liberty[16] and privacy,[17] and long-term negative effects on life prospects,[18] also have major instrumental benefits for police officers and their departments, which they understandably seek to preserve. At the same time, courts, asked to address legal challenges to the exercise of police authority, do so against the backdrop of judicial doctrine that predates recent decriminalization efforts and enables continued aggressive street-level enforcement by police.[19]

Part III seeks to draw some lessons from what to date has been a less than entirely successful democratic experiment in decriminalization. One observation lies in the reality that decriminalization, in terms of substantive law and the procedure conditioning its application, does not always achieve the diminution in police authority imagined by proponents. Often this is because the law adopted really amounts to depenalization, imposing a fine and lessening or denying the possibility of incarceration or creation of a criminal record, yet leaving intact police power to execute arrests and carry out searches. It also can be the case that legislative efforts to reclassify possession as noncriminal do not actually limit police authority, as a result of broad judicial understandings of what qualifies as an arrestable offense.

Against this backdrop, the central institutional role of police as a source of possible resistance to decriminalization becomes critically apparent. With decriminalization, as is the case with policing more gener-

---

15 *See, e.g.*, Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351 (2013); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013).

16 *See* United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (describing arrest as "a serious personal intrusion regardless of whether the person seized is guilty or innocent"); United States v. Marion, 404 U.S. 307, 320 (1971) (describing arrest as "a public act that may seriously interfere with the defendant's liberty . . . disrupt his employment, drain his financial resources, curtail his associates, subject him to public obloquy, and create anxiety in him, his family, and his friends"). On the negative personal consequences of arrest more generally, see Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987 (2014).

17 A lawful arrest allows police to search an individual and his "grab area," *see* Chimel v. California, 395 U.S. 752, 763 (1969), and possibly his car, *see* Arizona v. Gant, 556 U.S. 332, 341–44 (2009). When brought to a detention facility persons arrested for even a minor offense can be subject to a strip search, without any individualized suspicion that they possess weapons or contraband. *See* Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510, 1520–23 (2012).

18 Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL. ST. J., Aug. 18, 2014, http://online.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 (noting negative impact of arrests in variety of areas including employment, housing, and loans).

19 Reflecting, as Judge Henry Friendly once observed, the "everlasting aye or nay of a constitutional decision." Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 930 (1965).

ally, the solution will not likely lie in federal constitutional change,[20] as little reason exists to think that the Supreme Court will undo its permissive Fourth Amendment jurisprudence anytime soon. Rather, if the goals of decriminalization are to be realized, promise for positive change resides in state courts imposing limits on the search and seizure authority of police and public pressure being brought to bear on police departments to ensure that decriminalization is given effect on the nation's streets.

## I. A CASE STUDY: DECRIMINALIZATION OF MARIJUANA POSSESSION

### *A. Democracy and Decriminalization*

Government efforts to criminalize marijuana originated in 1915 when Utah enacted a law prohibiting the sale or possession of the drug.[21] Other states, motivated by a variety of factors, including racial concerns over marijuana use by Mexican- and African-Americans,[22] and the belief that it served as a gateway to more serious drugs and caused mental illness and criminal behavior,[23] quickly followed suit. As of 1931, twenty-two states criminalized marijuana use, possession, or trafficking,[24] and by 1937 the number of prohibitionist states grew to thirty-five.[25] By the 1950s, all states had criminal laws restricting marijuana, threatening increasingly harsh punishments.[26] Arrests for marijuana offenses kept pace with this shift, rising exponentially over time: from about 20,000 in 1965 to 190,000 in 1970, and then more than doubling to 421,000 in 1973.[27]

The federal government first targeted marijuana in 1937, when the Marijuana Tax Act imposed stringent regulations on prescribing physicians, backed by fines.[28] Not until 1970, however, a year after President

---

20 *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 762–63, 775–81 (2012).

21 Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970). New York City's Sanitary Laws listed marijuana as a prohibited drug in 1914. *Id.*

22 Brent Staples, *The Federal Marijuana Ban Is Rooted in Myth and Xenophobia*, N.Y. TIMES, July 29, 2014, http://www.nytimes.com/2014/07/30/opinion/high-time-federal-marijuana-ban-is-rooted-in-myth.html?op-nav.

23 MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA—MEDICAL, RECREATIONAL AND SCIENTIFIC 24–26 (2012).

24 *Id.*

25 Bonnie & Whitebread, *supra* note 21, at 1034.

26 *See id.* at 1074–77.

27 *See* James B. Slaughter, *Marijuana Prohibition in the United States: History and Analysis of a Failed Policy*, 21 COLUM. J.L. & SOC. PROBS. 417, 420–21 (1988).

28 Marijuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (1937). Five years before, Congress, alarmed over the prospect of interstate crime caused by an increase in marijuana use,

Richard Nixon declared a "war on drugs,"[29] did Congress formally criminalize the manufacture, sale and possession of marijuana when it passed the Controlled Substances Act,[30] classifying marijuana as a Schedule I drug alongside heroin and cocaine.[31]

Almost as soon as marijuana was criminalized by the federal government, however, decriminalization became the subject of public consideration. In 1972, President Nixon created the National Commission on Marihuana and Drug Abuse at the behest of Congress to assess marijuana policy.[32] Headed by former Pennsylvania Republican Governor Raymond Shafer, the Commission conducted a dozen public hearings and reviewed available research, and ultimately unanimously recommended that criminal penalties for the private possession and use of marijuana be eliminated[33] and that states decriminalize public possession (but not use).[34]

Shortly after the Shafer Commission's findings were made public a New York Times editorial urged a "sharp scaling down of marijuana penalties" and the "elimination of criminal sanctions."[35] The American Bar Association, while stopping short of backing total elimination of criminal penalties, likewise recommended that penalties be significantly reduced.[36] Similar reforms were advocated by other prominent national organizations, including the National Conference of Commissioners on Uniform State Laws and the American Medical Association.[37]

Although Congress and President Nixon rejected the Commission's findings, with Nixon stating that he did not believe that effective criminal justice could be based on "a philosophy that something is half legal and half illegal,"[38] interest in decriminalization caught on in the states. In 1973, Oregon became the first state to decriminalize simple possession,

---

passed the Uniform Narcotic Drug Act, which encouraged states to adopt prohibitions. Bonnie & Whitebread, *supra* note 21, at 1028.

29 DAVID F. MUSTO & PAMELA KORSMEYER, THE QUEST FOR DRUG CONTROL: POLITICS AND FEDERAL POLICY IN A PERIOD OF INCREASING SUBSTANCE ABUSE, 1963-1981, at 60 (2002).

30 Comprehensive Drug Abuse and Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236–1285 (codified as amended at 21 U.S.C. §§ 812–844 (2013)).

31 18 U.S.C. §§ 812, 841(a)(1), 844(a) (2013).

32 NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972).

33 *See* Fred P. Graham, *National Commission to Propose Legal Private Use of Marijuana*, N.Y. TIMES, Feb. 13, 1972, at 1.

34 *Id.*

35 Editorial, *'Decriminalizing' Marijuana*, N.Y. TIMES, Feb. 20, 1972, at E12.

36 *See* Fred P. Graham, *A.B.A. Would Ease Marijuana Laws*, N.Y. TIMES, Aug. 18, 1972, at 10.

37 Richard J. Bonnie, *The Meaning of "Decriminalization": A Review of the Law*, 10 CONTEMP. DRUG PROBS. 277, 278 (1981).

38 Slaughter, *supra* note 27, at 423.

making it a civil violation punishable by a fine.[39] By 1975, Colorado, Alaska, Ohio, and California had decriminalized possession to some extent,[40] and in ensuing years several more states followed suit: Maine and Minnesota (1976); Mississippi, North Carolina, and New York (1977); and Nebraska (1978).[41]

In the late 1970s, however, the decriminalization movement began to stall. At the federal level, President Jimmy Carter's proposal to remove criminal penalties for possession of small quantities of marijuana for personal use was rebuffed by Congress,[42] with House members expressing concern that there would be first decriminalization, then legalization.[43] In 1979, more than a dozen state legislatures introduced decriminalization bills; none passed.[44]

By the 1980s, although popularity of marijuana among American youth—across all socio-economic strata—made decriminalization more politically palatable,[45] the drug's association with remnants of the hippie counterculture fostered political resistance.[46] In the 1980s as well, alarm grew over cocaine, crack cocaine in particular, prompting a dramatic infusion of resources for drug enforcement, which as cocaine use receded, resulted in a rededication of attention to enforcing marijuana prohibition.[47]

In the last decade or so, however, the decriminalization pendulum has swung back the other way. In 2001, Nevada passed its decriminalization statute.[48] In 2008, 65% of Massachusetts voters backed the "Massachusetts Sensible Marijuana Policy Initiative,"[49] which changed simple marijuana possession from a misdemeanor to a "civil offense."[50] In 2011, Connecticut's decriminalization statute went into effect;[51] in

---

39 *Id.* at 425.

40 James A. Inciardi, *Marijuana Decriminalization Research*, 19 CRIMINOLOGY 145, 151 (1981).

41 *Id.*

42 *Carter Asks Congress to Decriminalize Marijuana Possession*, N.Y. TIMES, Mar. 15, 1977, at 15.

43 *Id.*

44 Eric Josephson, *Marijuana Decriminalization: The Processes and Prospects of Change*, 10 CONTEMP. DRUG PROBS. 291, 292 (1981).

45 Inciardi, *supra* note 40, at 155.

46 *Id.*

47 Slaughter, *supra* note 27, at 441–45.

48 John Hughes, *Nevada's Unfortunate Drug Initiative*, CHRISTIAN SCI. MONITOR (Oct. 12, 2002), http://www.csmonitor.com/2002/1016/p11s02-cojh.html.

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

50 David Abel, *Voters Approve Marijuana Law Change*, BOSTON GLOBE, Nov. 11, 2008, http://www.boston.com/news/local/articles/2008/11/05/voters_approve_marijuana_law_change/.

51 David Owens, *Police Prepare for Marijuana Decriminalization*, THE HARTFORD COURANT, July 1, 2011, http://articles.courant.com/2011-07-01/news/hc-police-new-marijuana-law-0701-20110630_1_marijuana-car-search-police-car.

2013 Rhode Island[52] and Vermont both became decriminalization jurisdictions;[53] and Maryland[54] and the District of Columbia (pending congressional approval)[55] joined the ranks in 2014.[56]

Decriminalization has also taken root at the local level. In Chicago, for instance, a city in which police made over 33,000 marijuana possession arrests in 2010,[57] the city council in 2012 voted overwhelmingly (43-3) to have police ticket but not arrest individuals who possess less than fifteen grams of marijuana, making it a fine-only offense.[58] Further indicative of the shift in political mood, multiple cities and counties in states retaining criminal prohibition have requested that their police treat marijuana possession as a "lowest law enforcement priority."[59]

The laws have been motivated by a variety of factors. In addition to the cost associated with incarcerating individuals convicted of possessing marijuana,[60] and a desire to loosen government control over victimless

---

52 W. Zachary Malinowski, *R.I. Law Now Says It's Not a Crime to Possess Small Amounts of Marijuana*, PROVIDENCE J., Apr. 1, 2013, http://www.providencejournal.com/breaking-news/content/20130401-r.i.-law-now-says-it-s-not-a-crime-to-possess-small-amounts-of-marijuana.ece.

53 Nick Wing, *Vermont Marijuana Decriminalization Law Goes into Effect*, HUFFINGTON POST (July 1, 2013), http://www.huffingtonpost.com/2013/07/01/vermont-marijuana-decriminalization_n_3529294.html.

54 Mollie Reilly, *Maryland Decriminalizes Marijuana Possession*, HUFFINGTON POST (Apr. 14, 2014), http://www.huffingtonpost.com/2014/04/14/maryland-marijuana-decriminalization_n_5107412.html.

55 Trip Gabriel, *Marijuana Is at Center of Feud in Capital*, N.Y. TIMES, July 13, 2014, http://www.nytimes.com/2014/07/14/us/politics/marijuana-decriminalization-in-washington-dc-is-contested-by-federal-lawmakers.html?_r=0.

56 The laws vary in their threshold maximal amounts, ranging from less than half an ounce (Connecticut and Maryland) to just under three and one-half ounces (Minnesota). *See States that Have Decriminalized*, NORML, http://norml.org/aboutmarijuana/item/states-that-have-decriminalized (last visited Dec. 26, 2014).

57 AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 15 (2013) [hereinafter ACLU, WAR ON MARIJUANA], *available at* https://www.aclu.org/sites/default/files/assets/1114413-mj-report-rfs-rel1.pdf.

58 Kristen Mack, *Chicago Oks Pot Tickets*, CHI. TRIB., June 28, 2012, http://articles.chicagotribune.com/2012-06-28/news/ct-met-council-0628-20120628_1_pot-possession-possession-of-small-amounts-pot-tickets. Support at the local government level for decriminalization, it should not go unacknowledged, is not uniform. Ohio provides perhaps the best example: state law classifies possession as a minor misdemeanor, yet local governments have exercised their home rule authority to classify possession as a first-degree misdemeanor, a more serious and per se arrestable offense. *See* City of Niles v. Howard, 466 N.E.2d 539, 541 (Ohio 1984); State v. Williams, No. 2009CA00196, 2010 WL 3766774, at *2 (Ohio 5th Dist. Ct. App. Sept. 27, 2010). On the power of local governments to legislate their independent criminal norm preferences more generally see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

59 *See Lowest Law Enforcement Jurisdictions*, MARIJUANA POLICY PROJECT, http://www.mpp.org/reports/lowest-law-enforcement.html (last visited Dec. 26, 2014) (noting thirteen localities as well as Denver and Seattle, cities located in states in which possession has since been legalized).

60 *See* ACLU, WAR ON MARIJUANA, *supra* note 57, at 4.

crimes more generally,[61] decriminalization advocates point to major racial disparities in arrest and conviction rates,[62] and the long-term negative consequences of continued criminalization for individuals (including collateral consequences such as lost access to student loans and housing).[63]

### *B. Decriminalization on the Streets*

The marijuana decriminalization trend represents a major political shift. As noted at the outset, however, it also elides a curious counter-reality: a concurrent massive increase in the number of marijuana possession arrests.

As a substantial body of research shows, the war on drugs has largely been a war on marijuana,[64] especially possession of small amounts of the drug.[65] In 2010, there were over 889,000 marijuana-related arrests, 140,000 more than in 2001, and 88% of the arrests were for possession.[66] Of particular significance to the discussion here, heavy police focus on arrests for possession is evidenced in jurisdictions that have adopted decriminalization policies. For instance, Nevada and Oregon numbered among the top five jurisdictions with the greatest increase in possession rates between 2001 and 2010.[67] And in 2012, New York and

---

61 *See, e.g.*, DOUGLAS N. HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS (2002).

62 ACLU, WAR ON MARIJUANA, *supra* note 57, at 17–20; Andrew Golub et al., *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 132–55 (2007); Holly Nguyen & Peter Reuter, *How Risky Is Marijuana Possession? Considering the Role of Age, Race and Gender*, 58 CRIME & DELINQUENCY 879, 883–84, 890 (2012); Ian Urbana, *Blacks Are Singled Out for Marijuana Arrests, Federal Data Suggests*, N.Y. TIMES, June 3, 2013, at A15. This is despite data showing similar marijuana usage rates among blacks and whites. Rajeev Ramchand et al., *Racial Differences in Marijuana-Users' Risk of Arrest in the United States*, 84 DRUG & ALCOHOL DEPENDENCE 264, 265–70 (2006).

63 DRUG POLICY ALLIANCE, APPROACHES TO DECRIMINALIZING DRUG USE & POSSESSION 1 (2014), *available at* http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Approaches_to_Decriminalization_Feb2014.pdf.

64 *See* Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, HARM REDUCTION J., Feb. 9, 2006, at 3, *available at* http://www.harmreductionjournal.com/content/3/1/6 (noting that in 1992 marijuana arrests made up only 28% of all drug arrests and that by 2002 the percentage grew to 45%).

65 *Id.* at 2. From 1990–2002, marijuana arrests accounted for 82% of the increase in drug arrests nationwide (450,000) and 79% of these arrests were for possession alone. In 2008, almost 800,000 individuals were arrested for possession, three times the number of such arrests in 1991. Nguyen & Reuter, *supra* note 62, at 880.

66 ACLU, WAR ON MARIJUANA, *supra* note 57, at 14.

67 JON B. GETTMAN, MARIJUANA IN THE STATES 2012: ANALYSIS AND DETAILED DATA ON MARIJUANA USE AND ARRESTS 14–15 (2014), *available at* http://norml.org/pdf_files/JBG_Marijuana_in_the_States_2012.pdf. According to an earlier study, examining 1991–2000 data, more than half of the states decriminalizing possession had higher per capita arrest rates than criminalization states and experienced significant increases in the number of possession arrests. Rosalie L. Pacula et al., *Marijuana Decriminalization: What Does It Mean*

Nebraska had the second and fifth highest per capita arrest rates in the nation for marijuana possession.[68]

Perhaps the nation's most widely reported example of local-level resistance was seen in New York City. Despite New York State having decriminalized personal possession of marijuana in 1977, City police long waged an aggressive campaign to arrest individuals for possession, most recently generating massive numbers of arrests based on a proviso in state law allowing arrest when marijuana is "open to public view" (a class B misdemeanor).[69] According to media reports and a lawsuit challenging the practice, police invoked the exception when, after stopping individuals and ostensibly having reasonable suspicion that they possessed a weapon, commanded that they empty their pockets, resulting in the public view of marijuana.[70]

Marijuana possession arrests figured centrally in the NYPD's "quality of life" and "order maintenance" policing practices,[71] accounting for a 2,461% increase in marijuana possession arrests since the late 1990s.[72] Between 1998 and 2013 marijuana possession arrests in New York City ranged from 30,000–50,000 a year,[73] dwarfing the number of such arrests in the state as a whole,[74] and reflecting dramatic racial disparities.[75] Despite strenuous public criticism, and concern voiced by New York Governor Cuomo, possession arrests continued unabated.[76]

---

*in the United States?* 22–23 (Nat'l Bureau of Econ. Research, Working Paper No. 9690, 2003), *available at* http://www.nber.org/papers/w9690.

68 ACLU, WAR ON MARIJUANA, *supra* note 57, at 15.

69 N.Y. PENAL CODE § 221.10 (McKinney 2014).

70 Natapoff, *supra* note 15, at 1064–65.

71 *See* Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEG. STUD. 591, 592 (2010).

72 King & Mauer, *supra* note 64, at 3; *see also* Geller & Fagan, *supra* note 71, at 591 ("Although possession of small quantities of marijuana has been decriminalized in New York State since the late 1970s, arrests for marijuana possession in New York City have increased more than tenfold since the mid-1990s, and remain high more than 10 years later."). Possession arrests, while playing a critical role, have been but a part of the massive number of low-level offenses serving as grist for the mill of the City's order maintenance policing. *See* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEG. ETHICS 285, 298 n.80 (2014).

73 Christopher Mattias, *NYC Police Making Fewer Marijuana Arrests, But There's Still a Huge Problem*, HUFFINGTON POST (Apr. 18, 2014), http://www.huffingtonpost.com/2014/04/18/new-york-city-marijuana-arrests_n_5171657.html.

74 Bruce D. Johnson et al., *An Analysis of Alternatives to New York City's Current Marijuana Arrest and Detention Policy*, 31 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 226, 243 (2008).

75 Golub et al., *supra* note 62, at 139.

76 Christopher Mathias, *NYPD Still Making Thousands of Marijuana Arrests, and One Lawmaker Has Had Enough*, HUFFINGTON POST (May 28, 2014), http://www.huffingtonpost.com/2014/05/28/nypd-marijuana-hakeem-jeffries_n_ 5400453.html; *80 Marijuana Possession Arrests a Day Is More of the Same*, MARIJUANA-ARRESTS.COM, http://marijuana-arrests.com/docs/MORE-OF-THE-SAME—NYC-Marijuana-Arrests-June2014.pdf (last visited Dec. 26, 2014). Only very recently, as this Article was going to press, did police signal a willingness to

Similar street-level resistance is evident in Chicago where, as mentioned earlier, the City Council in 2012 directed police to ticket (not arrest) for marijuana possession.[77] Notwithstanding that the law was motivated by a concern to have police dedicate their attention to more serious misconduct in a city with a high homicide rate,[78] police continued to make possession arrests,[79] at a rate even higher than before the law took effect.[80] After the law's implementation, the city's per capita marijuana possession arrest rate was over 2.3 times greater than the national average,[81] with rates in some neighborhoods being more than 1,100% greater.[82]

Police officials offered a variety of explanations for the outcome. According to the superintendent of police, officers made arrests when those detained lacked identification, smoked marijuana in public, or possessed the drug near a park or school grounds.[83] Another more practical reason was voiced by Chicago Fraternal Order of Police President Mike Shields, who offered that "[t]he ticketing process is a pain in the butt. It's so much easier to do a marijuana arrest the old-fashioned way."[84] Officials were also asked to explain why, despite city council concern

---

relent on their arrest policy, as a result of heavy pressure from new Mayor Bill de Blasio who campaigned as a staunch advocate of police reform. *See* Joseph Goldman, *Marijuana May Mean Ticket, Not Arrest, in New York City*, N.Y. TIMES, Nov. 9, 2014, http://www.nytimes.com/2014/11/10/nyregion/in-shift-police-dept-to-stop-low-level-marijuana-arrests-officials-say.html.

77 *See* Mack, *supra* note 58.

78 *Id.*

79 *See* Mike Dumke, *Mayoral Ally Thanks Police for Ignoring the Pot Decriminalization Law He Sponsored*, CHICAGO READER, Nov. 1, 2013, http://www.chicagoreader.com/Bleader/archives/2013/11/01/mayoral-ally-thanks-police-for-ignoring-the-pot-decriminalization-law-he-sponsored; *see also* Becky Schlikerman, *More Arrests than Tickets for Pot in Chicago*, CHICAGO SUN-TIMES, May 19, 2014, at 10.

80 Fran Spielman & Frank Main, *Pot Tickets a Bust*, CHICAGO SUN-TIMES, Oct. 25, 2013, at 10.

81 KATHLEEN KANE-WILLIS ET AL., ILLINOIS CONSORTIUM ON DRUG POLICY OF ROOSEVELT UNIVERSITY, PATCHWORK POLICY: AN EVALUATION OF ARRESTS AND TICKETS FOR MARIJUANA MISDEMEANORS IN ILLINOIS 19 (2014) [hereinafter ROOSEVELT UNIVERSITY STUDY].

82 *Id.*

83 Spielman & Main, *supra* note 80.

84 *Id.* To issue a ticket, police must be qualified to field-test the substance in question or summon a colleague who is, and a trip must be made to the station to inventory the drug, the field test kit and the test affidavit. *Id.* According to union president Shields, "I can get through a physical arrest in 45 minutes. With this new process, it probably takes about an hour and 15 minutes." *Id.* Shields elaborated: "If you're a gang banger and a known problem and you have weed, you're damn right you're getting locked up." *Id.* A supervisor in a high-crime district likewise related that citations are a "pain in the ass." Mike Dumke, *Chicago Decriminalized Marijuana Possession—But Not for Everyone*, CHICAGO READER, Apr. 7, 2014, http://www.chicagoreader.com/chicago/police-bust-blacks-pot-possession-after-decriminalization/Content?oid=13004240. In New York City, the arrest process has been similarly streamlined, requiring 30–60 minutes of officer time. Bruce D. Johnson et al., *Policing and Social Control of Public Marijuana Use and Selling in New York City*, 6 LAW ENFORCE-

over the racially skewed nature of marijuana possession arrests, over 78% of arrestees post-enactment were black and that several predominantly black areas of the city actually experienced increases in the number of possession arrests.[85] As noted by a local researcher familiar with the data, "[w]here the rubber hits the road is the practice, and there's a really big disconnect between the policy and the practice."[86]

The importance of police buy-in is borne out by experience in Illinois more generally where, despite state law continuing to criminalize possession, over one hundred municipalities have enacted ticket ordinances for marijuana possession.[87] In Chicago, 93% of alleged violations resulted in an arrest, whereas in nearby more affluent Evanston the rate was 31%.[88] In Champaign, where the University of Illinois is located, arrests were made in 25% of cases.[89] Underscoring the critical role of implementation, the authors of a recent study examining arrest practices in Illinois note that "policing practices must change. It is not enough to change the wording in the law. Without clear leadership in the municipality, practices may remain the same, even though, on the books, the law was changed."[90]

Similar resistance has been evidenced in other localities. In Flint, Michigan, for instance, city police and state troopers publicly proclaimed their intent to make possession arrests despite voters' strong endorsement of a ballot decriminalization initiative.[91] Philadelphia police responded in like fashion to the city council's endorsement of decriminalization.[92] Police have also ignored efforts by local voters and political bodies directing them to make enforcement of criminal possession laws a low priority.[93]

---

MENT EXECUTIVE FORUM 58, 67 (2006), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2964872.

85 Dumke, *supra* note 84.

86 Schlikerman, *supra* note 79, at 10 (quoting director of Roosevelt University's Illinois Consortium on Drug Policy).

87 ROOSEVELT UNIVERSITY STUDY, *supra* note 81, at 8.

88 *See id*. at iv–v.

89 *Id.* at 10. In Aurora, Illinois officials never implemented an ordinance that was adopted. *Id.* at 20.

90 *Id.*

91 Gary Ridley, *Flint Decriminalization of Marijuana Vote Only "Symbolic;" Arrests Will Continue, City Says*, MLIVE.COM (Nov. 8, 2012), http://www.mlive.com/news/flint/index.ssf/2012/11/flint_police_will_still_make_m.html (noting determination by Flint, Michigan police to enforce state law despite decriminalization ordinance approved by 57% of city voters).

92 Mike Adams, *Philly Police Ignore Decrim, 264 Arrests This Month*, HIGH TIMES (July 22, 2014), http://www.hightimes.com/read/philly-police-ignore-decrim-264-arrests-month.

93 *See, e.g.*, Mike Nizza, *Denver Officials Ignore Marijuana Votes*, THE LEDE N.Y. TIMES BLOG (Mar. 6, 2008, 9:13AM), http://thelede.blogs.nytimes.com/2008/03/06/denver-officials-ignore-marijuana-votes/; Phillip Smith, *Feature*: *Lowest Law Enforcement Priority Ma-*

## II. DECRIMINALIZATION AND ITS DISCONTENTS

As the preceding Part makes clear, democratic endorsement of decriminalization does not necessarily translate into fewer marijuana possession arrests. This Part examines the institutional forces militating against the wind down, focusing on resistance from police and the judicial doctrine that informs their work.

### *A. Police Instrumentalism*

It has long been recognized that police officers play a critical gatekeeping role in the criminal justice system. While they are expected to arrest individuals suspected of having committed serious crimes, they wield near-total discretion to execute arrests for low-level social-disorder offenses,[94] which have a variety of significant benefits for individual officers and the departments that employ them.

First, arrests serve as a tangible performance metric. Almost fifty years ago, Jerome Skolnick noted that arrests allowed police to fulfill "production demands,"[95] in what even then was recognized as "a major industry in modern urban society."[96] That arrests themselves fail to result in conviction is not especially important;[97] what is important, from the perspective of individual officers and their supervisors, is the number of arrests.[98]

---

*rijuana Initiatives Face the Voters in Five Cities*, STOPTHEDRUGWAR.ORG (Oct. 26, 2006), http://stopthedrugwar.org/print/1605.

94 *See* Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); *see also* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 547 (1960).

95 *See* JEROME SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 243 (1966); *see also* ARTHUR NIEDERHOFFER, BEHIND THE SHIELD: THE POLICE IN URBAN SOCIETY 53 (1967) ("[I]n the precinct a patrolman is measured by his arrest record.").

96 SKOLNICK, *supra* note 95, at 240–41.

97 *See* Gerald M. Caplan, Book Review, *Arrest: The Decision to Take a Suspect into Custody*, 80 HARV. L. REV. 484, 487–88 (1966) (noting practice of "nonprosecutive policing" with respect to low-level victimless crimes, "geared to a record-keeping system and a promotional structure that emphasizes 'clearance by arrest, not clearance by prosecution or conviction'"); Wayne R. LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEX. L. REV. 434, 445–48 (1967) (noting that police effectiveness with victimless offenses is not tied to clearance rates but rather is gauged by arrests and that a paucity of arrests suggests that police are not doing their job). Before the First World War, mayoral administrations in Cleveland and Toledo, Ohio experimented with a policy in which police were instructed that "their efficiency was determined not by the number of arrests they made but by the number of convictions which resulted from their arrests." Robert H. Bremner, *The Civic Revival in Ohio: Police, Penal and Parole Policies in Cleveland and Toledo*, 14 AM. J. ECON. & SOC. 387, 387 (1955).

98 *See, e.g.*, John A. Eterno, Op-Ed, *Policing by the Numbers*, N.Y. TIMES, June 17, 2012, http://www.nytimes.com/2012/06/18/opinion/the-nypds-obsession-with-numbers.html.

Police departments, despite evidence to the contrary,[99] have long resisted accusations that arrest quotas exist, a concern that has grown over time as departments[100]—especially in large urban areas[101]—have explicitly embraced quantitative management methods. Marijuana possession arrests afford a compelling illustration. For officers on street patrol, they are low hanging fruit,[102] as they are easy to make compared to arrests for other crimes,[103] and provide new officers with opportunities for training and experience.[104]

Marijuana possession arrests also provide tangible economic benefit. For officers, the arrests, especially when triggering overtime pay, amount to "collars for dollars."[105] For departments, while possession ar-

---

99 *See, e.g.*, JONATHAN RUBINSTEIN, CITY POLICE 50 (1973) ("Arrest quotas are rigidly enforced for vice arrests . . . . Regardless of their success in fulfilling other departmental goals, any failure to produce the necessary vice arrests means trouble for the captain, the lieutenants, the sergeants, and all the men in the district who have jobs that they want to keep."); *see also* JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 86–88, 96–98, 174 (1968) (noting arrest quotas in various municipal police departments).

100 The New York City Police Department's "CompStat" program, used since 1994 to track criminal incidents and citizen complaints in individual precincts, serves as the nation's foremost example. *See generally* DAVID WEISBURD ET AL., POLICE FOUND. REPORTS, THE GROWTH OF COMPSTAT IN AMERICAN POLICING (2004).

101 *See* JOHN A. ETERNO & ELI B. SILVERMAN, THE CRIME NUMBERS GAME: MANAGEMENT BY MANIPULATION 228–29 (2012) (noting use in *inter alia* Baltimore, Chicago, Los Angeles, Newark, and San Francisco). In New York City, CompStat has come under repeated fire for its purported causal role leading to arrest quotas. According to former NYPD Captain John Eterno:

> Eighteen years after the start of the much-vaunted CompStat system of data-driven crime fighting . . . precinct commanders are pitted against one another and officers are challenged to match or exceed what they did the previous year, month and week. Words like "productivity" are code for quotas. Supervisors must exceed last year's "productivity" regardless of community conditions, available budget and personnel, and, most important, the consequences to citizens.

Eterno, *supra* note 98; *see also* Nathaniel Bronstein, *Police Management and Quotas: Governance in the CompStat Era*, 48 COLUM. J. L. & SOC. PROBS. (forthcoming 2015) (manuscript at 12–13), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424912.

102 *See* David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55, 60 (2008); King & Mauer, *supra* note 64, at 5, 11.

103 *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2022 (2008) (discussing how drug arrests are a police focus because they are cheap to investigate and require fewer personnel hours than more serious crimes).

104 Harry Levine, *The Scandal of Racist Marijuana Arrests—and What to Do About It*, THE NATION (Nov. 18, 2013), http://www.thenation.com/article/176915/scandal-racist-marijuana-arrests-and-what-do-about-it?page=0,2.

105 HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997–2007, at 19–20, *available at* http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf. According to the study's authors, marijuana arrests have become a "'quality of life' issue – for the police." *Id.* at 19. Nor is it unprecedented for officer pay to be directly tied to the affirmative decision to arrest. *See, e.g.*, Brown v. Edwards, 721 F.2d 1442, 1452, 53 (5th Cir. 1984) (stating that a "Mississippi fee statute is not [unconstitutional] . . . where the arrest is

rests consume resources,[106] the budgetary effect is counterbalanced by federal government funding allocations tied to marijuana possession arrest numbers.[107] Moreover, marijuana arrests, like arrests for other low-level offenses, play a central sustaining role in an arrest-dependent system facing continued falling serious crime rates.[108]

Surely not to be overlooked as well, arrests provide police on street patrol major strategic and tactical benefits, satisfying a range of social control objectives, including maintaining respect, clearing the street of individuals who arouse general suspicion, and facilitating the investigation of other suspects.[109] At least as important, arrests afford police a key investigatory tool of immediate importance: they allow searches.

---

otherwise validly made without a warrant and on probable cause" and that an arrest is not rendered unconstitutional "simply on account of the officer's motives in making the arrest").

106 *See* DRUG POLICY ALLIANCE, ONE MILLION POLICE HOURS: MAKING 440,000 MARIJUANA POSSESSION ARRESTS IN NEW YORK CITY, 2002-2012, at 5, 7 (2013), *available at* http://www.drugpolicy.org/sites/default/files/One_Million_Police_Hours_0.pdf; *see also* King & Mauer, *supra* note 64, at 6.

107 ACLU, WAR ON MARIJUANA, *supra* note 57, at 100–04; *see also* Radley Balko, *Anatomy of a Pot Bust*, WASH. POST, June 5, 2014, http://www.washingtonpost.com/news/the-watch/wp/2014/06/05/anatomy-of-a-pot-bust/ (recounting testimony from a trial in San Francisco, where the Board of Supervisors directed police to make marijuana possession arrests a low enforcement priority, in which officers acknowledged that they received overtime pay for their work and that the department received federal money for buy-bust operations). For an earlier recognition of funding influence, see NAT'L COMM'N ON MARIJUANA AND DRUG ABUSE, *supra* note 32, at 129–30 (1972) ("The funding mechanism is so structured that it responds only when 'bodies' can be produced or counted. Such a structure penalizes a reduction in the body count, while it rewards any increase in incidence and arrest statistics with more money. Those receiving funds thus have a vested interest in increasing and maintaining those figures.").

108 King & Mauer, *supra* note 64, at 11; *see also* Joseph Goldstein, *Safer Era Tests Wisdom of "Broken Windows" Focus on Minor Crime*, N.Y. TIMES, July 24, 2014, http://www.nytimes.com/2014/07/25/nyregion/safer-era-tests-wisdom-of-broken-windows-focus-on-minor-crime-in-new-york-city.html?_r=0 (discussing significant drop in felony arrests and sharp increase in minor offense arrests as a result of N.Y.P.D. policing strategies and noting that "as the city grew safer, the police also pursued even lower violations, such as having a foot on a subway seat"); Issa Kohler-Hausmann, *End the War on Marijuana, NYPD*, N.Y. DAILY NEWS (Dec. 10, 2012), http://www.nydailynews.com/opinion/war-marijuana-nypd-article-1.1215819 ("New York City's marijuana exceptionalism has little to do with contributing to public safety . . . . [T]here is mounting evidence that patrol officers feel pressure to issue summons and make misdemeanor arrests just to hit targets, irrespective of public safety goals."). Before CompStat, the NYPD averaged 2,300 marijuana possession arrests per year; since then the annual average has been 36,000. HARRY G. LEVINE & LOREN SIEGEL, DRUG POLICY ALLIANCE, $75 MILLION A YEAR: THE COST OF NEW YORK CITY'S MARIJUANA POSSESSION ARRESTS 4 (2011), *available at* http://marijuana-arrests.com/docs/75-Million-A-Year.pdf.

109 WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 144–52 (1965). *See also* PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT 119–20, 155 (2008) (noting police use of arrest "to assert authority or get criminals off the street"); SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, at 10 (1993) (noting that criminal law is "frequently used for purposes unrelated to the punishment of criminals"); Wesley G. Skogan & Tracey L. Meares, *Lawful Policing*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 71 (2004) (noting studies finding that "officers intent on seizing contraband, disrupting illicit networks,

When an individual is lawfully arrested (as opposed to being issued a ticket or summons[110]) police can search the arrestee's body and the area within his physical reach.[111] If the arrestee is in or was a recent occupant of an automobile at the time of arrest, police can possibly search the passenger compartment and containers located therein,[112] impound the vehicle, and inventory its contents.[113] In all such instances, any evidence or contraband found can serve as a basis for prosecution of other, possibly more serious (and career-enhancing) criminal misconduct.[114] Finally, arrests allow police to collect valuable identifying data, including biometric information such as fingerprints, mug shots, and DNA, which can be retained for later investigative use.[115]

In short, arrests for minor offenses play a staple role in modern-day policing. Contrary to the Supreme Court's assertion that police are predisposed "to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason,"[116] police have powerful individual and institutional reasons to make arrests.[117] The verity of this

---

or asserting their authority on the street freely violated [legal rules] because their goal was not principally to secure an individual conviction").

110 *See* Knowles v. Iowa, 525 U.S. 113, 118–19 (1998).

111 *See* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 440 (2001).

112 *See* Arizona v. Gant, 556 U.S. 332, 341–44 (2009).

113 *See* Colorado v. Bertine, 479 U.S. 367, 372–73 (1987).

114 *See, e.g.*, United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989) ("The potential benefits to be derived from a search of the person . . . provide the police with the incentive to employ the [search incident] exception as a potent investigatory tool."). Indeed, police can execute arrests for minor offenses that they would not otherwise perhaps even bother with solely as a pretext, acting on a hunch or suspicion that the arrestee is engaged in more serious misconduct. *See* Arkansas v. Sullivan, 532 U.S. 769, 772 (2001).

115 *See* Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561, 1603 (2012). While to date DNA collection efforts have been mainly limited to felony arrests, it should not come as a surprise that collection increasingly occurs based on arrests for less serious offenses. *See id.* at 1562, 1587.

116 Atwater v. City of Lago Vista, 532 U.S. 318, 523 (2001).

117 *See supra* notes 94–115 and accompanying text. Further testament of the executive's more general interest in the preserving arrest authority, New York City Mayor Rudolph Giuliani, when zero tolerance and order maintenance policing were gaining steam in the mid-1990s, prevailed upon the state legislature to recriminalize dozens of minor offenses that had been treated as civil offenses. Clifford Krauss, *State Legislators Agree to Restore Arrests for Minor Offenses*, N.Y. TIMES, Nov. 11, 1995, at 26.

is underscored by the massive number of arrests for minor offenses that fail to result in prosecution,[118] much less conviction.[119]

### *B. Doctrine*

Police incentives to arrest, however, do not operate in an institutional vacuum. Rather, they interact with permissive judicial doctrine, which predates the current surge in interest in decriminalization.

#### 1. Arrest Authority

When it comes to the warrantless arrest authority of police, the Supreme Court's landmark 2001 decision in *Atwater v. City of Lago Vista*[120] stands out for its singular importance. In *Atwater*, the Court was presented with the question of whether a warrantless arrest of a motorist for failure to wear a seat belt, an offense resulting a maximum penalty of a $50 fine and no jail time,[121] violated the Fourth Amendment's prohibition of unreasonable seizures. By a 5–4 vote, the Court concluded that any arrest, even "for a very minor criminal offense," is constitutionally reasonable so long as the officer possessed probable cause to believe that the alleged misconduct occurred.[122]

Rejecting petitioner's suggestion that police make case-specific determinations regarding whether the minor offense might trigger jail time under applicable law, the Court adopted a bright-line "readily administrable rule[ ]."[123] Requiring particularized judgments, the *Atwater* majority reasoned, would unduly complicate the job of police, for instance,

---

118 *See, e.g.*, Golub et al., *supra* note 62, at 1147 (reporting a non-conviction rate of 80% in New York City from 1992–2003); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 674 (2014) (noting that in New York City less than half of misdemeanor arrests in 2012 resulted in a conviction of any kind); Robert Skyora, *Our New Permanent Punishment Machine*, COUNCIL ON CRIME & JUSTICE, http://www.crimeandjustice.org/councilinfo.cfm?pID=65 (last visited Dec. 26, 2014) (citing statistics from Minnesota's two largest counties indicating that in 2004 nearly 60% of misdemeanors resulted in dismissals or not guilty verdicts). On the occurrence of minor offense arrests without conviction, more generally, see Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1 (2000).

119 What Alexandra Natapoff has aptly called "arrests without evidence." Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1331–37 (2012). Conviction data themselves, it warrants mention, are of questionable value given that innocent individuals, especially those swept up in high-volume urban justice systems, might well plead guilty simply to alleviate the cost (e.g., remaining in jail and missing work or paying for counsel) of challenging what might be a wrongful arrest. *See* Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 318 (2005).

120 *Atwater*, 532 U.S. 318.

121 *Id.* at 354 (citing TEX. TRANSP. CODE ANN. § 545.413(d) (West 2001)).

122 *Id.* The sole constitutional reasonableness requirement is that the act of physical arrest not be carried out in an "extraordinary manner, unusually harmful to the [arrestee's] privacy or physical interests." *Id.* at 352–53.

123 *Id.* at 347.

obliging them to decide whether "the weight of the marijuana [is] a gram above or a gram below the fine-only line."[124] Indeed, obliging police to draw such distinctions would create a "systemic disincentive to arrest":

> An officer not quite sure that the drugs weighed enough to warrant jail time . . . would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration . . . . Multiplied many times over, the costs to society of such under enforcement could easily outweigh the costs to defendants of being needlessly arrested and booked.[125]

In making probable cause the both necessary and sufficient precondition of Fourth Amendment reasonableness, the Court, as Justice O'Connor remarked in dissent, afforded police "constitutional carte blanche" to arrest.[126] Despite the majority's assertion of a "dearth of horribles demanding redress" as a result of "widespread abuse" of warrantless arrest authority for minor offenses,[127] the case law even then contained a multitude of examples.[128] Not surprisingly, the *Atwater* Court's clear-cut endorsement of police authority to arrest for minor offenses has done nothing to lessen the incidence of such arrests.[129]

For civil libertarians, a close reading of *Atwater* held out hope for a modest limit on police warrantless arrest authority: that police could arrest for nothing less than a "very minor *criminal* offense."[130] It is not certain, however, that the Court is wedded to a requirement that police

---

124 *Id.* at 348–49.

125 *Id.* at 351.

126 *Id.* at 365–66 (O'Connor, J., dissenting).

127 *Id.* at 322–23 (majority opinion).

128 *See* Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 430–31 (2002) (surveying multiple instances of arrest, including for illegal parking, littering, riding a bicycle without a headlight, possessing drug paraphernalia, eating food on a subway, speeding, and driving with a broken taillight).

129 *See, e.g.*, Reid v. Henry County, Ga., 568 F. App'x 745, 748 (11th Cir. 2014) (lack of working car turn signal); Ray v. City of Chicago, 629 F.3d 660, 661 (7th Cir. 2011) (driving without use of auto headlights); Brown v. Fisher, 251 F. App'x 527, 534 (10th Cir. 2007) (inoperable car headlight); Durruthy v. Pastor, 351 F.3d 1080, 1084 (11th Cir. 2003) (jaywalking); Rodi v. Rambosk, No. 2:13–cv–556–FtM–29CM, 2014 WL 1876218, at *1 (M.D. Fla. 2014) (failure to stop at a stop sign); People v. McKay, 41 P.3d 59, 63 (Cal. 2002) (riding a bicycle in the wrong direction down a residential street); Perkins v. United States, 936 A.2d 303, 304, 309 (D.C. 2007) (violating open container law); State v. Mercante, 836 So. 2d 596, 598 (La. Ct. App. 2002) (urinating in public); McBride v. State, 359 S.W.3d 683, 686, 692 (Tex. Ct. Crim. App. 2011) (jaywalking). In the District of Columbia, police can arrest for 159 minor offenses, including operating a radar detector, storing building materials in an alley, climbing a street lamp, and digging for fishing bait in Rock Creek Park. Mike DeBonis, *Here Are 159 Minor Things D.C. Officers Can Arrest You For*, WASH. POST, Oct. 24, 2011, http://www.washingtonpost.com/blogs/mike-debonis/post/here-are-159-minor-things-dc-officers-can-arrest-you-for/2011/10/24/gIQA4mDRDM_blog.html.

130 *Atwater*, 532 U.S. at 354 (emphasis added).

warrantless arrest authority is limited to offenses classified as criminal. Indeed, in *Arkansas v. Sullivan*,[131] a per curiam decision issued roughly a month after *Atwater*, the Court in perfunctory fashion stated than an arrest for travelling 40 m.p.h. in a 35 m.p.h. zone, a "violation" resulting in only a fine under Arkansas law,[132] was permissible.[133] Even more recently, the Court in *Florence v. Board of Chosen Freeholders of the County of Burlington*[134] upheld the strip search of an individual arrested (mistakenly, it turned out) for civil contempt for failure to pay a fine, a non-criminal offense under New Jersey law.[135]

*Atwater*'s broad authorization to arrest was significantly bolstered a few years later by *Virginia v. Moore*,[136] which held that state statutory limits on police arrest authority (in *Moore*, requiring that persons suspected of driving with a suspended license be ticketed and not arrested absent extenuating circumstances) were immaterial when it comes to assessing Fourth Amendment reasonableness.[137] In *Atwater*, the challenged arrest for failure to wear a seat belt was legally permitted under state law: the Texas Legislature authorized (but did not require) police to arrest violators.[138] In *Moore*, on the other hand, the arrest was in direct and knowing contravention of state law prohibiting arrest under the circumstances, yet a unanimous Court, invoking *Atwater*'s "probable cause standard"[139] condoned the arrest (and thus also the search conducted incident thereto).[140]

*Atwater* and *Moore* have synergistically combined to afford police unprecedented discretionary authority to arrest for minor offenses. As

---

131 Arkansas v. Sullivan, 532 U.S. 769, 770 (2001) (per curiam).

132 *See* Respondent's Opposition to Petition for Certiorari, Arkansas v. Sullivan, 532 U.S. 769 (2001) (No. 00-262), 2000 U.S. S. Ct. Briefs LEXIS 1045, *32–34 (citing ARK. CODE ANN. §§ 5-1-108, 27-51-201(a)(1), 27-50-301).

133 *See Sullivan*, 532 U.S. at 771 ("[W]e note that the Arkansas Supreme Court never questioned [the arresting officer's] authority to arrest Sullivan for a fine-only traffic violation (speeding), and rightly so." (citing *Atwater*, 532 U.S. 318)).

134 132 S. Ct. 1510, 1520 (2012).

135 *See* Petition for a Writ of Certiorari at 4, *Florence*, 132 S. Ct. 1510 (2012) (No. 10-945), 2011 WL 220710, at *4. For further discussion of *Florence* and its implications, see Wayne A. Logan, Symposium, Florence v. Board of Chosen Freeholders*: Police Power Takes a More Intrusive Turn*, 46 AKRON L. REV. 413 (2013).

136 553 U.S. 164 (2008).

137 *Id.* at 167 (citing VA. CODE ANN. § 19.2-74 (Lexis 2004)). In *Atwater*, the majority emphasized that, short of a constitutional prohibition, police authority to arrest for minor offenses might be limited by statutes specifying extenuating circumstances in which arrests might be permitted. Such an approach would be preferable to a broad constitutional rule, the Court reasoned, because "the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle." *Atwater*, 532 U.S. at 352.

138 *Atwater*, 532 U.S. at 323.

139 *Moore*, 553 U.S. at 171.

140 *Id.* at 177–78.

Judge Posner recently noted in a decision upholding an arrest for civil contempt (for alleged failure to pay parking tickets), "arrests for violations of purely civil laws are common enough."[141] Citing *Atwater* and *Moore*, Judge Posner added that "the fact that [an arrest] is not for an 'arrestable' offense does not make it unconstitutional."[142] Justice Thomas, also writing in 2009, echoed this expansive view, recognizing as a "basic principle of the Fourth Amendment" that officers "can enforce with the same vigor all rules and regulations regardless of the[ir] perceived importance," and regardless "of the perceived triviality of the underlying law."[143]

The foregoing has obvious importance for decriminalization. While, as discussed later, state decriminalization laws vary in their content, a common characteristic is that they reclassify marijuana as a civil offense. Whether the lexical shift has practical significance, in terms of limiting police authority post-*Atwater*, is thus a question of critical importance. As noted earlier,[144] state courts have embraced *Atwater*, and federal courts are showing little inclination to attach importance to state legislative classificatory changes, as evidenced by a recent case out of Oregon. In upholding a warrantless arrest for jaywalking, which Oregon recently sought to decriminalize as a non-arrestable, non-criminal "traffic violation" punishable only by a fine,[145] the federal trial court in *Miller v. City of Portland* stated:

> The principle behind *Moore* is that state law does not define the protections against unreasonable search and seizure afforded by the Fourth Amendment. This principle holds true whether the offense for which state law prohibits arrest is a misdemeanor or "violation." That Oregon has denominated this particular offense a "violation" rather than a "crime" is immaterial to the scope of the Fourth Amendment, and thus this denomination cannot affect the propriety of any arrest thereunder.[146]

The court elaborated that a state's political decision to restrict police authority, to "redefin[e] . . . certain violations of its laws as mere 'violations,' and not 'crimes,' cannot be held to affect the parameters of the

---

141 Thomas v. City of Peoria, 580 F.3d 633, 637–38 (7th Cir. 2009) (citing *Moore*, 553 U.S. at 174).

142 *Id.* at 637.

143 Safford Unified School Dist. No. 1 v. Redding, 557 U.S. 364, 391 (2009) (Thomas, J., concurring in result and dissenting in part).

144 *See supra* note 129 and accompanying text.

145 Miller v. City of Portland, No. 3:11-01509-JE 2014, 2014 WL 320555, at *5 (D. Or. Jan. 29, 2014).

146 *Id.* at *8.

Fourth Amendment's protections."[147] Were this not the case a "state would render otherwise constitutional actions unconstitutional simply by changing the terminology with which it refers to violations of law."[148] Just as Virginia's decision to impose procedural preconditions for arrest in *Moore* did not affect the constitutionality of a probable cause-based arrest, the court reasoned, Oregon's choice of a "'more restrictive' policy" on the punishment classification of jaywalking had no impact on the constitutionality of police prerogative to arrest.[149]

Along these same lines, the Eighth Circuit, relying on *Atwater* and *Moore*, recently upheld the arrest of a Nebraska resident suspected of possessing an ounce or less of marijuana,[150] an "infraction" under state law to be enforced by a citation and punishable by a fine.[151]

2. Auto Search Authority

Long-standing doctrine affording police authority to search automobiles is another way in which decriminalization efforts can be undermined. Since the Prohibition-era case of *Carroll v. United States*,[152] police have been able to search an auto when probable cause exists to believe that it contains evidence of criminal activity or contraband.[153] Based on this case law, courts have allowed auto searches because, even if marijuana is not technically subject to criminal prohibition, its possession is still unlawful and therefore qualifies as "contraband."[154] Relying on *Carroll* and its progeny, jurisdictions that otherwise deny police the right to arrest or search an individual, absent probable cause to believe

147 *Id.* at *9.

148 *Id.*

149 *Id.* (citing Virginia v. Moore, 553 U.S. 164, 174 (2008)).

150 United States v. Perdoma, 621 F.3d 745, 749–50 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 2446 (2011); *cf.* United States v. Burtton, 599 F.3d 823, 830 (8th Cir. 2010) (upholding arrest for violation of Nebraska's "open container" law, an infraction, stating that "[i]n light of *Moore*, if an arrest is otherwise reasonable, the fact that it is not for an arrestable offense, does not make it unconstitutional").

151 NEB. REV. STAT. ANN. § 28-416(13)(a) (West 2014); NEB. REV. STAT. ANN § 29-435 (West 2014).

152 267 U.S. 132 (1925).

153 *See* California v. Acevedo, 500 U.S. 565 (1991).

154 *See, e.g.*, United States v. Pugh, 223 F. Supp. 2d 325, 330 (D. Me. 2002) (quoting Illinois v. McArthur, 531 U.S. 326, 331–32 (2001)) ("The case law requires only that there exist a fair probability that evidence of a crime or contraband will be found. Contraband includes 'unlawful drugs'"); People v. Waxler, 224 Cal. App. 4th 712, 721 (Cal. Ct. App. 2014) ("[A] law enforcement officer may conduct a warrantless search of a vehicle pursuant to the automobile exception when the officer has probable cause to believe the vehicle contains marijuana, which is contraband."); State v. Smalley, 225 P.3d 844, 848 (Or. 2010) (deeming marijuana contraband "regardless of its quantity"). *Cf.* State v. Barclay, 398 A.2d 794, 797 (Me. 1979) ("[M]arijuana, even when its possession can only give rise to a civil violation, can be a legitimate object of a search warrant, and if found, can be seized and confiscated.") (internal citations omitted).

the individual possesses a criminal amount of marijuana, such as Minnesota,[155] permit auto searches under such circumstances.[156]

The presence of any marijuana, moreover, can justify a search for the possible presence of a larger, criminalized amount. As the California Court of Appeal put it in upholding the warrantless search of a car in which an officer saw and smelled burnt marijuana, "[i]t is well settled that even if a defendant makes only personal use of marijuana found in the passenger compartment of a car, a police officer may reasonably suspect additional quantities of marijuana might be found in the car."[157] Nor is police authority to search limited by the fact that an individual might possess a marijuana medical use license, allowing lawful possession of the drug or possession of a greater amount.[158]

## III. REALIZING DECRIMINALIZATION

Change, as any self-help guru will tell you, is never easy.[159] With decriminalization, the obstacles to reducing arrests and searches are institutional—from rank-and-file police officers and their departments, and courts that provide the doctrinal basis for resisting limits on police search and seizure authority. This Part considers possible ways in which democratically driven change, embodied in decriminalization efforts, can perhaps be more fully realized.

---

155 *See* State v. Ortega, 770 N.W.2d 145, 149 n.2 (Minn. 2009).

156 *See* State v. Dickenson, No. A13-1516, 2014 WL 2807676, at *5–6 (Minn. Ct. App. 2014); State v. Thiel, 846 N.W.2d 605, 611 (Minn. Ct. App. 2014); *see also* State v. Moore, 734 N.E.2d 804, 808 (Ohio 2000) (upholding auto search based on experienced officer's smelling of burnt marijuana).

157 *Waxler*, 224 Cal. App.4th at 723–24. For discussion of the probable cause effect of burned and unburned marijuana, vis-à-vis the warrantless search of a closed container, see Robey v. Superior Court, 302 P.3d 574, 597–98 (Cal. 2013) (Liu, J., concurring).

158 *Id.* at 725; *see also* United States v. Phillips, No. 2:13-CR-00398-MCE, 2014 WL 1275916, at *6 (E.D. Cal. Mar. 27, 2014) ("[P]olice [need not] determine whether an individual has a medical marijuana card before making an arrest, or conducting a search, for possession of marijuana."); People v. Stormoen, No. B253681, 2014 WL 3686093, at *3 (Cal. Ct. App. July 24, 2014) (stating that medical marijuana laws "do not alter the probable cause analysis; they provide a limited immunity, not a shield from reasonable investigation"). In Washington State, before voters approved legalization of personal possession of up to an ounce of marijuana, state law allowed only the medicinal use of marijuana and expressly prohibited arrest "solely for being in the presence or vicinity of medical marijuana or its use." *See* Sinclair v. City of Grandview, 973 F. Supp. 2d 1234, 1259 (E.D. Wash. 2013) (citing WASH. REV. STAT. § 69.51A.050(2) (2008)); *see also* State v. Fry, 228 P.3d 1, 8 (Wash. 2010). A federal court, however, denied a wrongful arrest claim, relying on *Moore* to conclude that probable cause existed to support officers' belief that the petitioner (along with a medical marijuana card holder) violated Washington law by manufacturing or possessing marijuana without a license. *Sinclair*, 973 F. Supp. 2d at 1259. *Cf.* People v. Brown, 825 N.W.2d 91, 94 (Mich. Ct. App. 2012) (holding that a medical use license is an affirmative defense to criminal prosecution).

159 Yet, it is also the case, as perhaps the same guru will offer, cribbing from Heraclitus, that "in life, change is certain—unless you need it for the bus."

### *A. Substantive Law and Its Construction*

With decriminalization, one thing that becomes immediately evident is that it comes in many guises. As one commentator observed twenty-five years ago:

> [T]here is no consensus on the meaning of "decriminalization." In a strict sense the term should be used to apply to behavior which is not sanctioned by criminal law. However, with respect to marijuana, the term "decriminalization" has generally been used to describe laws which reduce the legal sanctions for possession of small amounts to penalties other than imprisonment. . . . [T]he possession of marijuana remains against the law and is subject to penalties, although the maximum penalty is only a fine.[160]

As a consequence, "[e]ven though possession is no longer subject to incarceration in the 'decriminalization' states, it remains against the law to possess the drug. . . . [T]he broad police powers of search and seizure still apply and must necessarily be broadly used as long as possession remains an offence."[161]

The foregoing assessment remains true today. While the nation's chief advocacy organization, the National Organization for the Reform of Marijuana Laws (NORML) considers eighteen jurisdictions (seventeen states and the District of Columbia) as having embraced decriminalization,[162] closer consideration reveals significant variation. The laws fall into two broad categories: those that (1) much like earlier laws, described above, retain the criminal status of possession yet impose less in the way of punishment, usually prescribing a fine and either no or lessened jail time, and (2) laws that reclassify possession as a civil wrong.

The first approach really amounts to depenalization, qualifying as decriminalization in name only. Possession is still criminalized, it is only punished to a lesser extent, meaning (as in *Atwater*) that police can still arrest.[163] Nevada, for instance, classifies possession as a misde-

---

160 Eric Single, *The Impact of Marijuana Decriminalization: An Update*, 10 J. PUB. HEALTH POL'Y 456, 456 (1989). Even then it was evident that "'decriminalization' laws in the U.S. were much less radical than their name implies. They merely involved the elimination of jail terms for first offenders, which had already been an unusual sentence for most cases." *Id.* at 462.

161 *Id.* at 462.

162 *See States That Have Decriminalized*, *supra* note 56.

163 *See* Rosalie L. Pacula et al., *What Does It Mean to Decriminalize Marijuana? A Cross-National Empirical Examination* 4 (JSP/Center for the Study of Law & Soc. Faculty Working Papers, Sept. 2004), *available at* http://www.escholarship.org/uc/item/9v76p00j.

meanor,[164] a crime that is arrestable under state law.[165] North Carolina has made possession a class 3 misdemeanor, warranting a suspended sentence,[166] but state law authorizes arrest for all misdemeanors.[167] In Alaska, possession is a class B misdemeanor,[168] also a basis for custodial arrest.

With the second category of decriminalization, possession is reclassified as a civil "infraction," "violation," or "offense." The change in nomenclature, however, can be deceptive, often only giving the nominal appearance of limiting police search and seizure authority. In California, for instance, possession of less than an ounce of marijuana is an "infraction punishable by a fine of not more than one hundred dollars"[169] and no jail time.[170] An infraction, however, is still technically deemed a "crime" or "public offense" under the California Penal Code,[171] and laws governing arrest for misdemeanors apply to infractions.[172] California courts have held that a custodial arrest for a fine-only offense is permissible,[173] and have allowed arrests for marijuana possession in particular.[174] New York provides a similar example. There, in addition to police allegedly manipulating situations in order to justify marijuana in "public

---

164 NEV. REV. STAT. ANN. § 453.336(4)(a) (West 2014).

165 *Id.* § 193.120(3).

166 N.C. GEN STAT. § 90-95(d)(4) (West 2014).

167 *Id.* § 15A-401(b); *see also* United States v. Massenberg, No. 4:11-CR-4-FL, 2011 WL 3652741, at *6 n.4 (E.D.N.C. Aug. 17, 2011) (noting that simple possession remains an arrestable offense under state law).

168 ALASKA STAT. ANN. § 11.71.060 (West 2014).

169 CAL. HEALTH & SAFETY CODE § 11357(b) (West 2014).

170 CAL. PENAL CODE § 19.6 (West 2014).

171 Id. § 16 (West 2014); *see also* People v. Waxler, 224 Cal. App. 4th 712, 723 (Cal. Ct. App. 2014) (noting that simple possession of marijuana remains a "crime" under California law).

172 *See* CAL. PENAL CODE § 19.7 (West 2014) ("[A]ll provisions of law relating to misdemeanors shall apply to infractions including, but not limited to, powers of peace officers . . . ."); *see also id.* § 840 (authorizing arrest for infraction).

173 *See* People v. McKay, 41 P.3d 59, 63 (Cal. 2002) (holding that a custodial arrest for the infraction of riding a bicycle the wrong way down a street does not "violate the Fourth Amendment and that compliance with state arrest procedures is not a component of the federal constitutional inquiry").

174 *See, e.g.*, People v. Bester, No. A137728, 2014 WL 710961, at *6 (Cal. Ct. App. Feb. 25, 2014); People v. Delery, No. B24024, 2013 WL 5209821, at *10 (Cal. Ct. App. Sept. 17, 2013); People v. Keding, No. A136147, 2013 WL 6814453 (Cal. Ct. App. Dec. 26, 2013). According to data compiled by the State Attorney General, California's decision to reclassify possession from a misdemeanor to an infraction, effective January 2011, has had a demonstrable impact on lowering the number of marijuana-related arrests. *See* KAMALA HARRIS, ATTORNEY GENERAL OF CALIFORNIA, CRIME IN CALIFORNIA 2012, app. at 63 (2012), *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd12/cd12.pdf (noting "significant decline in misdemeanor marijuana arrests"). However, because data are not collected on the number of arrests for infractions, it remains unclear the extent to which arrests for possession continue to be made.

view" scenarios (an arrestable misdemeanor),[175] state law provides that simple possession is a "violation" for which a desk appearance ticket is to be issued,[176] yet seemingly allows for arrests (and hence searches).[177] Vermont, likewise, makes possession a "civil violation," punishable only by a fine, yet expressly provides that the provision "is not intended to affect the search and seizure laws afforded to duly authorized law enforcement officers under the laws of this State."[178]

At the same time, state procedural limits on police arrest authority, even if not given constitutional short shrift in the wake of *Virginia v. Moore*,[179] can have less street-level effect than perhaps envisioned. Consistent with the *Atwater* majority's concern over the difficulty in marijuana possession cases of requiring police to draw fact-based legal

---

175 *See* N.Y. PENAL LAW § 221.10 (McKinney 2014).

176 *See id.* § 10.00(3) (classifying a "violation" as "an offense" that can result in up to fifteen days imprisonment); *id.* § 221.05 ("Unlawful possession of marijuana is a violation punishable only by a fine of not more than one hundred dollars.").

177 *See* N.Y. CRIM. PROC. LAW § 150.75 (McKinney 2014) (stating with respect to possession that "[w]henever the defendant is arrested without a warrant, an appearance ticket shall promptly be issued and served upon him"); Peter Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 150.75 (McKinney 2014) ("As indicated by the language of the present section, a person may be arrested for unlawful possession of marijuana; that is, the officer need not serve an appearance ticket in lieu of making the arrest."); William C. Donnino, Practice Commentary, N.Y. Penal Law § 221.00 (McKinney 2014) (stating that "[a]lso unique to this offense is that the Criminal Procedure Law provides that upon arrest for this violation, generally the defendant must be given an appearance ticket"). The impact of the confusion is noted in the Practice Commentary:

> The distinction between service of a ticket in lieu of arrest and service after arrest is important should a question arise regarding the officer's right to search the person and further incriminating evidence is found as a result of a search incident to arrest. The law is not really clear on the issue of whether a custodial type arrest is permitted, which would authorize a search of the defendant's person, since the officer is required to *promptly* issue an appearance ticket.

Peter Preiser, Practice Commentaries, N.Y. Crim. Proc. Law § 150.75 (McKinney 2014); *see also* Cabral v. City of New York, No. 12 Civ. 4659(LGS), 2014 WL 4636433, at *7 (S.D.N.Y. Sept. 17, 2014) (interpreting New York law to allow custodial arrest for simple marijuana possession).

178 VT. STAT. ANN. tit. 18, § 4230a(a)(c) (West 2014). Although not concerning possession, a recent First Circuit Court of Appeals case is instructive of the modest impact offense reclassification can have. In *Collins v. University of New Hampshire*, the defendant challenged his arrest for disorderly conduct, a "violation" under New Hampshire law. 664 F.3d 8, 14 (1st Cir. 2011) (citing N.H. REV. STAT. ANN. § 644:2(VI)). The court rejected the argument that "one cannot be arrested for an offense classified as a 'violation,'" noting that "the use of the word 'crime' [in New Hampshire law] was not intended as a word of limitation but rather to encompass broadly *all offenses* prohibited by statute or ordinance." *Id.* (quoting State v. Miller, 348 A.2d 345, 347 (N.H. 1975). The First Circuit elaborated that the disorderly conduct statute was part of the state's criminal code and that there was no basis to conclude that "an offense defined in the Criminal Code is somehow civil in nature." *Id.*

179 *See* 553 U.S. 164 (2008).

distinctions in the field,[180] courts interpreting the parameters of decriminalization have afforded police considerable latitude, for instance allowing arrests unless it is clear that the suspect did not possess an arrestable amount.[181] It also remains to be seen how weight is to be determined with marijuana-laced "edibles": for instance, a person found with a "pot brownie" that weighs over the specified amount allowed.[182]

Courts, however, can play a critically important role in ensuring that decriminalization is effectuated on the streets. A foremost example is found in Massachusetts, whose highest court, in the wake of a voter-approved constitutional decriminalization initiative later codified in statutory law, made clear that it will not "undermine the clear intent of the voters to alter police conduct" vis-à-vis marijuana possession.[183] In a series of recent cases the court has barred police from executing auto searches[184] and arrests[185] absent probable cause that a suspect is engaged in *criminal* behavior, for instance possessing over an ounce of marijuana or distributing the drug. The decisions have had a significant impact. In 2008, possession arrests in Massachusetts numbered 8,502; in 2010, a year after decriminalization took effect, the number of arrests dropped to

---

180 *See* Atwater v. City of Lago Vista, 532 U.S. 318, 348 (2001) (stating that officers executing arrests cannot be expected to know whether "the weight of the marijuana [is] a gram above or gram below the fine-only line").

181 *See, e.g.*, State v. Hanson, 488 N.W.2d 511, 512 (Minn. Ct. App. 1992).

182 *Cf.* Chapman v. United States, 500 U.S. 453, 461(1991) (including "blotter" paper when calculating the weight of LSD); State v. Peck, 773 N.W.2d 768, 773 (Minn. 2009) (including weight of "bong water" when calculating weight of methamphetamine).

183 Commonwealth v. Jackson, 985 N.E.2d 853, 859 (Mass. 2013); *see also* Commonwealth v. Cruz, 945 N.E.2d 899, 910 (Mass. 2011) (noting that the law signaled the desire of voters to "change the societal impact of possessing one ounce or less of marijuana" and send a "clear directive to police departments handling violators to treat commission of this offense as noncriminal"); *id.* ("The entire statutory scheme implicates police conduct in the field. Ferreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is neither desired by the public nor in accord with the plain language of the statute.").

184 *See* Commonwealth v. Overmyer, 11 N.E.3d 1054, 1060 (Mass. 2014) (holding that the odor of unburnt marijuana, without probable cause to believe that car contained a criminal amount of marijuana, did not justify search); Commonwealth v. Daniel, 985 N.E.2d 843, 849 (Mass. 2013) ("Absent articulable facts supporting a belief that either occupant of the vehicle possessed a criminal amount of marijuana the search was not justified by the need to search for contraband."); Commonwealth v. Pacheco, 985 N.E.2d 839, 843 (Mass. 2013) (because officer lacked probable cause to believe vehicle occupants sharing marijuana joint were engaged in distribution officer lacked probable cause to search trunk); *Cruz*, 945 N.E.2d at 911–13 (holding that while marijuana is contraband, because it remains unlawful to possess any amount of marijuana, police must have "probable cause to believe that a *criminal* amount of contraband is present in the car" in order to invoke auto exception).

185 *See Jackson*, 985 N.E. at 859–60 (holding that because a lawful arrest requires the existence of probable cause to believe that an individual has committed a criminal offense, and because the sharing of a marijuana cigarette was akin to simple possession, a non-criminal offense, arrest was unlawful). *Cf. Cruz*, 945 N.E.2d at 908 (holding that officer lacked authority to order individual out of car because he only had evidence of a civil violation being committed, not probable cause to believe individual possessed over an ounce of marijuana).

1,181.[186] The Commonwealth now has the lowest per capita arrest rate for marijuana possession in the nation,[187] and from 2001 to 2010 saw the nation's largest percentage decrease in possession arrests: 86%.[188]

State courts, moreover, by invoking their own constitutions, what Justice Brennan famously called a potential "font of individual liberties,"[189] have it within their power to limit police arrest authority. The Ohio Supreme Court, for instance, has declined to follow *Atwater* and has held that arrests for minor misdemeanors violate both state law and the Ohio Constitution,[190] and state intermediate courts of appeal have rejected *Moore* and invalidated arrests when police violate state law requiring that police ticket (and not arrest) individuals suspected of possessing marijuana.[191] Other decriminalization states have similar cite-and-release provisions,[192] providing state courts an opportunity to give street-level effect to decriminalization.

Whether this comes to pass, however, depends in significant part on the involvement of federal courts. This is because federal courts enjoy authority to override state constitutional (and statutory) preferences in cases filed in federal court[193] when state-investigated cases "go federal" as a result of concurrent state-federal jurisdiction.[194] In Ohio, for instance, federal courts, unlike their state counterparts, have adhered to *Atwater* and *Moore* and allowed arrests for minor misdemeanors.[195] Fur-

---

186 ACLU, WAR ON MARIJUANA, *supra* note 57, at 114.

187 *Id.*

188 *Id.* at 42 n.32.

189 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

190 *See* State v. Brown, 792 N.E.2d 175, 177–78 (Ohio 2003) (holding that an arrest for the minor misdemeanor of jaywalking was unconstitutional under the Ohio Constitution). For the handful of other state cases that have rejected *Atwater* on state constitutional grounds see, e.g., State v. Askerooth, 681 N.W.2d 353, 363 (Minn. 2004); State v. Bauer, 36 P.3d 892, 897 (Mont. 2001); State v. Bayard, 71 P.3d 498, 501–02 (Nev. 2003); State v. Rodarte, 125 P.3d 647, 650 (N.M. Ct. App. 2005).

191 *See, e.g.*, State v. Robinson, No. 10CA0022, 2012 WL 1970447, at *6 (Ohio Ct. App. June 4, 2012); State v. Hall, No. 95983, 2011 WL 4600406, at *4 (Ohio Ct. App. Oct. 6, 2011); State v. Melvin, No. 88611, 2007 WL 2135121, at *5 (Ohio Ct. App. July 26, 2007). For a pre-*Atwater* case advancing the same position see State v. Robinson, 659 N.E.2d 1292, 1297 (Ohio Ct. App. 1995).

192 *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 2283(1) (2014); NEV. REV. STAT. ANN. § 453.336 (West 2014); VT. STAT. ANN. tit. 18, § 4230(a) (West 2014).

193 *See generally* Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293, 296–97 (2013) (discussing "reverse silver platter" doctrine).

194 *See* Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1247–48 (2010) (discussing concurrent authority and the common occurrence of federal drug prosecutions arising out of arrests made by state and local police).

195 *See, e.g.*, Synek v. Brumfield Township, No. 5:11-CV-774, 2012 WL 4483806, at *8 (N.D. Ohio Sept. 27, 2012) (denying wrongful arrest claim because plaintiff had no federal constitutional right to avoid arrest for the commission of a minor misdemeanor); Hall v. Village of Gratis, No. 3:07-CV-351, 2008 WL 4758693, at *8 (S.D. Ohio Oct. 27, 2008) (same

ther illustrative of the divide, a federal trial court in Tennessee recently upheld an arrest (and subsequent rectal search) by Tennessee police of an individual suspected of simple marijuana possession, in disregard of state law that only allowed issuance of a citation under the circumstances.[196]

Opportunity for such overrides, it should be noted, could be lessened as a result of what appears to be decreasing U.S. Department of Justice interest in state-originated marijuana possession cases.[197] Yet even if this comes to pass,[198] state and local-generated drug possession cases can still be expected to figure in federal criminal cases based on the very common occurrence of such arrests serving as a basis to uncover illegal weapons, a mainstay of federal criminal dockets.[199]

### *B. The Police and Public Opinion*

Substantive law and the judicial doctrine that informs it, however, only partially account for how (and whether) decriminalization is given effect on the streets. As Part I made clear, and policing scholars have long noted more generally,[200] police buy-in plays a critical part.

Historically, rank-and-file police and their departments have not always been known for their embrace of progressive ideals,[201] and police

---

and noting that the "Fourth Amendment does not forbid warrantless arrests for minor misdemeanors").

196 Booker v. LaPaglia, No. 3:11–CV–126–PLR–CCS, 2014 WL 4259474 (E.D. Tenn. Aug. 28, 2014) (interpreting TENN. CODE ANN. §§ 39-17-418(b), 40-7-118(b)(1)).

197 *See* Commonwealth v. Craan, 13 N.E.3d 569, 578 (Mass. 2014) (noting Department of Justice Memoranda issued in 2009 and 2013).

198 To date, the policy has not met with universal approval in local federal prosecutor offices. *See* Harry Bruinius, *Brooklyn DA and New York Police at Odds on Minor Crimes*, CHRISTIAN SCI. MONITOR (July 9, 2014), http://www.csmonitor.com/USA/Justice/2014/0709/Marijuana-Brooklyn-DA-and-New-York-police-at-odds-on-minor-crimes-video ("[F]ederal law enforcement officials and local [U.S.] attorneys have bristled at the policy [discouraging federal possession cases in decriminalization states], and many federal arrests have continued in pot-friendly states.").

199 Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2251–52 (2014); *see also, e.g.*, United States v. Johnsonmarin, No. CR11-00063 WHA, 2011 WL 2899095, at *3 n.4 (N.D. Cal. July 20, 2011) (upholding marijuana possession arrest resulting in federal firearm prosecution, and noting that even if arrest was unlawful under state law, Fourth Amendment analysis was not affected because the San Francisco police officers were "cross-designated as federal officers").

200 *See, e.g.*, LAFAVE, *supra* note 109, at 525 n.74 ("[It] is important to determine precisely to what degree the law is communicated to the police and, to the extent that it is, the degree to which the legal norms are accepted by the police.").

201 For example, a decade after the Supreme Court invalidated consensual homosexual sodomy laws on constitutional grounds in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), police in Louisiana persisted in arresting individuals based on a "carnal copulation" law still on the books. Jim Mustian, *Gays in Baton Rouge Arrested under Invalid Sodomy Law*, BATON ROUGE ADVOCATE, July 28, 2013, at A1. *See also* SKOLNICK, *supra* note 95, at 59–62 (stating that "policemen are notably conservative, emotionally and politically" and discussing several examples in support); *id.* at 117–18 (commenting on "tenacity" of police with respect to drug policy and the policing of narcotics offenses). The views of law enforcement on their role as

can have strong motivation to maintain the status quo.[202] In this respect, they are like other policy "implementation agents,"[203] rational choice actors prone to resisting changes that do not align with their individual and institutional interests.[204]

When evaluating the likely implementation success of decriminalization, it is thus important to remain mindful of the irreducibly political nature of policing.[205] Modifying police behavior, as Professor David Sklansky has observed, does not turn solely on "issues of [police] culture"; attention must also be paid to "questions of institutional structure: both the internal decision-making structures of police departments and the external processes of political control."[206] "[D]emocracy," Sklansky correctly notes, "tends to enter discussions of policing today in ways that are hesitant, weak and confused."[207]

A key lesson of the story recounted here is that when it comes to regulating police behavior, democratically endorsed preferences and police practice can be at odds with one another. The Supreme Court has posited that an outraged public will serve as an effective check on police overreach,[208] especially when it occurs at the local level.[209] The late William Stuntz championed a similar view.[210] Faith in police respon-

---

foot soldiers in the drug war, it should not go unacknowledged, are not monolithic, as the organization Law Enforcement Against Prohibition attests. *See* LAW ENFORCEMENT AGAINST PROHIBITION, http://www.leap.cc/ (last visited Dec. 27, 2014).

202 *See supra* note 117 and accompanying text. The unique institutional interests and perspective of police is seen in conflicts that can arise with prosecutors, who when urging officers to bring them "better" arrests have faced sharp criticism from police, their fellow executive branch actors. *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 196 (2008).

203 *See* James P. Spillane et al., *Policy Implementation and Cognition: Reframing and Refocusing Implementation Research*, 72 REV. OF EDUC. RES. 387, 390 (2002).

204 *See* SKOLNICK, *supra* note 95, at 243 ("[T]he police seek the opportunity to introduce the means necessary to carry out 'production demands.' The means used to achieve these ends, however, may frequently conflict with the conduct required of them as legal actors.").

205 *See, e.g.*, Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 143 (1956) (noting that "policing in our culture is a public, political function"); *id.* at 145 ("[A police officer] is the living embodiment of democratic law. If he conforms to that law, he becomes the most important official in the entire hierarchy, able to facilitate the progressively greater realization of democratic values."). For a more extended development of this same point from the same era see GEORGE E. BERKLEY, THE DEMOCRATIC POLICEMAN (1969).

206 DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 99 (2008).

207 *Id.* at 58.

208 *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 598–99 (2006); Illinois v. Lidster, 540 U.S. 419, 426 (2004).

209 Wolf v. Colorado, 338 U.S. 25, 32–33 (1949) (positing that public opinion can be "far more effectively exerted against oppressive conduct on the part of the police directly responsible to the community itself" than against "remote authority pervasively exerted throughout the country").

210 *See, e.g.*, William J. Stuntz, *Implicit Bargains, Government Power and the Fourth Amendment*, 44 STAN. L. REV. 553, 588 (1992) ("Fourth Amendment regulation is usually unnecessary where large numbers of affected parties are involved. Citizens can protect them-

siveness and democratic accountability, however, has long been questioned by others who maintain that push-back is muted when those targeted lack political influence.[211] Experience in Chicago, where marijuana possession arrests of poor and minority residents have persisted in the face of decriminalization,[212] whereas they have not in comparatively more affluent and white Evanston and Champaign, Illinois,[213] affords strong evidence of the political counter-narrative being at work.

In light of the foregoing, how can decriminalization and the forces resisting it be reconciled? One option might be to increase the direct political accountability of police. Unlike their fellow executive branch actors, prosecutors,[214] heads of urban police departments do not typically stand for election,[215] based on historic concern over cronyism and targeting of political opponents.[216] Yet the instances of political process failure recounted here suggest why greater direct political accountability might have appeal. If democratic preference continues to shift toward decriminalization, and faces resistance, heightened political accountability might not be such a bad thing after all.[217] Noted former police chief and scholar O.W. Wilson was surely right when he long ago remarked that "the police cannot progress ahead of public sentiment."[218] They should not, however, be permitted to lag behind it.

## CONCLUSION

As the decriminalization movement attests, the American body politic is showing increasing interest in softening the harsh penal policies adopted over the past several decades. Whether the shift persists is anyone's guess but given strong political support from the political left and

---

selves in the same way that they protect themselves against most kinds of government misconduct—they can throw the rascals out.").

211 *See* Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2068 (2006) (citing and discussing sources making this point).

212 *See supra* note 85 and accompanying text.

213 *See supra* note 88 and accompanying text.

214 *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581 (2009).

215 Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, 15 CRIME & JUST. 51, 57–58 (1992).

216 *See generally* ROBERT M. FOGELSON, BIG-CITY POLICE (1977); SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM (1977).

217 Such accountability of course critically depends upon public awareness of police behaviors and practices. On the historic lack of such information and the challenges involved in securing it more generally see Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013).

218 O.W. WILSON, POLICE PLANNING 48 (2d ed. 1957).

right alike there is reason to think that it will.[219] If it does, and jurisdictions continue efforts to shrink the reach of the "exorbitant codes" that the Supreme Court has largely refused to regulate,[220] advocates should remain mindful of the obstacles that stand in the way of fulfilling the goals of codified law on the streets.

Laws that merely lessen the punishment of marijuana possession, for instance, do not necessarily limit police power to arrest, contrary to the apparent supposition of the nation's leading advocacy organization.[221] Neither do laws that seek to limit the collateral consequences of arrest or conviction, such as with respect to employment or access to student loans.[222] Similarly under-inclusive are recent calls for prosecutors to refuse to charge possession cases brought to them by police,[223] as doing so again fails to remove possession from law enforcement's "menu of options" for arrest,[224] and ignores the functional reality that police supervisors need not defer to prosecutorial policy.[225]

---

219 *See* Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 609–12 (2011).

220 *See* Whren v. United States, 517 U.S. 806, 818 (1996) (refusing to regulate police arrest authority in the face of "exorbitant codes," stating that there is "no principle" that would enable it to distinguish prohibitory laws that are "so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement"). Only on rare occasion has the Court seen fit to invalidate criminal law prohibitions on constitutional grounds, with consensual homosexual sodomy being the most recent notable example. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

221 *See States That Have Decriminalized*, *supra* note 56 (asserting that decriminalization results in law enforcement treating possession "like a minor traffic violation"); *see also* DRUG POLICY ALLIANCE, APPROACHES TO DECRIMINALIZING DRUG USE & POSSESSION (2014), *available at* http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Approaches_to_Decriminalization_Feb2014.pdf ("Decriminalization is the removal of criminal penalties for drug law violations (usually possession for personal use).").

222 *See, e.g.*, ORE. REV. STAT. ANN. § 153.008(1)(b)–(c) (West 2013); VT. STAT. ANN. tit.18, § 4230(a)(5) (West 2014).

223 *See, e.g.*, Stephanie Clifford, *Proposal to Limit Prosecutions of Marijuana Cases in Brooklyn*, N.Y. TIMES, Apr. 23, 2014, at A22, *available at* http://www.nytimes.com/2014/04/24/nyregion/in-brooklyn-proposing-to-end-prosecutions-for-low-level-marijuana-offenses.html; *see generally* Roger A. Fairfax, *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 321–34 (2014); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 793 (2012).

224 WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 4 (2011); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 932–33 (2006).

225 *See, e.g.*, Joel Rose, *Brooklyn DA Shifts Stance on Pot, But that Won't Impact NYPD*, NAT'L PUB. RADIO (July 12, 2014) http://www.npr.org/2014/07/12/330761032/brooklyn-da-shifts-stance-on-pot-but-that-wont-impact-nypd (quoting NYPD Commissioner William Bratton's response to report that the Brooklyn district attorney plans to no longer prosecute low-level marijuana possession cases: "It will not have any impact on our officers and the discretion they have as they go about their business"). *Cf.* Craig R. McCoy et al., *Philadelphia Plans Fines for Use of Marijuana*, PHILA. INQUIRER, Apr. 5, 2010, at A1 (discussing Philadelphia initiative whereby arrests would no longer be prosecuted as misdemeanors but would

As the discussion here also makes clear, however, even when nominal limits on police authority are imposed, they can lack practical effect. Police officers and their departments have powerful institutional incentive to maintain their search and seizure authority, which has been enabled by judicial doctrine that took shape during the nation's decades-long experiment in harsh penality. To the Supreme Court, probable cause of misconduct—itself a very low proof threshold[226]—is the *sine qua non* of Fourth Amendment reasonableness,[227] and state procedural limits on police authority to arrest for minor offenses lack federal constitutional relevance.[228] The Court has also afforded police extensive authority to search cars when they have probable cause to believe that contraband is present,[229] which lower courts have taken to include marijuana, because despite decriminalization its possession technically remains unlawful.[230] In the absence of a forceful state judiciary, willing to reify and enforce state political will and constitutional tradition, limits on police authority to search and seize risk going unrealized.

Even presuming, however, that decriminalization efforts succeed in limiting police authority, hazards remain. Perhaps most significant is the prospect that governments, by imposing fines in lieu of prison or jail, will maintain or actually increase enforcement because doing so will generate revenue,[231] without need to extend expensive constitutional rights, such as the right to legal counsel and a jury trial.[232] At the same time, rank-and-file officers, feeling pressure to "keep their numbers up,"

---

rather result in a fine and required drug abuse treatment, and quoting police spokesperson as saying that police would continue to make arrests and "[w]hether or not they make it through the charging process, that's up to the D.A.").

226 *See* Illinois v. Gates, 462 U.S. 213, 232 (1983) (describing probable cause as a " 'fluid concept' turning on the assessment of probabilities"); Texas v. Brown, 460 U.S. 730, 742 (1983) (plurality opinion) (stating that probable cause "does not demand any showing that [the arresting officer's belief in a suspect's guilt] is correct or more likely true than false").

227 Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); *see also* Maryland v. Pringle, 540 U.S. 366, 370 (2003) (positing that the existence of probable cause serves as an effective safeguard against executive branch overreach).

228 Virginia v. Moore, 553 U.S. 164, 176 (2008).

229 California v. Acevedo, 500 U.S. 565, 580 (1991).

230 *Id.*

231 For extended discussion of this impulse, long present but assuming greater importance as a result of the recent proliferation of "legal financial obligations" imposed on low-level offenders in particular, see Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 ILL. L. REV. 1175.

232 *See* SPANGENBERG PROJECT, *supra* note 5, at 3; *see also* Taylor Whitten, Note, *Under the Guise of Reform: How Marijuana Possession Is Exposing the Flaws in the Criminal Justice System's Guarantee of a Right to a Jury Trial*, 99 IOWA L. REV. 919 (2014). For an instance of a court refusing to allow decriminalization to result in denial of the right to a jury trial, on state constitutional grounds, see State v. Fuller, 311 P.3d 861, 863–64 (Or. 2013) (holding that right attaches when defendant arrested for misdemeanor thefts and prosecutor decided to pursue charge as violations).

might feel the urge to expand enforcement.[233] Even officers who might have been disinclined to arrest when possession was criminalized, might feel less constrained when they know that an individual will not suffer jail time or a criminal record and that any political push-back from communities will be correspondingly lessened.[234] Rounding out the dynamic, officers will be able to enforce the law free of fear that the exclusionary rule will be applied, inasmuch as the issuance of a ticket or summons is not typically deemed a Fourth Amendment seizure,[235] and the rule itself usually does not apply in the civil context.[236]

Ultimately, decriminalization, as Professor Alexandra Natapoff recently noted, thus represents a compromise: "[U]nlike legalization, it accepts the criminal system as an appropriate governance mechanism for an increasingly wide range of social behaviors and environments, even if it rejects the overtly punitive, debilitating quality of incarceration."[237] In light of the risks discussed above, it could be that nothing short of legalization is required for a true wind down to take place.[238] In Colorado and Washington State, voters have decided to legalize personal possession of marijuana, and policy makers nationwide are keeping a watchful eye on the effects of the change.[239] However, with other forms of public order offenses now the subject of decriminalization efforts (such as jaywalking, public consumption of alcohol) legalization is unlikely, highlighting the importance of the observations offered here.

---

233 *See Marijuana Possession Arrest, Illegal Searches, and the Summons Court System: Hearings of the New York City Council Public Safety Commission on Res. 986-A*, at 10 (June 12, 2012) (Testimony of Professor Harry G. Levine), *available at* http://marijuana-arrests.com/docs/Testimony-NYCityCouncil-Marijuana-Arrests—Illegal-Searches—Summons-Court-System-June-2012.pdf (noting risk that officers will continue or even increase enforcement under a fee-based summons system).

234 I am indebted to Professor Josh Bowers for this insight. To limit this threat, enforcement authority of less serious offenses might be relegated away from police toward non-sworn personnel. *See* Eric Miller, *Role-Based Policing: Restraining Police Conduct Outside the "Legitimate" Investigative Sphere*, 94 CAL. L. REV. 617, 665 (2006). While a constructive suggestion, for reasons discussed earlier such a proposed shift would face powerful and very likely successful institutional opposition from rank-and-file police and their departments.

235 *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(i) (5th ed. 2013).

236 *See The Exclusionary Rule*, 43 GEO. L.J. ANN. REV. CRIM. PROC. 224, 240–41 (2014) (citing Supreme Court decisions withholding application of the exclusionary rule in a variety of civil cases).

237 Alexandra Natapoff, *Decriminalizing Misdemeanors*, VAND. L. REV. (forthcoming) (manuscript at 3), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494414.

238 In 2013, for the first time since the Gallup Organization began posing the question over forty years ago, a majority of Americans (58%) supported marijuana legalization. Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), http://www.gallup.com.poll/165539/first-time-americans-favor-legalizing-marijuana.aspx.

239 *See* Amanda Paulson, *Pot Learning Curve: Washington Cribs from Colorado's Legalization Roll-Out*, CHRISTIAN SCI. MONITOR (July 8, 2014), http://www.csmonitor.com/USA/2014/0708/Pot-learning-curve-Washington-cribs-from-Colorado-s-legalization-rollout-video.