Up in Smoke: The Struggle for Recreational Marijuana Decriminalization and Means to Advance Marijuana-Related Mitigation of Immigration and Criminal Consequences

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Introduction

Recreational marijuana poses federal criminal and immigration consequences that may be subject to eventual mitigation because of a growing trend among state governments for decriminalization. Any federal decriminalization of marijuana may come too late for foreign nationals presently in immigration proceedings or presently facing criminal charges in state court. Preventing finality has potential to mitigate immigration consequences,[1] so foreign nationals would have an improved chance of benefiting from any decriminalization. Tactics to prevent finality and other marijuana mitigation strategies including state lobbying are worthwhile to improve a possibility of immigration mitigation.

A. Learning from past gains: Immigration mitigation will be best preserved in the recreational marijuana arena by creatively advocating for civil rights.

Decades ago John Lennon famously overcame an order to show cause alleging exclusion for a U.K. offense based on possession of recreational[2] "cannabis resin" because simple possession under the statute of conviction did not have "a guilty knowledge" element.[3] In this fourth decade since the *Lennon* opinion's publication, a shroud of smoke still surrounds recreational marijuana. For the haze to break, the people must lobby and advocate for neither criminal nor immigration consequences from recreational marijuana.

Lawyers and legal workers should look to grassroots activists to share the favorable public perception of recreational marijuana in lobbying legislatures. Meanwhile, preserving objections and appealing will further the odds that foreign nationals will benefit from any recreational marijuana decriminalization. Federal banking reform is a source of potentially-retroactive benefits applicable to foreign nationals who keep cases alive by preventing the finality of convictions and immigration proceedings in a context of objections and appeals.

B. A break in the clouds of smoke: Marijuana decriminalization developments.

Since 1996, many states have addressed the increasing citizen support for the legalization of marijuana. Twenty-three states have legalized medical marijuana use.[4] Four of those states, Alaska and Colorado as well as Oregon and Washington, have moved beyond medical marijuana; they have legalized

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[1] Padilla v. Kentucky 559 U.S. 356, 130 S. Ct. 1473 (2010); Chaidez v. United States 568 U.S. ___, 133 S. Ct. 1103 (2013).

[2] Medical marijuana use was not claimed, and related jurisprudence had not yet developed.

[3] Lennon v. United States, 527 F.2d 187, 194 (2d Cir. 1975) (opining ground of exclusion at Immigration and Nationality Act (INA) § 212(a)(21) and 8 U.S.C. § 1182(a)(21) inapplicable). Amendments to the INA codified an analogous inadmissibility ground at INA § 212(a)(2)(A)(i)(II) and 8 U.S.C. § 1182(a)(2)(A)(i)(II).) The extent to which recreational "cannabis resin" will take the same course as recreational marijuana is unknown. Harsher penalties often apply to "cannabis resin," commonly known as hashish.

[4] The twenty-three states that have passed medical marijuana laws are: Alaska (Ballot Measure 8 (1998)), Arizona (Proposition 203 (2010)), California (Proposition 215 (1996)), Colorado (Ballot Amendment 20 (2000)), Connecticut (House Bill 5389 (2012)), Delaware (Senate Bill 17 (2011)), Hawaii (Senate Bill 862 (2000)), Illinois (House Bill 1 (2013)), Maine (Ballot Question 2 (1999)), Maryland (H. Bill 1101 (2013); H. Bill 180 (2013)), Massachusetts (Ballot Question 3 (2012)), Michigan (Proposal 1 (2008)), Minnesota (S.F. 2470 (2014)), Montana (Initiative 148 (2004)), Nevada (Ballot Question 9 (2000)), New Hampshire (House Bill 573 (2013)), New Jersey (Senate Bill 119 (2010)), New Mexico (Senate Bill 523 (2007)), New York (A. 6357/S. 7923 (2014)), Oregon (Ballot Measure 67 (1998)), Rhode Island (Senate Bill 0710 (2006)), Vermont (Senate Bill 76 (2003)), and Washington (Initiative 692 (1998)). Washington D.C. also legalized marijuana for medical purposes with the Legalization of Marijuana for Medical Treatment Amendment Act of 2010, B18-622 (May 4, 2010).

marijuana for recreational use.[5] The District of Columbia has also joined those four states in legalizing recreational marijuana.[6]

Despite the increasing support for legalization of marijuana, marijuana continues to be illegal under federal law.[7] The Controlled Substances Act (The Act) defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."[8] The Act states that "a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or substance." The Act goes on to describe the findings required for each of the schedules. Schedule I requires three findings: "(A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of acceptance for use of the drug or other substance under medical supervision."[9] The list of controlled substances under Schedule I of the Act includes "marihuana" as one of the listed hallucinogenic substances rendered illegal under federal law.

Continued criminalization of marijuana under federal law is out of step with state support for the legalization of marijuana for recreational use. The continued criminalization of marijuana as a controlled substance subjects non-citizens to inadmissibility and/or deportability grounds of removal. Because federal law continues to criminalize marijuana, non-citizens who, under state law, lawfully use marijuana for recreational purposes, may find themselves suffering irreparable consequences derived from what they believed was a lawful activity. A non-citizen may be rendered inadmissible for engaging in the use of marijuana, even if no conviction results.[10] A lawful permanent resident also risks removal if a record establishes constant marijuana use.[11]

Although federal law continues to criminalize all marijuana use, the recent state movement toward legalization of recreational marijuana has sparked a contentious debate. The marijuana dispensary business both for medical and recreational use has increased substantially; it has become one of the fastest growing industries in the United States.[12] This increase in dispensaries has resulted in an increase in tax revenue for states, as well as an increase in income for those owning the dispensaries.[13] Marijuana-related business owners, however, now face an obstacle preventing their business growth, and increasing the risks they face when safeguarding their earnings. Despite executive action anticipating measures to clarify how financial institutions should work with marijuana-related businesses, financial institutions are leery of moving forward without clearer and more concrete Congressional action.[14] Financial institutions fear federal prosecution in the absence of concrete federal action.[15] No financial institutions will bank with marijuana-related businesses. Without federal banking reform, such businesses cannot safeguard proceeds legitimately. Partnerships will develop between marijuana-related businesses and organized crime for money laundering by paying taxes as though marijuana-related proceeds came from federally-legitimate sources. Absent banking reform, public safety will be sacrificed as organized crime is enriched by money laundering for marijuana marketers.

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[5] Alaska Ballot Measure 2: An Act to Tax and Regulate the Production, Sale and Use of Marijuana (2014) (to be codified at Alaska Stat. §§ 17.38.010 to .900); Colo. Const. art. XVIII, § 16; Oregon Ballot Measure 91: Control, Regulation and Taxation of Marijuana and Industrial Hemp Act (2014); Wash. Rev. Code § 69.50.401(3) (West Supp. 2014).

[6] Washington, D.C. Initiative 71: Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014.

[7] 21 U.S.C. § 812.

[8] 21 U.S.C. § 802 subd. (6).

[9] *Id.*

[10] *See* INA § 212(a)(1)(A)(i).

[11] *See* INA § 237(a)(2)(B)(ii).

[12] Matt Ferner, *Legal Marijuana Is the Fastest-Growing Industry in the U.S.: Report*, The Huff Post Business (Jan. 28, 2015, 10:59 AM), http://www.huffingtonpost.com/ 2015/01/26/marijuana-industry-fastest-growing_n_6540166 .html.

[13] *Id*.

[14] Financial Crimes Enforcement Network, Dep't of the Treasury, FIN-2014-g001, BSA Expectations Regarding Marijuana-Related Businesses (2014), [hereinafter FinCen Marijuana-Related Businesses Guidance]; Memorandum from James M. Cole, Deputy Att'y Gen. to United States Att'ys, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014).

[15] Andrew Grossman, *Banks to be Allowed to do Business With Marijuana Dispensaries*, The Wall Street Journal (February 14, 2014), http://www.wsj.com/ articles/SB10001424052702304434104579383150782034282 ("Banks have been wary of providing services to marijuana businesses given the push by the Justice Department and state regulators to prosecute lenders that don't sufficiently guard against the proceeds of illicit activity. The banks worry that a policy change that isn't enshrined in law could leave them open to prosecution.).

In keeping with a traditional public safety agenda of combatting organized crime, the decriminalization of marijuana by some states in the union should prompt Congress to pass federal legislation eliminating the present incentive to launder the proceeds. To the extent that banking institutions will suffer neither civil nor criminal penalties for accepting cash deposits from state-authorized vendors of recreational marijuana, such vendors will be encouraged to engage in full disclosure of their proceeds. The present-day disincentive for such disclosures is a result of Congress' failure to mitigate these banking penalties. If Congress continues not to pass legislation mitigating these penalties, then there will be further consequences: the present disincentive for full disclosure will create an industry standard in which fraud pervades within business circles marketing state-authorized recreational marijuana. This trend will provide vendors with an incentive to engage in relationships with any entity that can characterize proceeds of state-authorized recreational marijuana transactions as earned in federally-legitimate businesses.

Publicity has brought to the forefront two justifications: (1) public safety as a concern because recreational marijuana businesses accumulate large reserves of cash that banks fear accepting as deposits because of current law; and (2) cash transactions present a probability of taxing recreational marijuana, which would be a source of federal revenue.

The frequency with which state-authorized recreational marijuana vendors engage in money laundering is a socially-repugnant and unstated reason for the decriminalization of recreational marijuana. Decriminalization would stem the tide of money laundering by eliminating the incentive to do so. There is presently an incentive to launder money. An example serves to emphasize this point when federally-illegitimate businesses including state-authorized recreational marijuana vendors present the federally-ill-begotten money as derived from legitimate business. For example, nightclubs pay taxes on both funds received from customers and federally-ill-begotten cash receipts otherwise in their possession. The "ill-begotten" receipts may far exceed actual receipts from customers. Federal authorities are disinclined to audit or take other enforcement actions when large deposits are made by legitimate businesses that pay taxes.

The prevalence of money laundering among state-authorized recreational marijuana purveyors undermines both justifications that have been presented. A third unstated rationale is what Congress should be paying most attention to: eliminating recreational marijuana as a source of revenue for organized crime would improve public safety. First, there would be no large cash reserves and there would be far less money laundering because of cash deposits daily. Second, the business' legitimacy provides the vendor with savings to pay taxes on federally-ill-begotten gains rather than placing the money out of reach in a money-laundering scheme.

There is presently an incentive for money laundering due to a smaller risk that scrutiny of laundered cash will lead federal enforcement authorities to take action. Federal legislation authorizing banking in proceeds from state-authorized recreational marijuana would create a disincentive. State-authorized recreational marijuana vendors are often protected by organized crime, which has a money-laundering stake in this state-authorized business. Laundered money thus becomes an asset that organized crime earns for protection of state-authorized vendors of recreational marijuana. Discouraging the cycle of laundering money that becomes protection money would improve public safety. Organized crime would be forced out of laundering state-authorized recreational-marijuana proceeds. Organized crime would solicit protection money from vendors less frequently if federal reform of banking laws authorized financial institutions to accept proceeds from vendors.

Congress has recently taken steps to improve the legitimacy of proceeds from marijuana-related business. On April 28, 2015 H.R. 2076 Marijuana Businesses Access to Banking Act of 2015 was introduced in the House. This bill states its purpose as "[t]o create protections for depository institutions that provide financial services to marijuana related businesses, and for other purposes."[16] The Senate has also taken steps to draft its own bill to provide protections for financial institutions that decide to provide banking services to marijuana related businesses. On July 9, 2015 Senator Merkley introduced S. 1726, the Marijuana Businesses Access to Banking Act of 2015.[17] If either of these bills receives bi-partisan support in both Houses and is signed into law, financial institutions will be allowed to conduct business with marijuana-related businesses without the fear of any sort of federal prosecution. In essence, the federal government would give banks the green light to conduct business with companies which, under federal law, engage in illegal activities. The legitimization of marijuana-related businesses will change perceptions: the innocuous character

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[16] Marijuana Businesses Access to Banking Act of 2015, H.R. 2076, 114th Cong. (1st Sess. 2015-2016).

[17] Marijuana Businesses Access to Banking Act of 2015, S.1726, 114th Cong. (1st Sess. 2015-2016).

of marijuana will become mainstream. From an optimistic perspective, scaling back penal consequences of marijuana would mitigate immigration consequences.

But, if federal banking reform does not lead to large-scale federal decriminalization, then the Financial Crimes Enforcement Network ("FinCEN") would likely require banks to file suspicious activity reports ("SARs") pursuant to the Bank Secrecy Act ("BSA"). There is cause for alarm because, in states now authorizing recreational marijuana, vendors have transitioned to maintaining business records. Full disclosure should be encouraged by insulating vendors against exposure for voluntary compliance. Because vendors would voluntarily provide information to financial institutions serving their interests, the Fourth Amendment would not be violated by disclosure of such information.[18] Transactional immunity should be extended to vendors who timely comply with statutory conditions. In the context of search and seizure law that would otherwise apply under the Fourth Amendment, it is unreasonable to apply abbreviated standards to compliant vendors.

C. Lobbying should be undertaken in states receptive to recreational marijuana for legislation exclusive to marijuana retroactively eliminating as an element that intent (mens rea) and possession (the actus reus) must coincide.

In the aforementioned case involving John Lennon, he was not found to be inadmissible because the U.K. statute underlying his conviction was a "...a foreign law that made guilty knowledge irrelevant..." This article proposes that lobbying should be undertaken in recreational marijuana jurisdictions prompting state legislators to tailor a marijuana-only retroactive amendment expressly eliminating as an element that intent (mens rea) and possession (the actus reus) must coincide.

There is a likelihood in the short term of enforcement of new categories of marijuana offenses like possession for sale without a sales license or possession for sale by a felon. Conviction of such offenses would arguably not result in inadmissibility under Immigration and Nationality Act section 212(a)(2)(A)(i)(II) and 8 USC 1182(a)(2)(A)(i)(II) under *Lennon* if a comprehensive amendment were passed as to all marijuana offenses under a given state's laws eliminating the need for intent and possession to coincide. This amendment would render them regulatory offenses of an innocuous character.

On one hand, retroactively eliminating the element of intent and possession occurring simultaneously would make clear that all marijuana offenses have for time immemorial not been grounds for conviction-based inadmissibility. On other hand, unless there is a finding of factual innocence, facts in any report of an arrest for marijuana sales may establish reason to believe that the foreign national is a drug trafficker under INA § 212(a)(2)(C) and 8 U.S.C. § 1182(a)(2)(C). Application of this fact-based ground of inadmissibility is completely independent of whether a conviction has been entered. Due to the preference of state legislators for finality of convictions after appeal, lobbying efforts should be undertaken to encourage legislators to include a rider precluding post-conviction relief that any retroactive legislation affects.

D. Any state that retroactively reduces marijuana penalties to fines, retroactively introduces a preponderance-of-evidence burden of proof to marijuana, and retroactively deems all marijuana distribution dispositions to involve a small quantity for a social purpose would mitigate immigration consequences.

The Board of Immigration Appeals has found that the conviction definition at INA § 101(a)(48(A) and 8 U.S.C. § 1101(a)(48)(A) is not satisfied by a state-labeled "violation" in the context of a preponderance-of-evidence standard.[19] Immigration consequences of marijuana offenses would be mitigated to the extent states receptive to recreational marijuana would also retroactively amend applicable burden-of-proof standards on marijuana-related cases. Such an amendment would need to take the form of preponderance of the evidence rather than proof beyond a reasonable doubt.

This amendment would prevent simple possession of marijuana dispositions from being construed as priors for purposes of "*recidivist* simple possession," an aggravated felony.[20] The lower threshold of proof would also discourage state prosecutors from charging

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[18] *See* United States v. Miller, 425 U.S. 435 (1976) ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by the person to the Government.").

[19] Matter of Eslamizar, 23 I. & N. Dec. 684 (BIA 2004).

[20] Carachuri-Rosendo v. Holder, 560 U.S. 563, 568, 130 S. Ct. 2577, 2581 (2010) ("*recidivist* simple possession" [emphasis in original] inapplicable unless there is a charging instrument alleging both a new simple possession count as well as a prior simple possession conviction, and the foreign national is thereafter convicted of the new simple possession count in the same hearing at which a prior simple possession as alleged is expressly found true.).

enhancements. Simple possession with a prior would become increasingly rare.

The United States Supreme Court has opined that deportability for an aggravated felony based on a controlled substance is not satisfied when a foreign national convicted of a state offense could not defend by asserting a small quantity of marijuana distributed for a social purpose.[21] Because the generic definition incorporates a social-purpose defense for small-quantity distribution, any state marijuana distribution statute depriving a defendant of such a defense is categorically not an aggravated felony. A retroactive amendment to state marijuana distribution statutes creating a non-rebuttable presumption of a small quantity for a social purpose would deprive defendants of a defense based on a small quantity for a social purpose. There would be no possibility of a small-quantity-for-a-social-purpose defense against such a state statute, and the generic definition would not be met, so none of the many immigration consequences associated with an aggravated felony would attach.

To avoid a perception of creating broader exposure, the aforementioned tactics should be coupled with lobbying for retroactive characterization of these matters as civil dispositions on which a fine is the only penalty. Due to the preference for finality of convictions after appeal, legislators should be encouraged to include a rider precluding post-conviction relief that any retroactive legislation affects.

E. Smoking break: Toolkit for state lobbying as well as preserving objections for the record and appealing state convictions and immigration court decisions

Legislation has already surfaced that would provide state court trial judges in Oregon with discretion beginning January 2016 to grant post-conviction relief as to recreational-marijuana felony convictions.[22] This legislation is only a small step in the direction of lobbying for more profound state legislation. Opposition will likely mount to profound legislative change for exceptions created by *Lennon*, *Eslamizar*, *Carachuri-Rosendo* and *Moncrieffe*. In the vast majority of state prosecutions, criminal defense counsel will be confined to development of a paper trail of objections and appeals among few means to mitigate immigration consequences. Preservation of objections in immigration courts and criminal trial court will provide fodder for presenting the issues on appeal before state appellate courts, the Board of Immigration Appeals and federal appellate courts.

By coordinating with grassroots allies, creative legal workers and lawyers will help shift public perceptions. Publicity campaigns should be aimed at centrists to contrast traditional consequences in the criminal and immigration spheres against modern-day penal consequences now encompassing immigration consequences.[23]

Publicity campaigns should share the news that federal banking reform will mitigate the possibility of organized crime's participation in the profits of recreational marijuana. Right now, the inability to bank in the proceeds of state-regulated recreational marijuana is an incentive for legitimate marketers of state-regulated recreational marijuana to launder their proceeds through organized crime. Discouraging legitimate marketers from laundering their proceeds is an easy means to turn this incentive into a disincentive.

F. Federalism analysis: The agenda should be a joint federal and state task force

While twenty-three states have legalized marijuana either for medical or recreational use, the federal government continues to stand strong in its position to criminalize all marijuana use.[24] Federal courts have so far declined to mitigate marijuana penalties, so there is no cause for optimism about favorable judicial intervention.[25] The inconsistency of enforcement priorities between federal and state authorities sets a precarious precedent: the public is left with a perception that the federal government engages in selective prosecution. The danger of a marijuana decriminalization movement aligning itself with state rights groups should lead the federal government to consider a joint task force that brings federal and state government actors to the table. While the federal government enjoys the power to regulate marijuana as part of

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[21] Moncrieffe v. Holder, 569 U.S. ___, 133 S. Ct. 1678 (2013).

[22] Kirk Johnson, *Oregon's Legal Sale of Marijuana Comes With Reprieve*, The New York Times, (Sept. 20, 2015), http://mobile.nytimes.com/2015/09/21/us/oregons-legal-sale-of-marijuana-comes-with-reprieve.html?_r=1.

[23] *Padilla v. Kentucky*, *supra*.

[24] 21 U.S.C. § 812.

[25] *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 489–95 (2001) (holding that medical necessity was not a defense to the Controlled Substances Act); Americans for Safe Access v. Drug Enforcement Admin., 706 F.3d 438 (D.C. Cir. 2013) (U.S. Court of Appeals for the District of Columbia Circuit declined to characterize as arbitrary and capricious the DEA's refusal to reschedule marijuana.).

powers derived from the Commerce Clause,[26] this leverage should not be employed without recognition that a sense of desperation will grow among recreational marijuana proponents: desperate times demand desperate measures. An alliance between recreational marijuana proponents and state rights groups will be inevitable unless the federal government takes initiative to form joint task forces with state governments decriminalizing recreational marijuana and accordingly finds common ground.

What requires redress includes disparate definitions of marijuana as a controlled substance between the federal government and the Several States; and a growing disparity between federal and state enforcement officials on the exercise of discretion in enforcing marijuana laws. The Commerce Clause of the U.S. Constitution does allow the federal government to file criminal charges in federal district court for federal controlled substance act violations involving marijuana. However, even the Supremacy Clause of the U.S. Constitution cannot bar state decriminalization because federal preemption does not apply and the U.S. Constitution's Tenth Amendment prohibits the federal government from insisting on state regulation: "No matter how powerful the federal government interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."[27] Federal government may not commandeer states to enforce federal laws.[28]

G. The federal government's credibility will suffer without decriminalization.

The federal government's stance on decriminalization will lead to scrutiny in the court of public opinion. Recreational marijuana has become a watershed issue of our time, so standing in the way of progress will have political consequences. The direction that our society is taking on recreational marijuana can be gleaned in part from what's happened in the four aforementioned recreational-marijuana states and the District of Columbia: vendors of recreational marijuana hold sway over politicians and voters as well as reap the reward necessary to gain ground. This trend will further develop because some cash-rich vendors, out of a preference to avoid money laundering, will hire federal and state lobbyists throughout the country for federal banking reform and state recreational marijuana bills.

Vendors operate in the cash economy because federal law imposes criminal and civil penalties for banking with marijuana-related vendors.[29] State-authorized marijuana vendors engage private security to keep proceeds in cash, or engage in money laundering.

To advance federal banking reform in Congress, lobbyists will be looking at the impact: federal banking reform may have unintended consequences of upending federal prohibitions on marijuana. Federal law proscriptions include manufacturing, distributing, and dispensing of marijuana[30] as well as aiding and abetting in those activities.[31]

The two bills which are currently pending in Congress would provide banks with the opportunity to engage the flourishing marijuana-related businesses. If either of these two bills succeed and is signed into law, new questions would arise as to decriminalization and immigration mitigation. Anticipating a response antagonistic to decriminalization, a Commerce Clause exception may be created for banks to provide services to individuals and businesses who knowingly engage in activities prohibited under federal criminal law.

Marijuana decriminalization is necessary in order to fully protect banks from federal penalties. Title 21 of the United States Code currently includes only one express exception to the criminalization of manufacture, distribution, dispensation, or possession of marijuana. That exception applies exclusively to Government-approved research projects.[32] Unless the federal government can legally create a similar exception for banks as well as a narrow exception for marijuana-related businesses in states which have legalized recreational marijuana, then banks will continue to be forced to reject marijuana-related

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[26] Gonzales v. Raich, 545 U.S. 1, 23–33 (2005) (holding that the federal government's Commerce Clause power was broad enough to criminalize the cultivation of a small amount of medicinal marijuana for personal use).

[27] New York v. United States, 505 U.S. 144, 152 (1992).

[28] Printz v. United States, 524 U.S. 898, 912 (1997).

[29] Julie Andersen Hill, *Banks, Marijuana, and Federalism, 65* Case Western Reserve L. Rev. 597, 608 (2015) ("By facilitating customers' credit card payments, the institution would be aiding and abetting the distribution of marijuana. And by knowingly accepting deposits consisting of revenue from the sale of marijuana, the institution may be acting as an accessory after the fact." (footnotes omitted)).

[30] 21 U.S.C. §§ 801-904 (2012).

[31] 18 U.S.C. § 2 (2012) ("Whoever . . . aids, abets, counsels, commands, induces or procures" a federal crime or "causes" a federal act to be done, "is punishable as a principal.").

[32] *See* 21 U.S.C. § 823(f).

businesses. If the pending bills only create an exception for banks, the federal government would essentially be allowing banks to aid and abet criminal activity. Banks would be allowed to provide services to businesses whose funds derived from an illegal activity. The federal government would be encouraging a criminal activity by providing financial services to these businesses. Creating an exception for the banks without creating an exception for the vendors would amount to inconsistent, as opposed to comprehensive, banking reform.

Unless a firewall was statutorily created to prevent regulators from providing these vendor lists to the U.S. Attorney, an exception for banks without an exception for vendors would present banks with massive exposure to law suits by vendors for sharing customer lists with government regulators. In the context of an exception shielding banks from criminal penalties but not shielding vendors, it is likely that the current bank regulations like the aforementioned BSA would stay in place. Because federal law would continue to prohibit the distribution and sale of marijuana, financial institutions would still be required to file Suspicious Activity Reports (SARs) with the FinCEN pursuant to the BSA on activity involving a marijuana-related business.[33] The continuing need for financial services would push marijuana-related vendors in the direction of risking prosecution because there is not a possibility of any defense to money laundering and money laundering costs more.

In the context of any prosecution of vendors based on information that the vendors provided financial institutions voluntarily, jury nullification would be the only hope for vendors who exercise their rights to jury trial on the thrust that there is a public consensus contrary to federal law. While a federal jury would probably convict despite a vendor's compliance with the law, jurists would be disinclined to impose heavy sentences.

The prosecutions would turn on information that all marijuana-related businesses would provide in seeking financial services from banks. Under the current BSA, banks are required to file SARs with the FinCEN if "the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose."[34] It is unclear whether the U.S. Attorney has access to limited or comprehensive information gathered under the BSA.

What has become clear is that the U.S. Attorney may access this information without a search warrant, and without violating the Fourth Amendment, pursuant to the third party doctrine.[35] Vendors voluntarily provide this information, so the banks are a third party.

The U.S. Attorney would be in a position to gather information of business owners including state-authorized vendors in recreational marijuana. Vendor bank transactions including withdrawals or deposits would likely be available to the U.S. Attorney. There is a strong possibility that credit card transaction information from customers of vendors would come to the attention of the U.S. Attorney. Marijuana transactions, even in states where this activity is lawful, would be considered funds derived from illegal activity as defined by federal law. Customers of these vendors and vendors themselves would be prosecuted. The U.S. Attorney would line up bankers as witnesses against customers and vendors.

On August 29, 2013, the U.S. Department of Justice Deputy Attorney General James M. Cole issued a memorandum addressing marijuana enforcement under the CSA in light of state (as opposed to federal) decriminalization.[36] The memorandum outlines eight enforcement priorities including preventing distribution of marijuana to minors, transportation to states where marijuana is still illegal, and preventing marijuana possession on federal property.[37] Immigration enforcement is not listed as an enforcement priority. Even if a given non-citizen is not selected for

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[33] 31 C.F.R. § 1020.320. Banks must report if (i) The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation.

[34] FinCen Marijuana-Related Businesses Guidance, *supra* note 14.

[35] Olmstead v. United States, 227 U.S. 438, 474 (1928); United States v. Miller, 425 U.S. 44 (1976) ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.").

[36] James M. Cole, Deputy Attorney General, U.S. Department of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

[37] *Id*.

prosecution, such a foreign national will still suffer immigration consequences when the U.S. Attorney follows common practice by disclosing federal marijuana offenses not resulting in a conviction to Immigration and Custom Enforcement (ICE). Such controlled substance trafficking is a "significant misdemeanor," at a minimum, rendering the foreign national a priority for removal.[38]

H. *Mellouli* and retroactivity – a practice pointer

Even if the pending bills to allow banks to provide services to marijuana-related businesses do not ultimately lead to federal decriminalization of marijuana, state decriminalization creates possible defenses for non-citizens who have been convicted of a marijuana related offense. The U.S. Supreme Court held in *Mellouli v.* Lynch,[39] that the strict categorical approach analysis, by which a state statute is compared to the generic definition, is applicable to drug paraphernalia offenses. The *Mellouli* Court relied on the 1965 opinion of the Board of Immigration Appeals (BIA) in *Matter of Paulus*,[40] to emphasize a foreign national is not subject to removal when the state statute of conviction relates to drug paraphernalia for controlled substances not found in federal schedules.[41] Furthermore, the *Mellouli* Court focused on whether any allegedly-controlled substances would have actually subjected the foreign national to a federal conviction at the time of the state conviction, rather than asking whether the allegedly-controlled substances would have subjected the foreign national to a federal conviction at the time of charging the foreign national with an inadmissibility or deportability ground of removal. "*At the time of Mellouli's conviction*, Kansas' schedules included at least nine substances not on the federal lists."[42] Because the controlled substances proscribed by the state at the time of conviction were much broader than those proscribed at the federal level, the Court found that the *Mellouli* defendant could not be removed. Extrapolating from the *Mellouli* opinion, even if the controlled substance is identified, the foreign national may not be found subject to inadmissibility or deportability grounds of removal unless the specific identified substance was proscribed at the federal level at the time of the conviction. To the extent a controlled substance was added after conviction, the foreign national cannot be said to have been convicted of a controlled substance offense listed under 21 U.S.C. § 806, so there is no basis for removal.

The *Mellouli* Court's position against retroactive proscription of newly-added controlled substances is consistent with the non-retroactive application of newly-enacted administrative agency rules. The Administrative Procedure Act ("APA") defines a rule as "the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy ...."[43] The APA further requires agencies to follow proper notice and comment procedures when creating new rules.[44]

The Drug Enforcement Administration ("DEA") effectively creates a new rule each time it decides to add or remove a controlled substance.[45] Because the inclusion of a new substance is considered rulemaking, the DEA must follow the rulemaking procedures found in the APA.[46]

I. Synthetic marijuana convictions post-*Melouli* - another practice pointer

The *Melouli* Court's decision is of particular import in the context of a foreign national who has been convicted for violation of a state law proscribing synthetic marijuana prior to introduction of synthetic marijuana into the federal schedules.

Colorado is a state outlawing synthetic marijuana but authorizing recreational marijuana. As of January 1, 2012, Colorado proscribed any synthetic cannabinoid. Colorado defines cannabinoid as "*any chemical compound that is chemically synthesized and either: (I) Has been demonstrated to have binding activity at one or more cannabinoid receptors; or (II) Is a chemical analog or isomer of a compound that has been demonstrated to have binding activity at one or more cannabinoid receptors.*"[47] *Cannabinoid is listed under the broader term of "controlled substance.*"[48]

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[38] Jeh Charles Johnson, Secretary, Department of Homeland Security, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/ default/files/publications/14_1120_memo_prosecutorial_discretion.pdf, *reprinted at* 19 Bender's Immigr. Bull. 1399 (Dec. 15, 2014).

[39] 135 S. Ct. 1980 (2015).

[40] 11 I. & N. Dec. 274 (1965).

[41] *Mellouli*, *supra*, 135 S. Ct. at 1982.

[42] *Id.* (emphasis added).

[43] 5 U.S.C. § 551(4) (emphasis added).

[44] *See* 5 U.S.C. § 553(b).

[45] *See* 21 U.S.C. § 811.

[46] 21 U.S.C. § 811(a)(2).

[47] Colo Rev. Stat. § 18-18-102(34.5) *(emphasis added)*.

[48] Colo. Rev. Stat. § 18-18-102.

Possession of a controlled substance is punishable without reference to a specific substance.[49] Thus, a foreign national convicted prior to the date of introduction of synthetic marijuana into federal schedules may not be held to have been convicted of a controlled substance. Synthetic marijuana was not in federal schedules at the time of the conviction.

J. A distinction: Medical marijuana authorization is unrelated to federal decriminalization of recreational marijuana and immigration mitigation.

There is a growing consensus that medical marijuana is equivalent to the assisted-suicide drugs that the United States Supreme Court, in *Gonzales v. Oregon*, declared not to violate section 102 of the Federal Controlled Substances Act so long as a physician has complied with state law in recommending a controlled substance for treatment.[50] Section 102 is codified in 21 U.S.C. § 802 et seq. so the *Gonzales v. Oregon* opinion naturally relied on this "pre-emption provision" at 21 U.S.C. section 903:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates ... to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision ... and that State law so that the two cannot consistently stand together.[51]

The application of section 903 to medical marijuana cannot be reconciled without distinguishing the Schedule II substances addressed in *Gonzales v. Oregon* from marijuana, which is a Schedule I substance:[52] Only medical marijuana requires application of section 903 and reconciliation of Schedule I from Schedule II.

Medical marijuana should never be presented as an alternative basis on which to find marijuana has been decriminalized federally or as an alternative basis on which to find deportability grounds or inadmissibility grounds do not apply to foreign nationals. The reason is that medical marijuana is only available with a recommendation, which is akin to a prescription. Since section 102 of the Federal Controlled Substances Act proscribes possession of a prescription drug without a prescription, possession of marijuana without a recommendation is equally a federal criminal offense and satisfies grounds of deportability and inadmissibility in the immigration context. Arguments couched in state authorization of medical marijuana, as a means of making a record for appeal via objection that marijuana has been federally decriminalized and that marijuana no longer renders foreign nationals subject to immigration consequences, would thus do more harm than good.

Conclusion

Great value can be gained for foreign nationals in the recreational marijuana context by preventing finality as well as engaging in state lobbying and adopting the other tactics offered in this article. Immigration mitigation tactics are incomplete at best at this early stage in the struggle for decriminalization. Scratching the surface on preventing finality reveals the need for more sophisticated means to prevent finality because cases will need to be kept alive until the struggle succeeds. Greater resources should be developed on preventing finality in immigration proceedings and pending criminal cases in state court.

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[49] Colo. Rev. Stat. § 18-18-403.5.

[50] Gonzales v. Oregon, 546 U.S. 243, 251 (2006) ("The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision.").

[51] *Id*.

[52] *Id*. at 250 ("Schedule I contains the most severe restrictions on access and use. . .").

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