

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

COMMITTEE ON DRUGS & THE LAW

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CHAIR
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December 11, 2018

Mr. Alphonso B. David, Esq.
Counsel to the Governor
State Capitol
Albany, NY 12224

Re: Governor's Workgroup to Draft Legislation for Regulated Adult Use of Marijuana

Dear Mr. David,

I am writing on behalf of the New York City Bar Association's Drugs and the Law Committee regarding ongoing efforts to prepare New York for the possibility of the regulated adult use of marijuana and to examine the legal and policy changes that will be necessary in order to make a safe and orderly transition from a criminal market to a viable regulated one. Our Committee greatly appreciates the initiative the Governor has taken on this issue. We fully recognize the importance of giving marijuana regulation a thorough study and public airing to ensure that the system adopted in New York is effective, fair and safely administered. We would like to take this opportunity to express the City Bar's strong support for the adoption of a system to regulate and tax the adult use of marijuana, and highlight a few key issues we hope the Governor's Workgroup will consider in its deliberations.

The City Bar formed the Drugs and the Law Committee in 1986 to research and analyze why the criminalization of drug use, manufacture, and distribution had neither solved nor ameliorated the problems associated with the manufacture, distribution, possession and use of drugs. In the intervening 32 years, the Committee has studied extensively U.S. drug policy, consistently finding that the societal costs of drug prohibition are too high to justify. After significant study the City Bar, through the work of our Committee, has endorsed the Marijuana Regulation and Taxation Act ("MRTA"), sponsored by Senator Krueger and Assemblymember Peoples-Stokes (A.3506-B/S.3040-B), as a model for how New York could adopt a marijuana

regulatory scheme.¹ For your reference, enclosed is the City Bar's report in support of the legislation² and recent testimony we delivered to the New York State Assembly on this topic.³

While we feel that the MRTA could be adopted with minor revisions, we wanted to highlight a few key provisions that we feel are essential for inclusion in any comprehensive and effective marijuana regulation policy.

- **Provide for the sealing or expungement of marijuana convictions.** We are concerned about the civil rights impacts marijuana laws have had historically, as the enforcement of these laws have either intentionally or incidentally targeted black and Hispanic individuals. The City Bar has long supported legislation that would permit broad sealing of criminal records related to nonviolent offenses, including marijuana convictions, in order to allow the affected New Yorkers to have the opportunity to secure housing, employment, education and vocational training that would otherwise be unavailable by virtue of such convictions.
- **Reinvestment of tax revenue into research, education and those communities most impacted by prohibition.** The City Bar supports generally and consistently shifting funds away from enforcement to treatment and prevention, and we support building strong, healthy, and safe communities across New York State. Any feasible attempts to correct for improper impacts of the current policies must be considered as we design new ones. A portion of the tax revenue received by the State should be earmarked to bolster communities that have been harmed by historical policies; to shore up our state's public education system, which is a key to drug abuse prevention; and to provide treatment and drug education to youth in our state. In addition, operational funding and research funds should be dedicated to examining the impacts of the legal transition.
- **Create a market system that allows for fair access.** It is important that a marijuana regulatory scheme includes some prohibitions on vertical integration of the market and limits the number of licenses held by individuals in various categories. These types of limitations are designed to allow entry into the market of a variety of license holders, including small businesses, and to avoid undue domination by big players in the industry. The system should reverse, not exacerbate, inequities, and seek to ensure that individuals who have been charged with crimes in the past, especially marijuana possession and/or sales crimes, are not unfairly barred from potentially participating in the legal marijuana economy.

¹ For information on all of the City Bar's work related to marijuana legalization, visit <https://www.nycbar.org/member-and-career-services/committees/marijuana-legalization-and-regulation>.

² Available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-marijuana-legalization-marihuana-regulation-and-taxation-act>. The Committee is still reviewing the "C" version of the legislation, as amended in the Senate on November 7, 2017 and the Assembly on November 16, 2018.

³ Available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-marijuana-legalization-marihuana-regulation-and-taxation-act-assembly-hearing-testimony>.

We hope these recommendations can be helpful to the Governor's Workgroup and would welcome the opportunity to discuss further should you have any questions. Thank you again for your work on New York's marijuana policy and we appreciate your consideration of our position.

Respectfully,

A handwritten signature in black ink, appearing to read 'LS', with a long horizontal flourish extending to the right.

Luke C. Schram

**REPORT ON LEGISLATION BY THE
COMMITTEE ON DRUGS AND THE LAW**

**A.3506-B
S.3040-B**

**M. of A. Peoples-Stokes
Sen. Krueger**

The Marihuana Regulation and Taxation Act¹

THIS BILL IS APPROVED

The New York City Bar Association’s Committee on Drugs and the Law (“the Committee”)² respectfully submits this report examining and approving the legalization, regulation, and taxation of marijuana for adult non-medical use in New York State and providing support for A.3506-B/S.3040-B (“the Legislation”),³ which would create a system for the production, distribution, and adult non-medical use of marijuana. We also recommend, if feasible, minor revisions to the Legislation, as noted herein. The Committee also takes this opportunity to express its support for the policy of ending criminalization of marijuana, and for taxing and responsible regulation of marijuana.

¹ The legislature is using an archaic spelling of marijuana (“marihuana”).

² The Committee on Drugs and the Law studies the dimensions of substance use and abuse and how society deals with those problems, and considers future drug policy goals and objectives. For more information on the Committee and its authored reports, see <http://www.nycbar.org/member-and-career-services/committees/drugs-and-the-law-committee>.

³ An act to amend the public health law, in relation to the description of marihuana, and the growing of and use of marihuana by persons twenty-one years of age or older; to amend the civil practice law and rules, in relation to removing certain references to marihuana relating to forfeiture actions; to amend the vehicle and traffic law, in relation to making technical changes regarding the definition of marihuana; to amend the penal law, in relation to the qualification of certain offenses involving marihuana and to exempt certain persons from prosecution for the use, consumption, display, production or distribution of marihuana; to amend the alcoholic beverage control law, in relation to providing for the licensure of persons authorized to produce, process and sell marihuana; to amend the state finance law, in relation to establishing the New York state marihuana revenue fund, the New York state drug treatment education fund and the New York state community grants reinvestment fund; to amend the tax law, in relation to providing for the levying of an excise tax on certain sales of marihuana; to amend the criminal procedure law, the civil practice law and rules, the general business law, the state finance law, the executive law, the penal law and the vehicle and traffic law, in relation to making conforming changes; to repeal sections 221.05, 221.10, 221.15, 221.20, 221.25, 221.30, 221.35 and 221.40 of the penal law relating to the criminal possession and sale of marihuana; to repeal paragraph (f) of subdivision 2 of section 850 of the general business law relating to drug related paraphernalia; to repeal section 150.75 of the criminal procedure law relating to appearance tickets for certain marihuana offenses; and making an appropriation therefor.

I. SUMMARY

The Legislation legalizes limited possession, use, and licensed cultivation and distribution of marijuana by adults age 21 and older as a matter of New York State law. It creates a system governing the production and distribution of marijuana, and provides for state and local taxation of marijuana sales. The proposed system would be administered by a Bureau of Marijuana Policy (the “BMP”) within the State Liquor Authority (the “SLA”). The Legislation also allows for farming of industrial hemp. This well-crafted bill is complex, and seeks to establish a multi-tiered process for certification of, oversight of, and reporting by producers and distributors.

This Legislation continues the prohibition on public smoking of marijuana, but reduces the penalty from a Class B misdemeanor to a civil fine and leaves intact the prohibition on smoking marijuana in bars, restaurants, and other places where tobacco may not be smoked, except that the law allows for licensure of facilities for on-premises consumption if local approval is granted. The BMP is charged with creating a stringent vetting process for applicants seeking licenses to cultivate or distribute marijuana. In particular, among other criteria to be established by the BMP, applicants must: (1) disclose the identities of all principals, directors, and officers; (2) provide adequate information regarding all principals, directors, and officers to the BMP for a determination of fitness for the licensure sought; (3) possess, or be bound by contract to possess, premises compliant with state and local restrictions on activities to be undertaken at the premises; (4) identify the location of the premises; (5) disclose all sources of funding; and (6) disclose the terms and conditions governing the operation of the licensed premises. The Legislation also requires applicants to notify municipalities (outside of the City of New York) or community boards (within the City of New York) not less than 30 days before applying to the BMP for a license of the applicant’s intent to seek such a license.

Additionally, municipalities that wish to exclude marijuana retailers have the local option to do so via a general election ballot question. Municipalities that permit marijuana businesses may enact time, place, and manner restrictions more stringent than those embodied in the Legislation or those promulgated by the BMP.

The Legislation repeals the criminal prohibition on possession of two pounds or less of marijuana and 4.5 ounces of concentrated cannabis by adults. It allows cultivation of up to six marijuana plants within a private residence or on the grounds of a private residence in a locked space that is not visible by normal unaided vision from a public place. The Legislation continues to prohibit possession of more than two pounds of marijuana or 4.5 ounces of concentrated cannabis by an adult, with an exception for marijuana cultivated at home. Marijuana retailers would be allowed to sell only to adults age 21 and older.

II. LEGAL CONTEXT OF THE PROPOSED NEW YORK LEGISLATION

While marijuana is illegal under the federal Controlled Substances Act of 1970 (“CSA”), in recent years numerous states have begun varying their policies and laws with respect to marijuana. For example, since 1996, 29 states (including New York) and the District of

Columbia have begun to allow marijuana for medical use.⁴ In 2012, Colorado and Washington both passed voter initiatives to legalize marijuana for adult non-medical use. In 2014, Alaska and Oregon also passed voter initiatives to legalize marijuana for adult non-medical use. District of Columbia voters approved Initiative 71, which permits adults 21 years of age or older to grow and possess (but not sell) limited amounts of marijuana.⁵ In 2016, California adopted Proposition 64, adding that significant, large state to the list, along with Nevada, Maine, and Massachusetts. Amid the experimentation among states, public opinion about marijuana prohibition also has shifted, so that now a clear majority of Americans support legalization—about 60 percent as of October 2016.⁶ As of the writing of this report, no state has yet adopted a marijuana legalization scheme via legislation.

A previous report of the Committee and the Health Law Committee noted that the federal government classifies marijuana as a Schedule I controlled substance under the CSA, effectively prohibiting cultivation, distribution, and possession of marijuana under all but the most limited research protocols.⁷ The report also noted that Congress, in drafting the CSA, disclaimed any intent to occupy the field of controlled substances regulation “unless there is a *positive conflict* between [a] provision of this subchapter and [a] State law *so that the two cannot consistently stand together.*” 21 U.S.C. § 903 (emphasis added). The report noted that, “Thus, the CSA preempts only those state laws that create a positive conflict with the federal law.”⁸ A positive conflict exists when two laws cannot be simultaneously enforced.

The report found no such conflict in the context of New York’s then-proposed medical marijuana legislation, notwithstanding the federal government’s designation of marijuana as a Schedule I controlled substance with no currently accepted medical use in treatment, given that the federal government would retain the power to enforce its own law in its own jurisdiction. In the Committee’s view, while there are still some open questions on whether some aspects of a marijuana legalization and regulation policy may have federal preemption problems, there is ample precedent for state law differing from federal law, and we are seeing at the federal level some interest in state experimentation. Indeed, on Sept. 10, 2013, Deputy Attorney General James Cole, in testimony before the United States Senate Judiciary Committee, noted that the CSA allows states to remove criminal penalties for conduct that the federal government continues to criminalize under the CSA as long as the state policies do not create a “positive conflict” with federal law. There is no positive conflict when a state simply does not have a

⁴ Website of ProCon.org, available at <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (all websites last visited June 7, 2018).

⁵ “Initiative 71 and DC’s Marijuana Laws,” available at https://mayor.dc.gov/sites/default/files/dc/sites/mayoromb/release_content/attachments/I71QA.pdf.

⁶ Gallup, Support for Legal Marijuana Use Up to 60% in U.S., available at <http://www.gallup.com/poll/196550/support-legal-marijuana.aspx>; see also Pew Research Center poll, conducted in August and September 2016, available at <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>.

⁷ Report on A.6357-A/S.4406-A, which would create a system for the production, distribution, and medical use of marijuana for those citizens who would likely benefit from such use (Reissued June 2013), available at <http://www2.nycbar.org/pdf/report/uploads/20072485-UpdatedReportPermittingMedicalMarijuana.pdf>.

⁸ *Id.* at 12.

statute prohibiting something like marijuana, since there would be nothing conflicting with the federal government's right to come into that state and arrest a marijuana user under the federal law. Shortly before giving this testimony, Deputy AG Cole issued what became known as the "Cole Memo," an Obama-era directive that discouraged enforcement of federal laws in states that have legalized marijuana, except in certain types of cases (e.g., to prevent distribution to minors, violence associated with cultivation or distribution, or revenue being channeled to gangs).⁹

We recognize that the Cole Memo has since been rescinded, and that there is uncertainty as to whether federal enforcement will be heightened under the current administration. Notably, however, Attorney General Jeff Sessions' January 4, 2018 memo falls short of directing federal prosecutors to resume criminal enforcement of marijuana-related offenses. Instead, it leaves the decision up to individual federal prosecutors as to whether, and how much, to focus on prosecuting such cases.¹⁰

Cole's testimony suggested that the federal government may have more viable bases for challenging state licensure and regulation of marijuana businesses, but the Committee recognizes there are also viable arguments for finding that no positive conflict is present with licensure and regulation. Based on the available legal precedents and existing practices in medical marijuana states, the Committee holds the position that neither the CSA nor other federal law unquestionably preempts state licensure and regulation of marijuana businesses, but the Committee recognizes that this is a developing area of law. For example, state and local taxes directly linked to the quantity of marijuana produced and sold may be vulnerable to forfeiture to the federal government. At the same time, the Committee also notes that the federal government has not sought forfeiture of taxes collected by state and local governments from current medical and non-medical marijuana businesses lawfully conducted under state statutes.

III. COSTS AND BENEFITS OF CURRENT MARIJUANA POLICIES

Direct costs of the continued criminalization of marijuana offenses are in large measure susceptible to quantification. Ascertainable costs include time spent by law enforcement personnel in making arrests for marijuana offenses; time spent by prosecutors and support staff in reviewing and prosecuting marijuana offenses; time spent by state courts hearing cases involving marijuana offenses, including arraignments and determinations of bail; and payments to defense attorneys, whether through public defenders' offices or through the 18-B program. For prosecutions to go forward, laboratory results that confirm field tests for marijuana are required,

⁹ See "Guidance Regarding Marijuana Enforcement," Memorandum for All United States Attorneys from James M. Cole, U.S. Deputy Attorney General, August 29, 2013, *available at* <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

¹⁰ See "Marijuana Enforcement," Memorandum for All United States Attorneys from Jefferson B. Sessions, III, U.S. Attorney General, January 4, 2018, *available at* <https://www.justice.gov/opa/press-release/file/1022196/download> ("In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions. . . . These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.").

as are laboratory analysts to testify against the accused under the confrontation clauses of the state and federal constitutions (N.Y. Const. art. I, § 6; U.S. Const. amend. VI).

Costs borne by defendants, in addition to the direct costs of privately retained attorneys, include periods of incarceration, which can be significant, as well as lost employment, costs of child care while incarcerated, costs of correcting erroneous records when cases are ultimately dismissed, and lost financial aid for students.

Indirect and qualitative costs of the current marijuana policies also abound. Among the most significant are the opportunity costs. Instead of pursuing costly marijuana prosecutions, law enforcement could focus on protecting communities from public safety dangers and prosecuting violent crimes. Moreover, it is inherently inefficient to retain laws that are widely disregarded rather than complied with by otherwise law-abiding New York State citizens. Further, users must consort with criminals to obtain marijuana, exposing recreational users to dangers beyond those posed by the substance itself.

The main putative benefit of current marijuana policy is that it discourages use. It might be expected, for example, that prohibition of marijuana would result in unavailability, yet that has not proved to be the case. Indeed, 82% of high school students and young adults in their early twenties report that marijuana is “very” or “fairly” easy to obtain, and this is the very population whose use is most strongly disfavored. Moreover, there has not been a dramatic, or even significant, decline in marijuana use since the advent of marijuana prohibition.¹¹ Accordingly, the belief that prohibition would reduce access to marijuana, at least in the most vulnerable populations, has not been substantiated. That said, some people must certainly be deterred because the drug is illegal or cannot be obtained in a lawful manner in most states, and to that extent, prohibition has some advantage.

It is often suggested that prohibiting marijuana sends an important message that our society does not favor or tolerate use of potentially dangerous substances, especially among youth. This purported advantage is undermined because, as discussed above, evidence of decreased use as a result of even stringent marijuana laws is murky at best. Moreover, several substances as dangerous as or even more dangerous than marijuana are not similarly prohibited, such as cigarettes and alcohol; indeed, alcohol is associated with far more violent crime than any other drug in the United States.¹² In addition, regulating marijuana would make it safer than at

¹¹ See, e.g., Gallup chart on rise in use in '70s and '80s and relatively consistent level since then, available at <http://www.gallup.com/poll/163835/tried-marijuana-little-changed-80s.aspx>; fluctuating statistics from government records, available at <http://www.drugabuse.gov/publications/research-reports/marijuana/what-scope-marijuana-use-in-united-states>.

¹² See, e.g., <https://www.washingtonpost.com/news/wonk/wp/2014/08/19/alcohol-is-still-the-deadliest-drug-in-the-united-states-and-its-not-even-close/> (concluding that alcohol is involved in more homicides than every other substance, combined); Alcohol ranked “most harmful” among a list of 20 drugs, beating out crack and heroin, when assessed for its potential harm to the user and others, according to study results published in *The Lancet*, as reported at <http://www.cnn.com/2010/HEALTH/11/01/alcohol.harm/>. According to the National Institute on Alcohol Abuse and Alcoholism, nearly 88,000 Americans die from alcohol-related causes annually, making it the fourth leading preventable cause of death in the United States. See <http://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics>. For dangers of tobacco, see, e.g., <http://www.cdc.gov/tobacco/campaign/tips/resources/data/cigarette-smoking-in-united-states.html>;

present by subtracting the dangers of an unregulated, illicit market and adding the ability to impose age and other restrictions to protect youth and other accountability mechanisms.

A ban on marijuana may also be justified because marijuana can cause harm due to temporarily altering an individual's mental state, and can be addictive in a minority of cases. It can also be harmful to developing brains, and can sometimes exacerbate or trigger nascent mental illnesses. The dangers of marijuana must be weighed against the advantages the substance offers in alleviating or preventing some medical and mental health conditions, and the relative safety of having a regulated supply in contrast to a supply in the hands of outlaws not subject to any regulation.

As noted above, many states have experimented with decriminalization or legalization of marijuana in recent years. The District of Columbia and 29 states (including New York) allow some form of medical marijuana,¹³ and eight states plus the District of Columbia have legalized marijuana for all uses, including adult non-medical use. It is, however, premature to make any sweeping conclusions about the effect of allowing medical marijuana or adult non-medical use, as it will take time for the data to develop and there are multiple complexities that make the data difficult to compare across time. Indeed, an early report issued by the Colorado Department of Public Safety after the change in the law made clear in several places that most of the data would not be useful for drawing conclusions about the effects of legalization. Rather, it explained, the report was intended to be a baseline, to begin collecting data in an intentional way, rather than an analysis of the impact of changes in the Colorado laws.¹⁴ Despite these natural limitations to the developing data, to date there are some preliminary outcomes from legalization worth noting.

First and foremost is the data on underage use of non-medical marijuana, which preliminary analysis suggests decreases with relaxation of punitive measures, although there are some indications of increased use among adults.¹⁵ One seminal study by Dr. Esther K. Choo at Brown University's Medical School found decreases in youth consumption of marijuana in all states with relaxed marijuana laws.¹⁶ Other studies have underscored that the concerns that legalization would increase availability of marijuana to youth have not materialized.¹⁷ It should,

<http://www.cancer.gov/about-cancer/causes-prevention/risk/tobacco>; <http://www.lung.org/stop-smoking/smoking-facts/>.

¹³ The City Bar supported the legalization of medical marijuana in New York State, issuing a number of reports on the issue; see <http://tinyurl.com/y6unecux>.

¹⁴ Colorado Department of Public Safety, *Marijuana Legalization in Colorado: Early Findings, A Report Pursuant to Senate Bill 13-283, passim*, (March 2016), available at <http://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf> (hereinafter "CDPS Report").

¹⁵ See Colorado Department of Public Safety report, *supra* n. 14, at 7.

¹⁶ Esther K. Choo, et al., *The Impact of State Medical Marijuana Legislation on Adolescent Marijuana Use*, 55 J. OF ADOLESCENT HEALTH 160-66 (2014), [http://www.jahonline.org/article/S1054-139X\(14\)00107-4/pdf](http://www.jahonline.org/article/S1054-139X(14)00107-4/pdf), cited in Professor Robert T. Hoban, Esq. and Raushanah A. Patterson, *Sprung From Night Into the Sun: An Examination of Colorado's Marijuana Regulatory Framework Since Legalization*, 226 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L., 260 *et seq.* (2015-2016). *But see* mixed evidence on youth use trends reported in CDPS Report, *supra* n. 14, at 7-8.

¹⁷ Douglas A. Berman, *As Colorado Loosened Its Marijuana Laws, Underage Consumption and Traffic Fatalities Fell*, LAW PROFESSOR BLOGS NETWORK (Aug. 11, 2014),

however, be pointed out that use rates are notoriously difficult to pinpoint, and are unreliable to compare over time when factors such as stigma, novelty, and risk of arrest change.

Second, early data suggests that there have been positive effects from legalization in regard to drops in traffic fatalities,¹⁸ drops in fatalities due to overdoses on other illicit substances, and overall decreases in crime. “The 22 states that legalized medical marijuana have had ‘1,729 fewer overdose deaths in 2010’—a trend which has continued into 2014... states with medical marijuana have had 24.8% fewer prescription drug overdose deaths during the course of the study.”¹⁹ Homicide, rape, and robbery all have decreased in the period following the legalization in Colorado, and in the same period, burglaries in Denver decreased by 9.5% and overall property crime in the state went down by 7.9%.²⁰

The final bit of useful data concerns tax and licensing revenues, which have been cited as one of the primary reasons to permit non-medical adult use of marijuana, together with cost savings from the reduction in arrests, prosecutions, and incarcerations. In Colorado, the state directed marijuana funds to the school system, and in the March 2016 report by the Colorado Department of Public Safety, there has been a notable increase in revenue and spending allocated to schools: “Total revenue from taxes, licenses, and fees increased from \$76,152,468 in 2014 to \$135,100,465 in 2015 (+77%). Excise tax revenue dedicated to school capital construction assistance was \$35,060,590 in 2015.”^{21, 22}

Based on this preliminary data, it appears to the Committee that the harms and costs of marijuana prohibition to individuals and the community significantly outweigh the harms and costs of legalizing marijuana, and that the data supports this conclusion.

IV. STATEMENTS OF SUPPORT AND RECOMMENDATIONS FOR THE PROPOSED LEGISLATION AND THE UNDERLYING POLICY

The following are issues that are considered important by the Committee and underlie our support for the proposed Legislation. In some instances, the Committee suggests certain modifications to the Legislation. The Committee supports enactment of the proposed Legislation regardless of whether the proposed modifications are adopted. The Committee supports the effectuation of the policy of taxing and regulating marijuana and ending its criminalization

http://lawprofessors.typepad.com/marijuana_law/2014/08/as-colorado-loosened-its-marijuana-laws-underage-consumption-and-traffic-fatalities-fell.html. In 2016, the Drug Policy Alliance released a report concluding again that there was no significant change in marijuana use among youth in Colorado and Washington.

¹⁸ *Id.*

¹⁹ *Id.* at 261, citing Marco Torres, *Marijuana Decreases Death Rates From Pain Killers By Over 30 Percent*, PREVENTDISEASE.COM (Dec. 5, 2014), http://preventdisease.com/news/14/120514_Marijuana-Decreases-Death-Rates-By-Pain-Killers-By-Over-30-Percent.shtml.

²⁰ *Id.* at 263; see also CDPS Report, *supra* n. 14, at 3-7.

²¹ *Id.* at 9.

²² Although recommending how best to allocate licensing and tax revenues from legalizing and regulating non-medical marijuana in New York is beyond the scope of this report, data from other states demonstrates that legalization is likely to be economically beneficial to the state.

irrespective of the success of the Legislation.

A. Repeal of Criminalization of Personal Possession Offenses

The Committee opposes criminalization of marijuana and supports repeal of personal possession offenses for various reasons. First, marijuana criminalization consumes a significant portion of New York's limited criminal justice system resources. Every custodial arrest made and summons issued for personal possession offenses consumes police officers' time, rendering those officers temporarily unavailable. Arrests for Penal Law 221.10 ("PL") offenses set off a chain of events that require the officer(s) to bring the accused to the precinct, to book the accused, to fingerprint the accused, and to ensure that the fingerprints and the record of arrest are transmitted to the Division of Criminal Justice Services in Albany, to ensure that the accused's rap sheet is updated.

Next, prosecutors are called on to review and investigate the facts and circumstances of the arrest, to verify that the offense occurred and that the PL 221.10 misdemeanor rather than the PL 221.05 violation is the appropriate charge, to draft and file a complaint, and to commence the prosecution in the appropriate court. The investigation, verification, and drafting of the complaint require the prosecutor to consult with at least one of the arresting officers, resulting in two individuals attending to each arrest for some period of time. The substance purported to be marijuana must be booked into evidence and preserved for confirmatory laboratory testing. An arresting officer and the laboratory technician must be available to testify on those rare occasions where the accused opts to contest the charge. Judges, clerks, court officers, court reporters, and other court personnel also must spend time creating records. Corrections officers and court officers spend time holding the accused. Meanwhile, the accused must be fed, housed, and guarded until arraignment unless a desk appearance ticket is issued.

At arraignment, most defendants are represented by a public defender at taxpayer expense. Counsel for the accused is entitled to a RAP sheet, prepared on the prosecutor's time and government expense. The clear majority of defendants are granted an adjournment in contemplation of dismissal pursuant to Criminal Procedure Law 170.56 ("CPL"). For virtually all defendants, the case ends there, with the charges being dismissed one year from the date of the arraignment without further court involvement.

In addition, the Committee is concerned about the civil rights impacts of the marijuana laws.²³ In New York City, the enforcement of these laws either intentionally or incidentally targeted black and Hispanic individuals. Of the 50,000 individuals arrested by the NYPD for PL

²³ The City Bar has issued a number of reports highlighting the need for reform in this area; *see e.g.* Report on the NYPD's Stop-and-Frisk Policy, May 2013, <https://www2.nycbar.org/pdf/report/uploads/20072495-StopFriskReport.pdf> (recommending amending the Penal Law to make possession of marijuana in a public place a violation rather than a misdemeanor); Report in support of legislation that would allow for the conditional sealing of certain drug convictions, Nov. 2008, http://www.nycbar.org/pdf/report/A_4552_Memo.pdf (the City Bar has long supported legislation that would permit broad sealing of criminal records related to nonviolent offenses, including marijuana convictions in order to allow the effected New Yorkers to have the opportunity to secure housing, employment, education and vocational training that would otherwise be unavailable by virtue of such convictions).

221.10 offenses in 2010 and 2011, approximately 85% were black or Hispanic²⁴, and in the first eight months of 2014, 86% of those arrested for marijuana possession were blacks and Latinos. That is seven times the rate of whites for blacks and four times the rate for Latinos,²⁵ despite the fact that black and Hispanic New Yorkers account for only 48.6% of the City's population,²⁶ and that marijuana consumption rates appear to be indistinguishable between white, black, and Hispanic New York City youth.²⁷ These disparities have persisted even as enforcement has decreased.²⁸ In 2015, there were 16,590 arrests for low-level marijuana possession, down 42% from 2014 and down 67% from the nearly 51,000 arrests that occurred in 2011. Nevertheless, 88% of those who were arrested were African-American or Latino.²⁹

Although we note that a previous version of the legislation set the legal age at 18 for marijuana cultivation, this bill prudently sets New York's legal age for marijuana cultivation, purchase, and use at 21.

B. The Alcoholic Beverage Control Law Amendments, With Recommended Changes

The Legislation amends the Alcoholic Beverage Control Law ("ABC") to grant the BMP the power to regulate commercial marijuana cultivation, processing, and distribution. The Legislation would create a marijuana industry that is regulated in a manner substantially like the alcohol industry. The details of the proposed system are discussed below.

i. General provisions

The current Legislation includes some prohibitions on vertical integration of the market and limits the number of licenses held by individuals in various categories. These types of limitations are designed to allow entry into the market of a variety of license holders, including small businesses, and to avoid undue domination by big players in the industry.

²⁴ See, e.g., New York State Division of Criminal Justice Services, Computerized Criminal History System (Feb 2011). Includes all fingerprintable misdemeanor arrests for NYS Penal Law Article 221.10 as the most serious charge in an arrest event, ages 16 and older; <http://www.drugpolicy.org/resource/race-class-and-marijuana-arrests-mayor-de-blasios-two-new-yorks-nypds-marijuana-arrest-crus>.

²⁵ See Race, Class & Marijuana Arrests in Mayor De Blasio's Two New Yorks, available at <http://www.drugpolicy.org/sites/default/files/Race-Class-NYPD-Marijuana-Arrests-Oct-2014.pdf>.

²⁶ Non-Hispanic black individuals represented 22.8% of the City's population, according to the 2010 Census, while Hispanic individuals of any race represented 28.6% of the population, together making up a total of 51.4% of the population. A small percentage (2.8%) identified as both black and Hispanic, resulting in a net of 48.6% of the City's population identified as black or Hispanic.

²⁷ New York City Department of Health Youth Risk Behavior Survey data for 2011 indicate that black and Hispanic youth—those most likely to be arrested—use marijuana at rates that are statistically indistinguishable from the usage rates for white youth. See NYC Department of Health, NYC Youth Risk Behavior Survey 2011, available at <https://www1.nyc.gov/assets/doh/downloads/pdf/basas/youthdrugdemogsmj2015.pdf>.

²⁸ See, e.g., <http://www.drugpolicy.org/news/2016/02/new-data-released-nyc-marijuana-possession-arrests-under-17k-first-time-1996-67-drop-51>; <http://www.newsweek.com/how-do-misdemeanor-marijuana-arrests-affect-violent-crime-341145>.

²⁹ See *id.*

The Committee suggests that the provision presumptively restricting employment by a licensee of any person who has been convicted within three years of “an offense related to the functions... or duties” of the license expressly exclude those persons convicted solely of marijuana offenses under PL Article 221. Nevertheless, changes from an earlier iteration of the legislation have made restrictive provisions on licensees less pernicious. It should be noted that if the BMP interprets this provision broadly, it could have the effect of placing a substantial and unnecessary burden on certain individuals by preventing them from entering the legal marketplace for marijuana.

ii. Producers

Proposed ABC § 174 mirrors current ABC § 103, which governs the conduct of commercial manufacturers of alcohol. The provision would limit commercial cultivation (i.e., all cultivation outside of the home, provision discussed above) to “licensed producers.” The producer’s license also permits the producer to process and sell marijuana and concentrates at wholesale to processors, retailers, and other producers while barring direct sales to consumers.

The Legislation would require licensed producers to maintain books and records on the premises to adequately document compliance with all rules and regulations established by statute and/or promulgated by the SLA. The statute expressly requires the producer to record each sale on a numbered invoice that also contains the licensee’s license number, name, and address, as well as the quantity of marijuana sold and the terms of the sale.

The Committee views the adoption and application of the regulatory framework governing alcohol manufacturers to marijuana producers as a sensible starting point. The broad grant of regulatory powers to the SLA to further develop regulations applicable to marijuana producers as time and experience show to be necessary is particularly warranted in the context of regulating the marijuana industry which, as experience in other states has shown, is dynamic.

iii. Processors

The Legislation provides for licensing of “marihuana processors.” The activities in which processors may engage under their licenses include extracting cannabis resins and oils from the mature flowers of the plant, to be sold as concentrates or to be infused in distinctly labeled food and beverage products for oral consumption (proposed ABC § 20-c). Processors may package and label marijuana, concentrates, and infused products for sale in retail outlets, and they may sell those products at wholesale to licensed retailers. The Legislation permits holders of wholesale licenses to also hold processor licenses, and holders of processor licenses to hold wholesale licenses.

iv. Retailers

Proposed ABC § 176 would govern the activities of licensed retailers of marijuana, concentrates, and infused and edible products. The Legislation would require an applicant for a retail license to demonstrate ownership or possession of a storefront in premises zoned for

business, trade, or industry with a principal entrance on street level and located on a public thoroughfare. One additional entrance from a parking lot would also be permitted. Proximity limitations that currently govern the location of alcohol retail establishments' distances from schools and places of worship would apply to retail marijuana establishments. Additionally, hours of operation would be restricted to the same hours as are applicable to establishments selling alcohol for off-premises consumption.

Within the licensed premises, marijuana offered for retail sale would be required to be kept in sealed containers received from a licensed producer or processor. The Legislation would make an allowance for sealed screen-topped jars for access to smell.

The Legislation also contemplates delivery of marijuana under rules substantially the same as applicable to alcohol under current ABC § 105.

V. CONCLUSION

The Committee on Drugs and the Law supports this Legislation to create a legal, regulated market for adult non-medical use of marijuana in New York State. New York was the first state to turn away from alcohol Prohibition in 1923, and the Committee hopes the state will show similar leadership on this analogous issue, whether through this Legislation or another vehicle. Marijuana prohibition is a costly and ineffective policy that has not succeeded in eliminating marijuana use. The failed policy has devastated families and communities, eroded respect for the law, and strained police-citizen relations. Accordingly, the Committee applauds this Legislation and urges its adoption. Further, regardless of the vehicle, the Committee supports state and federal legislative and policy changes that reduce or eliminate criminalization of marijuana and that permit, tax, and regulate the production, distribution, and adult use of marijuana.

Committee on Drugs & the Law
Zarah Levin-Fragasso, Chair

June 2018

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**WRITTEN TESTIMONY OF THE
DRUGS AND THE LAW COMMITTEE**

**ASSEMBLY STANDING COMMITTEE ON CODES
ASSEMBLY STANDING COMMITTEE ON HEALTH
ASSEMBLY STANDING COMMITTEE ON GOVERNMENTAL OPERATIONS
ASSEMBLY STANDING COMMITTEE ON ALCOHOLISM AND DRUG ABUSE**

**HEARING ON THE
MARIHUANA REGULATION AND TAXATION ACT (A.3506-B)**

October 16, 2018

Updated and Resubmitted October 18, 2018

Good morning, distinguished Committee Chairs and Members, my name is Hanna Liebman Dershowitz. I am an attorney in New York and I am here this morning representing the New York City Bar Association (“City Bar”), in my capacity as a Member of the Drugs and the Law Committee. The City Bar has adopted a formal position, initiated by our Committee, supporting both the policy of taxing and regulating marijuana and the adoption of the well-crafted bill being considered here, Assembly Bill 3506-B, the Marihuana Regulation and Taxation Act (“MRTA”), introduced by Assembly Member Peoples-Stokes et al.¹

While many states have legalized recreational marijuana, no state has adopted a cannabis legalization scheme by means of legislation.² This allows New York to still demonstrate significant leadership by crafting a law through the legislative process that offers a thoughtful model for reform, bringing in best practices and adding innovations. Moreover, given the effect on our state of the elimination of the state and local tax exemptions, there is an additional opportunity to marshal the state’s resources toward better uses through a new revenue stream that also brings good jobs.

By implementing a legal, regulated framework, New York State can avoid the enormously wasteful current scheme that deprives the state of significant resources in terms of

¹ The City Bar’s report in support of the legislation can be found at <https://s3.amazonaws.com/documents.nycbar.org/files/20072987-MarijuanaRegulationTaxationAct.pdf>.

² Editor’s Note issued Oct. 18, 2018: The Committee has determined a clarifying note on this point is needed. While Vermont legalized marijuana use through legislation, the enacting legislation did not include a regulatory structure for sales and the market as New York’s proposed legislation does. New York has the opportunity to use the legislative process to adopt a truly regulated marijuana market.

prosecution costs, court time, jail space, public defense, lab costs, overtime for testimony, etc., Moreover, as I will discuss further, new taxes would create a boon that could be directed to drug prevention, education, and treatment.

The most frequent concern I have found among legislators struggling with this issue is the effect on kids, especially what message regulation sends versus prohibition. To these people I usually point out marijuana's ubiquitousness and availability to our youth, even in a non-legal environment. Having marijuana on the same footing as alcohol and tobacco offers increased opportunities to succeed at effective education and prevention. We do not believe a youthful indiscretion with marijuana (or any drug) should subject any young people to the derailment that comes with a criminal conviction. The criminal justice system is, to say the least, not the optimal treatment environment for people with substance vulnerability.

Moreover, the Committee has examined the extant data on underage use of non-medical marijuana, which preliminary analysis suggests *decreases* with relaxation of punitive measures (although there are some indications of increased use among adults). One seminal study in 2014 by Dr. Esther K. Choo at Brown University's Medical School found decreases in youth consumption of marijuana in all states with relaxed marijuana laws.³ Other studies have debunked concerns that legalization would increase the availability of marijuana to youth.⁴ If this sounds counterintuitive, consider that rates of use have been uncorrelated with stringency of laws or enforcement across decades of previous research, which ultimately failed to establish credibility for a cognizable deterrence effect. In 2017, Colorado reported its lowest rates of teen marijuana use since 2007 and 2008, according to state-level numbers from the National Survey on Drug Use and Health, a longstanding resource for tracking use rates. And rates of teen alcohol, tobacco, and heroin use are down sharply in the state, as well.⁵ These same data showed that adolescent marijuana use fell nationwide in 2016.

Another issue that is often raised is that legalization of marijuana could affect roadway safety. However, early data suggests that there have been positive effects from legalization, including drops in traffic fatalities, drops in fatalities due to overdoses on other illicit substances, and overall decreases in crime.⁶ According to one study, "The 22 states that legalized medical marijuana... had '1,729 fewer overdose deaths in 2010'—a trend which has continued into 2014... states with medical marijuana have had 24.8% fewer prescription drug overdose deaths

³ Esther K. Choo, et al., *The Impact of State Medical Marijuana Legislation on Adolescent Marijuana Use*, 55 J. OF ADOLESCENT HEALTH 160-66 [http://www.jahonline.org/article/S1054-139X\(14\)00107-4/pdf](http://www.jahonline.org/article/S1054-139X(14)00107-4/pdf) (2014), cited in Professor Robert T. Hoban, Esq. and Raushanah A. Patterson, *Sprung From Night Into the Sun: An Examination of Colorado's Marijuana Regulatory Framework Since Legalization*, 226 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L., 260 et seq. (2015-2016)(all websites last visited Oct. 15, 2018).

⁴ Douglas A. Berman, *As Colorado Loosened Its Marijuana Laws, Underage Consumption and Traffic Fatalities Fell*, LAW PROFESSOR BLOGS NETWORK (Aug. 11, 2014), http://lawprofessors.typepad.com/marijuana_law/2014/08/as-colorado-loosened-its-marijuana-laws-underage-consumption-and-traffic-fatalities-fell.html. In 2016, the Drug Policy Alliance released a report concluding again that there was no significant change in marijuana use among youth in Colorado and Washington.

⁵ Christopher Ingraham, *Washington Post*, "Following marijuana legalization, teen drug use is down in Colorado," December 11, 2017.

⁶ *Supra* n. 2.

during the course of the study.”⁷ In Colorado, homicide, rape, and robbery all have decreased in the period following the legalization, and in the same period, burglaries in Denver decreased by 9.5% and overall property crime in the state went down by 7.9%.⁸ A recent *American Journal of Public Health* article, in 2017, concluded the following: “Three years after recreational marijuana legalization, changes in motor vehicle crash fatality rates for Washington and Colorado were not statistically different from those in similar states without recreational marijuana legalization. Future studies over a longer time remain warranted.”⁹

While of course New York State would have to pay attention to accident rates in our state, we can expect that they likewise would not be materially affected by the change, unless use rates spiked drastically (contrary to indications in other states). Indeed, despite prevalent use today, our law enforcement officers do an excellent job keeping our roadways safe from impaired drivers. There is no reason to worry that they cannot handle this change. The findings on the comparative danger of alcohol versus marijuana are legion: drunk drivers are the cause of fully one-quarter of all roadway fatalities, while marijuana is barely associated. According to a recent meta-study, “Epidemiological studies have been inconclusive regarding whether cannabis use causes an increased risk of accidents; in contrast, unanimity exists that alcohol use increases crash risk.”¹⁰

It cannot be denied that a major advantage to legalization is the realization of tax and licensing revenues. In Colorado, the state directed marijuana funds to the school system, and in the March 2016 report by the Colorado Department of Public Safety, the state tallied a 77 percent increase in revenue and spending allocated to schools.¹¹ In 2015, the state’s schools received new funds of more than \$35 million for capital construction alone.¹² The MRTA currently provides for operational funding and (importantly) research funds to examine the impacts of the legal transition. Then the legislation directs the bulk of the revenues to education, treatment, and community reinvestment grants. The City Bar supports generally and consistently the shifting of funds away from enforcement to treatment and prevention, and we support building strong, healthy, and safe communities across New York State. Thus, we applaud the MRTA’s adherence to these best practices.

A central reason for the City Bar’s support for the State’s shift in approach away from prohibition is that we have significant concerns about the way the laws have been applied disproportionately in communities of color throughout the history of New York’s experiment

⁷ *Id.* at 261, citing Marco Torres, *Marijuana Decreases Death Rates From Pain Killers By Over 30 Percent*, PREVENTDISEASE.COM (Dec. 5, 2014), http://preventdisease.com/news/14/120514_Marijuana-Decreases-Death-Rates-By-Pain-Killers-By-Over-30-Percent.shtml.

⁸ *Id.* at 263; see also CDPS Report, *supra* n. 14, at 3-7.

⁹ Dr. Jayson D. Aydelotte et al., “Crash Fatality Rates After Recreational Marijuana Legalization in Washington and Colorado,” *American Journal of Public Health*, August 2017.

¹⁰ Sewell, R. Andrew, James Poling, and Mehmet Sofuoglu, “The Effect Of Cannabis Compared With Alcohol on Driving.” *The American journal on addictions / American Academy of Psychiatrists in Alcoholism and Addictions* 18.3 (2009): 185–193. PMC. Web. 15 Oct. 2018.

¹¹ *Supra* n. 2, at 9.

¹² *Id.*

with banning marijuana. The targeting of black and Latino New Yorkers was not ameliorated by the decriminalization in the 1970s, and it was not corrected even after extensive attention to highly disproportionate police practices that were producing outsize harm on minority communities.

Accordingly, the City Bar supports any feasible attempts to correct for improper impacts of the current policies as we design new ones. Indeed, the bill under consideration has commendable provisions that allocate revenues from the legalized market to bolster communities that have been harmed by historical policies; to shore up our state's public education system, which is a key to drug abuse prevention; and to provide treatment and drug education to youth in our state.

In addition to these important social justice concerns, the City Bar also supports the proposed changes in the law to continue to model a policy of sensible regulation of marijuana.

To that end, the current legislation includes some prohibitions on vertical integration of the market and limits the number of licenses held by individuals in various categories. These types of limitations are designed to allow entry into the market of a variety of license holders, including small businesses, and to avoid undue domination by big players in the industry. The City Bar supports these important aspects of the proposed law.

In keeping with the concerns raised above about helping to reverse, not exacerbate, inequities, the City Bar notes with approval the provisions in the current version of the bill that intend to ensure that individuals who have been charged with crimes in the past, especially drug possession crimes, are not unfairly barred from potentially participating in the legal marijuana economy. We included these concerns in our Report on this topic, in which we also noted that changes from an earlier iteration of the MRTA have made restrictive provisions on licensees less pernicious. It should be noted that if the Bureau of Marijuana Policy interprets this provision broadly or if the provision is made more stringent in the legislative process, it could have the effect of placing a substantial and unnecessary burden on certain individuals by preventing them from entering the legal marketplace for marijuana. The City Bar would urge the Members to retain the improved provisions while ensuring as much access as possible to individuals who have histories of criminal justice involvement.

The City Bar would like to call attention to some additional sensible and thoughtful provisions:

First of all, age: The bill prudently sets New York's legal age for marijuana cultivation, purchase, and use at 21.

In addition, the bill sensibly provides for a broad grant of regulatory powers to the State Liquor Authority to further develop regulations applicable to marijuana producers. This is absolutely in keeping with what experience in other jurisdictions in this and other regulatory practices has shown to be necessary. This approach is particularly warranted in the context of regulating the marijuana industry which, as experience in other states has shown, is dynamic.

The City Bar has examined the issue of federal preemption relating to marijuana's legal status and believes that, as best we can establish in the current environment, it is unlikely that there would be a pronounced or successful challenge to New York taking this action. Based on the available legal precedents and existing practices in medical and general marijuana states, the City Bar holds the position that neither the Controlled Substances Act of 1970 nor other federal law unquestionably preempts state licensure and regulation of marijuana businesses, but we recognize that this is a developing area of law and that the federal political environment plays a role. We rely in our Report on the history of preemption law in this arena, the doctrine of positive conflict, and the current state of the law to reach this conclusion. If you have additional questions, I am happy to elaborate.

In conclusion, the New York City Bar Association supports this Legislation to create a legal, regulated market for adult general use of marijuana in New York State. New York was the first state to turn away from alcohol Prohibition in 1923, helping to turn the tide, and we hope this body will show similar leadership on this analogous issue.

Marijuana prohibition is a costly and ineffective policy that has not succeeded in eliminating marijuana use. The failed policy has devastated families and communities, eroded respect for the law, and strained police-citizen relations. Accordingly, we applaud this body for considering this important policy reform, and urges you to pass this landmark legislation. The City Bar stands behind this position and stands ready to assist the Legislature in any way we can.

Thank you, and I appreciate the opportunity to speak with you this morning. I am happy to take any questions you may have.