

SMOKE AND MIRRORS: THE SELF-EXAMINATION OF CANADIAN MARIJUANA POLICY IN THE CONTEXT OF DECRIMINALIZATION IN THE NETHERLANDS

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INTRODUCTION

Drug policy reform is almost a non-issue in American government.¹ The only politically viable stance is a hardline position against all illegal drugs with harsh penalties for offenders.² Congress has attempted to stifle research into alternative drug policies by introducing House Bill 135.³ This only illuminates the boldness of the Canadian Senate,⁴ which released a report in September of 2002 recommending that the federal government legalize marijuana for use by Canadian citizens ages sixteen and over.⁵ This recommendation may or may not turn into actual policy. Nevertheless, it is a major step toward a policy change, and just as shocking, it is a strong indicator of a shift in public opinion on marijuana policy.⁶

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1. See Ed Leuw, *Introduction BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY* xiii (Ed Leuw & I. Haen Marshall eds., 1996). Strong stances against drugs "boost politicians' popularity by providing them with uncontroversial and gratuitous rallying themes and election platforms." *Id.* at xvi.

2. See *id.*

3. See H.R. 135, 104th Cong., 1st Sess. (1995). The resolution states: "[n]otwithstanding any other provision of law, no department or agency of the U. S. Government shall conduct or finance, in whole or in part, any study or research involving the legalization of drugs." *Id.* § 3. This restriction is based on Congressional findings of fact, citing the negative impacts of drug use on society and the dangers the usage represents. See *id.* § 2.

4. See Inba Kehoe, *How a Government Bill Becomes Law*, Canada Online, at <http://frenchcaculture.miningco.com/cs/bills/index.htm> (last visited Oct. 7, 2003). Legislative proposals in Canada must pass in both houses of Parliament, the House of Commons and the Senate; and then the proposals must be given "Royal Assent" by the Queen via the Governor General. See *id.* With the exception of bills that involve spending public funds, which must originate in the House of Commons, all other bills may originate in either the House of Commons or the Senate. See Guide to Legal Research, *Overview of the Legislative Process*, University of Toronto Law Library, at <http://www.law-lib.utoronto.ca/resguide/chapt3.htm> (last visited Oct. 7, 2003).

5. See generally Senate of Canada, Special Comm. on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy* 1 (Sept. 2002), at <http://www.parl.gc.ca/illegal-drugs.asp> (last visited Oct. 27, 2003) [hereinafter *Cannabis Report*].

6. See Julian Beltrame, *Grass, Pot, Ganja, Reefer Madness: The Sequel*, MACLEAN'S, Aug. 6, 2001, at 22-25. As of May 2001, forty-seven percent of Canadians favored marijuana legalization. See *id.* This rate increased further from twenty-six percent in 1975 to thirty-one percent in 1995. See *id.*

The Canadian Senate's recommendation is even more surprising when considered in light of the marijuana policy of the Netherlands, which is generally regarded as one of the most liberal in the world.⁷ The two policies are illustrative of the point that different historical backgrounds and different surroundings breed different policies regarding social ills, or in the case of these two countries, perceived social ills - ones that should be regulated and limited by public policy, not prohibited by it.

Part I of this Note examines the historical background of Canadian marijuana policy from the initial ban to the current proposal. This includes an analysis of the recently modified policy regarding the use of marijuana for medicinal purposes⁸ and an evaluation of the current penalties for the commission of common marijuana-related crimes.⁹ Finally, Part I explores the steps leading up to the preparation and issuance of the Canadian Senate's report.¹⁰

Part II outlines the proposal made by the Canadian Senate. The report contains recommendations for sweeping modifications in many areas of marijuana policy, all of which will be reviewed.¹¹ The report also contains a myriad of statistics and medical data regarding the physiological, psychological, and sociological effects of marijuana, which will be discussed as well. Also, Part II briefly investigates possible local and international obstacles that may prevent Canada from implementing its proposal.

Part III discusses the marijuana policy of the Netherlands beginning with a brief historical look at the evolution of Dutch drug policy from after World War II to the decriminalization of marijuana in 1976. It further examines the

7. See Christopher Dickey & Friso Endt, *Playing by Dutch Rules*, NEWSWEEK, June 4, 2001, at 18. See also U.S. Dept of State, Bureau for Int'l Narcotics and Law Enforcement Affairs, International Narcotics Control Strategy Report 438 (1999) [hereinafter Strategy Report].

8. See Institute of Medicine, *Marijuana and Medicine: Assessing the Science Base*, The National Academy of Sciences, available at <http://www.nap.edu/readingroom/books/marimed/index.html> (last visited Oct. 27, 2003). As a result of several states taking steps to allow the use of marijuana for therapeutic purposes, the Institute of Medicine's study was commissioned by the White House Office of National Drug Control Policy in January of 1997. See *id.* at 1. The various states that are putting forth efforts to allow the use of marijuana include: Alaska, Arizona, Colorado, Nevada, Oregon, and Washington. See *id.* The report thoroughly discussed the merits and drawbacks of marijuana and concluded that the chemicals derived from cannabis, called cannabinoids, could be useful in the treatment of chronic pain related to cancer. See *id.* at 144. It was determined that clinical trials would be necessary. See *id.* The Institute also examined some beneficial side effects of cannabinoids including appetite-stimulation, vomit-suppression, and sedation. See *id.* See Alicia Ault, *Institute of Medicine Says Marijuana Has Benefits*, THE LANCET, Mar. 27, 1999, at 353, for a qualified summary of the Institute's report.

9. See generally Controlled Drugs and Substances Act, S.C., ch. 19 (1996) (Can.) [hereinafter CDSA].

10. See *Regina v. Parker*, [2000] 49 O.R.3d. 481.

11. See generally *Cannabis Report*, *supra* note 5.

current state of Dutch marijuana policy and evaluates its results in Dutch society.

Finally, Part IV compares the Canadian proposal to the current Dutch policy, focusing on the differing backdrops giving rise to both the Canadian proposal and the Dutch policy. The structures of their respective political systems also had an impact on their choices in drug policy. The Dutch policy cannot be directly transplanted into the Canadian legal system, a phenomenon that will also be discussed in Part IV. This Note also observes a problem that Canada and the Netherlands may have in common, being neighbors of the United States and Germany, respectively, countries with strict anti-drug policies.¹²

This Note will not determine whether the passage of the Canadian proposal into law is likely or unlikely. Such a determination is chiefly an exercise in speculation. The significance of the proposal at this stage lies mainly in the fact that the Canadian government took an objective look at a politically sensitive issue. The fact that the results of that examination were a drastic departure from Canada's current policy and the policies of most industrialized nations compounds this significance even further.

I. THE PAST AND PRESENT OF CANADIAN MARIJUANA POLICY

Marijuana's history in Canada has been relatively consistent. The drug has been illegal in Canada even before it became accepted as a recreational drug and has remained illegal ever since, despite Parliamentary studies that essentially concluded that marijuana's effects were probably less harmful than the short and long-term social costs associated with criminal prosecutions of marijuana offenders.¹³ Recent years have marked a loosening of the formerly harsh treatment of the drug with the reduction of most maximum sentences for marijuana offenses and the acknowledgement that marijuana seems to have some value in easing the suffering of those with grave and terminal illnesses.¹⁴ These trends are indicative of a change in legislative and public attitude toward marijuana in general.¹⁵ This movement reached a new summit in September of 2002 with the release of the Canadian Senate's radical recommendations: primarily that marijuana be legalized for recreational use.¹⁶

12. See Dirk J. Korf, *Drug Tourism and Drug Refugees*, in BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY 119 (Ed Leuw & I. Haen Marshall eds., 1996). When a foreigner comes into a country to use or sell drugs, this is referred to as drug tourism. See *id.* This author primarily discusses drug tourism in the context of heroin. See *id.*

13. See *Cannabis Report*, *supra* note 5, at 278.

14. See discussion *infra* Part I.D.

15. See Beltrame, *supra* note 6.

16. See *Cannabis Report*, *supra* note 5, at 624.

A. *The Initial Ban*

Before any honest discussion of drug policy can take place, an understanding of why certain drugs were banned in the first place is essential. The social and political pressures that were present during the initial formation of drug policy must be reexamined in light of 100 years of progression in medical science and public policy. The beginnings of marijuana policy are the key to understanding its current state and future.

Drugs have a nearly century-long tradition of prohibition in Canada beginning with the ban of opium in 1908.¹⁷ The Opium Act,¹⁸ renamed the Opium and Narcotic Drug Act in 1911,¹⁹ was amended in 1923 to include cannabis sativa²⁰ on its list of controlled substances.²¹ The amendment procedures for the Act were, and still are, remarkably discretionary.²² The Schedules, which list the substances regulated by the Act, can be amended by the Governor in Council²³ when he deems it necessary and in the public interest.²⁴ Originally, the list consisted of only four drugs: opium, cocaine, morphine, and eucaine.²⁵

17. *See id.* at 248. Passage of the Opium Act in 1908 by the British House of Commons banned the "importation, manufacture and sale of opium for other than medicinal purposes." *Id.* at 252. Seven countries banned opium at the Shanghai Conference on Opium in 1909. *See id.* at 248. One reason for the prohibition of opium was the increase of Chinese immigrants in certain parts of Canada that coincided with an economic decline. *See id.* at 250. The Chinese were blamed for the importation of opium as well as the economic decline, which resulted in the formation of groups like the Asiatic Exclusion League. *See id.*

18. *See id.* at 252.

19. *See Cannabis Report, supra* note 5, at 253. The name of the Act was changed on January 26, 1911, when newly appointed Minister of Labour, Mackenzie King, introduced Bill 97. *See id.* The name of the Act was changed when other substances, specifically cocaine, became widely used in Canada; referring to it as the Opium Act no longer seemed appropriate. *See id.* Bill 97 was intended to make the Act more restrictive with additional enforcement measures. *See id.*

20. *See* Ernest G. Walker, Jr., *Cannabis: The Hemp Plant*, Southern Illinois University, at <http://www.siu.edu/~ebl/leaflets/hemp.htm> (last visited Oct. 27, 2003). Cannabis sativa is the scientific name of the plant used to produce marijuana, which is commonly smoked but can also be consumed in other ways. *See Cannabis, Drugs Information, available at* <http://www.drugs-info.co.uk/drugpages/cannabis/cannabis.htm> (last visited Oct. 27, 2003).

21. *See Cannabis Report, supra* note 5, at 253.

22. *See id.*

23. *See* Governor General of Canada, *Role and Responsibilities of the Governor General*, Government of Canada, at http://www.gg.ca/governor_general/role_e.asp (last visited Oct. 27, 2003). The Governor in Council is now called the Governor General, and is the *de facto* head of the Canadian government, acting as the Queen's representative. *See id.* The Governor General's primary duty is to represent the Crown by giving "Royal Assent" to acts passed by both houses of Parliament. *See id.*

24. *See Cannabis Report, supra* note 5, at 253. This broad power was granted to the Governor to quickly prohibit new drugs that might spread quickly through society rather than waiting for legislation to be passed through the typical parliamentary channels. *See id.*

25. *See id.*

Minister of Health Henri-Séverin Béland almost casually added cannabis to this list in 1923 when he simply announced, “[t]here is a new drug in the schedule.”²⁶ The reasons for his decision to include cannabis remain unclear since there were no substantiated reports of recreational cannabis use until the 1930’s.²⁷ The physiological and psychological effects of cannabis were not even addressed in the Canadian Parliament until 1932, which makes Béland’s decision to ban it rather perplexing.²⁸ But with the 1923 addition of cannabis to the Schedules, possession and trafficking of cannabis without a license became illegal in all Canadian provinces, punishable by imprisonment from six months up to seven years or a fine up to \$1,000.²⁹

Meanwhile, marijuana was gaining a broader base of recreational users in the United States, and as a result, the American media threw the country into a mild panic.³⁰ Canadian newspapers latched onto these stories as well, resulting in police officers giving terrible accounts of young Canadians whose minds and bodies were destroyed from marijuana use.³¹ As the frequency of these reports increased, federal parliamentary attitudes toward cannabis and drugs in general became more hostile, culminating with the 1932 amendments to the Opium and Narcotic Drug Act.³² The new amendments were mainly procedural, such as prohibiting convicted drug offenders from appealing their convictions for numerous offenses.³³

26. *Id.* at 256.

27. *See id.*

28. *See* P.J. GIFFEN ET AL., CANADIAN CENTRE ON SUBSTANCE ABUSE, PANIC AND INDIFFERENCE: THE POLITICS OF CANADA’S DRUG LAWS 53 (1991). In 1932, when asked by a member of parliament what cannabis was, the Minister of Health replied, “[i]t is one form of the drug used in India which, I believe, goes under the popular name hashish.” *Cannabis Report*, *supra* note 5, at 257. There is no objection to the use of it. *Id.*

29. *See* Francois Dubois, Office of Senator Pierre Claude Nolin, *The Federal Parliament and the Evolution of Canadian Legislation on Illegal Drugs* (2002), reprinted in *Cannabis Report*, *supra* note 5, at app. IV. Trafficking includes exportation, importation, and transportation within Canada. *See id.* It also includes distribution and sale of illegal drugs. *See id.*

30. *See Cannabis Report*, *supra* note 5, at 257. Marijuana was being imported from Mexico in the 1920’s, and although use did increase during this time, the media inferred that usage was more widespread than it actually was. *See* Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 646 n.174 (2000).

31. *See Cannabis Report*, *supra* note 5, at 257.

32. *See id.* at 257-58. The Minister of Health, Charles Power, called marijuana “a new menace to the youth of the country.” *Id.* at 258.

33. *See* Dubois, *supra* note 29, at 23-24. Appeals were severely limited for the following offenses: (1) a physician prescribing a drug for non-medical purposes; (2) a physician refusing to provide required information relating to the preparation of prescription drugs; (3) obtaining the same drug from two physicians; (4) a pharmacist selling a product containing specified quantities of illegal drugs to children under two years of age without proper labeling; (5) a pharmacist refusing to keep records of drug purchases, sales, and renewals; (6) possession of paraphernalia; and (7) “drug trafficking by mail.” *Id.* Offenses one, two, four, and five involve health care professionals who may lawfully prescribe specific amounts of certain narcotics, such as morphine, in the treatment of pain and disease. *See Cannabis Report*, *supra* note 5, at 263.

Unlike for other prohibited drugs, Canada's climate was ideal for growing and producing cannabis.³⁴ Section 3 of the 1938 Act prohibited growing cannabis without a permit from the Department of Health.³⁵ Parliamentary debates show that the Department of Agriculture had conducted experiments on industrial hemp by growing cannabis at farms in Ottawa and Montreal, and private businessmen were producing hemp as well.³⁶ The 1938 Act made further production illegal.³⁷

By 1938, all major cannabis offenses were enumerated in the Opium and Narcotic Drug Act.³⁸ 1938 marked the complete integration of Canada's ban on marijuana and its derivatives. In the years to follow, that policy would significantly evolve.

B. A New Philosophy

The 1954 amendments to the Opium and Narcotic Drug Act helped to modernize the act by adding an offense for possession with intent to distribute and increasing the maximum prison term for this and all trafficking offenses to fourteen years.³⁹ However, the events of 1955 were even more significant in moving Canadian policy in-line with late twentieth century philosophy.

In 1955, the Canadian Senate formed the Special Committee of the Senate on the Traffic in Narcotic Drugs in Canada (the Committee).⁴⁰

34. See *Cannabis Report*, *supra* note 5, at 257. The optimum temperature for growing marijuana is between sixty-eight and seventy-eight degrees Fahrenheit with a drop of about fifteen degrees in the evening hours. See *Beginner's Guide to Growing Marijuana*, Growing Marijuana, at <http://www.growing-marijuana.org/beginner.html> (last visited Oct. 27, 2003).

35. See *Cannabis Report*, *supra* note 5, at 257. The penalty for this offense was the same as the penalties for possession and trafficking. See *id.* The Department of Health had the power to issue permits to businesses, pharmacists, and physicians to obtain certain drugs for scientific experimentation and medical treatments. See *id.* at 263. Through the years, the Department developed varying regulations for prescription as well as prescription renewal procedures. See *id.* The Department imposed different obligations on scientific research companies and medical professionals. See *id.*

36. See *id.* at 257.

37. See *id.*

38. See Dubois, *supra* note 29.

39. See *Cannabis Report*, *supra* note 5, at 263-64.

40. See *id.* The Committee was formed on a motion by Senator Thomas Reid and was passed on February 24, 1955. See *id.* The Committee was originally formed due to increased traffic of opium and other drugs, mainly in Vancouver, where the problem had become too widespread for police to control. See *id.* The purpose of the Committee was best stated on the Senate floor during debate over Senator Reid's motion. See *id.* Senate Leader, W. Ross MacDonald, stated:

The work of the committee will largely be to consider the causes of this unfortunate problem with which this country is faced, to hear expert witnesses and to determine in what way the Government can make its most valuable contribution in resolving this unfortunate condition. The reports of this committee, based upon objective, cautious and factual assessment of the problem, may well become a document of the utmost importance and have far-reaching consequences in helping to found policy upon which the successful solution of this problem can rest.

Id. at 264-65.

Essentially, the Committee set out to evaluate the effectiveness of Canadian drug policy and reexamine its basic philosophy.⁴¹ The Committee heard testimony from fifty-two witnesses in various fields including law enforcement and medicine.⁴² Medical witnesses, testifying primarily on the topic of addiction, probably had the most crucial impact on the Committee's conclusions.⁴³ They testified that the majority of addicts in Canada were so-called "criminal addicts," ones who typically came from less affluent backgrounds and whose addiction became known not through voluntary treatment but contact with the criminal justice system, either by way of convictions under the Opium and Narcotic Drug Act or another law that revealed their addiction.⁴⁴

This testimony led the Committee to conclude that drug addiction was a criminal problem, a social evil that should be deterred through strict enforcement of drug policy as opposed to simply funneling addicts into treatment centers.⁴⁵ The Committee reported that "the evidence of medical authorities was to the effect that drug addiction is not a disease in itself. It is a symptom or a manifestation of character weaknesses or personality defects in the individual."⁴⁶

Based on this philosophy, the Committee rejected, without dissent, the idea of establishing treatment centers run by the government to assist addicts.⁴⁷ It argued, instead, that localities should more strictly enforce other provisions of the criminal codes, believing this would indirectly solve the addiction problem.⁴⁸ The theory was that by curbing prostitution, theft, vagrancy, and other crimes that drug addicts would likely commit, local police could drastically decrease the addiction problem.⁴⁹ The Committee recommended that incarcerated addicts be isolated from the rest of the prison population to

41. See *Cannabis Report*, *supra* note 29, at 264-65.

42. See *id.* The Committee heard from thirteen law enforcement agencies, ten different federal departments that all deal with drug trafficking, and twelve individual experts on addiction treatment. See *id.* at 265.

43. See *id.*

44. See *Cannabis Report*, *supra* note 5, at 265. There were 3,212 known addicts in Canada at the time. *Id.* Of those addicts, 2,364 were "criminal" addicts and 515 were "medical" addicts who became addicted through lawful use of controlled substances such as morphine, during medical treatments. See *id.* The final 333 addicts were categorized as "professional" addicts, including medical professionals who became addicted through access to narcotics meant for prescription or sale. See *id.* One study revealed that 1,101 of the criminal addicts were located in the city of Vancouver. See *id.*

45. See *id.* at 266.

46. *Id.* at 265.

47. See *Cannabis Report*, *supra* note 5, at 266.

48. See *id.* This conclusion was based on the testimony of Harry J. Anslinger before a U.S. Congressional Committee. See *id.* Anslinger was named Commissioner of the Federal Bureau of Narcotics in 1930. See John F. Galliher et al., *Lindesmith v. Anslinger: An Early Government Victory in the Failed War on Drugs*, 88 J. CRIM. L. & CRIMINOLOGY 661, 664 (1998). Before taking that position, Anslinger worked in the Treasury Department's Prohibition Division in the 1920's. See *id.* See also JOHN C. MCWILLIAMS, *THE PROTECTORS: HARRY J. ANSLINGER AND THE FEDERAL BUREAU OF NARCOTICS 1930-1962* (1990).

49. See *Cannabis Report*, *supra* note 5, at 266.

avoid spreading addiction within the penitentiary, and during their stay, addicts would receive treatment and specialized training to aid the rehabilitation process and help addicts deal with the specific troubles they face.⁵⁰ In addition, harsher penalties for trafficking offenses were recommended to attack the illegal drug supply.⁵¹

The majority of the Committee's recommendations were enacted into law in 1961 with the passage of the Narcotic Control Act.⁵² The Act increased trafficking penalties, carrying a twenty-five year maximum prison term as well as introducing the treatment provisions discussed above.⁵³ The purpose of these new provisions was to address all illegal drugs and not cannabis specifically.

C. *The Le Dain Commission*

The Le Dain Commission was formed in 1969 with the mission to examine Canada's drug policies.⁵⁴ Parliament gave the Commission broad discretion to conduct its study, and its purpose was, in many respects, similar to the Special Committee of the Senate on the Traffic in Narcotic Drugs in Canada.⁵⁵ Unlike the Committee, however, the Le Dain Commission did a more extensive study into marijuana use itself and issued a report on the topic in 1972.⁵⁶

At the outset of their report, the Commission made several "observations" about the nature of marijuana policy in Canada.⁵⁷ Most significantly, the Commission observed that the criminalization of marijuana was done "without any apparent scientific basis nor any real sense of social urgency[.]"⁵⁸ It also observed that in a three-year span the proportion of possession fines handed down for marijuana use increased from one percent in 1968 to seventy-

50. *See id.*

51. *See id.* at 267.

52. *See id.* at 268. This law retained most of the offenses contained in the Opium and Narcotic Drug Act and was divided into two sections: 1) Offences and Enforcement and 2) Preventive Detention and Treatment. *Id.* Under the second section, the government could detain an addict for up to ten years, mandate addicts participation in treatment programs, or opt instead to imprison the addict. *See id.* at 269. The majority of amendments passed with little debate. *See id.*

53. *See Dubois, supra* note 29.

54. *See Cannabis Report, supra* note 5, at 272. The Commission of Inquiry into the Non-Medical Use of Drugs was chaired by Gerald Le Dain and operated for over four years. *See id.* During this time, the Commission heard from 639 individuals and groups. *See id.* Marijuana legalization advocacy groups often cite the Commission's report on cannabis to support their position. *See also Dale Gieringer, The Case for Legalization*, The National Organization for the Reform of Marijuana Laws, available at http://www.norml.org/index.cfm?Group_ID=4422 (last visited Oct. 27, 2003).

55. *See Cannabis Report, supra* note 5, at 264-65, 272-73.

56. *See id.* at 264-65, 273.

57. *Id.* at 274.

58. *Id.*

seven percent in 1971.⁵⁹ This could be an indicator of many facts: a drastic increase in use, better enforcement by police, the movement of cannabis to the foreground of drug culture, or most likely, a combination of all three.

In a novel approach, the Commission focused its recommendations and its conclusions on the relative harm, to both the individual and society, caused by marijuana.⁶⁰ Although it did not have access to much scientific data, the Commission concluded not only that the harms caused by marijuana use were inconclusive but also that they appeared to be “less serious than those which may result from excessive use of alcohol.”⁶¹ It qualified this assessment by noting that the effects of long-term marijuana use could not be measured because of its relative infancy as a recreational drug.⁶² Even though the harms caused by marijuana did not appear severe, the Commission did not feel that a policy of decriminalization or legalization was an appropriate recommendation.⁶³

The Commission concluded that the government still had an obligation to protect the country’s youth from exposure to harmful substances.⁶⁴ Based on this rationale, the Commission found it inappropriate to legalize marijuana for use and distribution, instead believing that increased availability of marijuana, even at controlled quantities and qualities, would lead to increased use and increased abuse, primarily among those already using marijuana.⁶⁵ With this in mind, it recommended that current offenses for cannabis trafficking, possession for the purpose of trafficking, and importing and exporting should remain in the Narcotic Control Act.⁶⁶

The Commission was more liberal with respect to sentencing. The Commission saw a problem with lumping a less harmful drug like marijuana together with more harmful drugs like cocaine,⁶⁷ and therefore, it concluded that the negative consequences of a cannabis conviction to the individual were

59. *See id.* at 275-76

60. *See id.* *See* Norbert Gilmore, *Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL’Y 355, 370-82 (1996), for a detailed discussion of the harms and benefits of drug use to both society and the individual.

61. *Cannabis Report*, *supra* note 5, at 276.

62. *See id.*

63. *See id.* at 276-77. The *Cannabis Report* contains a glossary of terms at its outset and defines decriminalization as the “removal of a behaviour or activity from the scope of the criminal justice system.” *Id.* at xii. The definition distinguishes between *de jure* decriminalization, involving amendments to criminal law, and *de facto* decriminalization, involving an administrative decision not to prosecute illegal acts. *See id.* Legalization is defined as allowing and regulating the sale, distribution, and production of a drug. *See id.* at xiv. The “free market” form of legalization involves no state control; and the “regulatory regime” involves state controls similar to those restricting the consumption of alcohol and tobacco. *See Cannabis Report*, *supra* note 5, at xiv.

64. *See id.* at 277.

65. *See id.*

66. *See id.*

67. *See id.*

much greater than the negative consequences of the crime itself.⁶⁸ Aside from a potentially long prison term or large fine, those convicted often could not obtain employment, were stigmatized by neighbors, and subjected to restricted travel rights; these consequences of a criminal conviction were deemed severe when contrasted with the seemingly negligible impact on the user's health.⁶⁹

With this background in mind, the Commission made several recommendations for marijuana policy change. It suggested decreased penalties for trafficking offenses and giving a judge the option of not ordering imprisonment.⁷⁰ It advocated the repeal of simple possession of cannabis.⁷¹ It wanted to modify trafficking offenses to include importation and exportation and exclude non-sale transactions in which an individual gives another a small amount of marijuana at no charge.⁷² The Commission also recommended that the prohibition on growing cannabis for personal use be repealed.⁷³ In its view, these changes would foster more respect for the Narcotic Control Act among the populace and would codify their philosophy of basing the severity of penalties and the extent of prohibition on the potential harm that could be caused by the drug.⁷⁴

However, the Commission was hardly in agreement on these recommendations. One dissenter, Marie-Andrée Bertrand,⁷⁵ suggested removing cannabis from the schedules of the Narcotic Control Act entirely, thus leading to a policy of "controlled legalization."⁷⁶ Another dissenter, Ian Campbell,⁷⁷

68. *See id.* at 278.

69. *See Cannabis Report, supra* note 5, at 277.

70. *See id.* at 279.

71. *See id.*

72. *See id.* The amount of marijuana would be small enough if it were an amount that could "reasonably be consumed on a single occasion." *Id.*

73. *See id.*

74. *See Cannabis Report, supra* note 5, at 279.

75. *See Marie-Andrée Bertrand, Affidavit of Marie Andrée Bertrand, The Media Awareness Project, at* <http://www.mapinc.org/drugnews/v97/n000/a003.html> (last visited Oct. 27, 2003). This was an affidavit filed by Bertrand in support of a local Ontario challenge to Canadian drug laws in 1997 and adequately summarized her beliefs on marijuana prohibition. *See id.* After serving on the Commission, Bertrand became the President of the International Anti-Prohibitionist League. *See id.* She retired as a Professor of Criminology at the University of Montreal in 1996. *See id.* The constitutional challenge is still pending review in higher courts, but the Ontario Court of Appeal dismissed the appeal. *See R. v. Clay*, [2000] 49 O.R. (3d.) 577, 598 (Ont. C.A.).

76. *See Cannabis Report, supra* note 5, at 281. Bertrand felt that the added income from taxes on marijuana sales would benefit the Canadian economy. *See id.* This argument, too, is one frequently used by supporters of marijuana legalization. *See Michael L. Dennis & William White, The Marijuana Legalization Debate: Is There a Middle Ground?, in* THE DRUG LEGALIZATION DEBATE 79 (James A. Inciardi ed., 2nd ed. 1996).

77. *See Line Beauchesne, Setting a Public Policy on Drugs: A Question of Social Values What Do We In Canada Want?, at* <http://www.parl.gc.ca/36/2/parlbus/commbus/senate/comeille-e/presentation-e/beauchesne-e.htm> (last visited Oct. 8, 2003). Ian Campbell was a prohibitionist who felt that keeping cannabis illegal was the only way to prevent children and families from being contaminated. *See id.* Campbell also advocated increasing police raids, monitoring and testing offenders, and making medical treatment mandatory. *See id.*

agreed with the majority in most respects; however, he recommended that cannabis possession remain illegal.⁷⁸ Despite the dissenters, Minister of Health John Munro committed to following some of the Commission's suggestions on treating marijuana differently from the powerful narcotics with which it had been associated.⁷⁹

In November of 1974, Bill S-19, containing some of the reforms suggested by the Commission, was proposed in the Senate.⁸⁰ This Bill would have removed cannabis from the Schedules of the Narcotic Control Act and placed it under Section V of the Food and Drugs Act.⁸¹ The new classification of cannabis products would have resulted in a drastic reduction in penalties for some cannabis-related offenses.⁸² The Senate passed Bill S-19 in June of 1975 and referred it to the House of Commons for consideration.⁸³ The bill died there after two readings and was never considered for reintroduction.⁸⁴

The demise of the reforms suggested by the Le Dain Commission essentially marked the end of liberal marijuana reform movements in Canada for twenty years. The United States "war on drugs,"⁸⁵ ushered in by Ronald Reagan's presidency,⁸⁶ along with international galvanization in fighting

78. See *Cannabis Report*, *supra* note 5, at 281.

79. See *id.* at 282-83.

80. See *id.* at 283.

81. See *id.* The Food and Drugs Act is designed to allow the government to set and enforce safety standards for food and non-illicit drugs. See Pearl Reimer & Bryan Schwartz, *Biotechnology: A Canadian Perspective*, 1 ASPER REV INT'L BUS. & TRADE L. 91, 98 (2001).

82. See *Cannabis Report*, *supra* note 5 at 283. Possession is still an offense, punishable by a maximum fine of \$5,000; or if the offender is unable to pay the fine, the offender can be imprisoned for up to six months. See *id.* For simple possession cases, fines were always preferred over imprisonment. See *id.* The new Bill maintained trafficking offenses as well, with penalties ranging from a minimum of eighteen months to a maximum of fourteen years. See *id.* Despite the Commission's recommendations, the maximum prison term for cultivation offenses of the Narcotic Control Act of 1961 were set at seven years. See *id.* Subsequently, the Food and Drugs Act increased the allowable prison term to ten years. See *id.*

83. See *Cannabis Report*, *supra* note 5, at 284.

84. See *id.*

85. Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U.L. REV. 557, 599-602 (1998) (providing a brief history of the "war on drugs" in America).

86. See *id.* at 600 n.271. Ronald Reagan was elected U.S. President from 1981 – 1989. See *Ronald Reagan Biography*, The White House, available at <http://www.whitehouse.gov/history/firstladies/nr40.html> (last visited Oct. 27, 2003). President Reagan announced his administration's drug policy in 1982, striving to combine the efforts of various agencies to fight illegal drugs. See Blanchard & Chin, *supra* note 85, at 600 n.271. First Lady Nancy Reagan crafted the famous "Just Say No" campaign, which was designed to empower children to avoid giving into peer pressure to use drugs. See *Biography of Nancy Reagan*, The White House, available at <http://www.whitehouse.gov/history/firstladies/nr40.html> (last visited Oct 27, 2003).

drugs, led Canadian lawmakers to follow suit and alter their drug policy to fit the mold.⁸⁷

D. The Controlled Drug and Substances Act: The Current Policy

In 1992, Minister of Health Perrin Beatty proposed Bill C-85, which called for a unified law governing psychotropic substances.⁸⁸ This bill eventually became the Controlled Drugs and Substances Act (CDSA),⁸⁹ which became effective in 1996 and remains in effect today.⁹⁰ The CDSA merged the Narcotic Control Act and certain provisions of the Food and Drugs Act, resulting in a single piece of legislation governing all psychotropic substances in Canada.⁹¹

Schedule II of the CDSA contains cannabis and its byproducts.⁹² Schedules VII and VIII were special sections, designed to reduce penalties for trafficking and possession, respectively, of small amounts of cannabis.⁹³ Part I of the CDSA defines the offenses and criminal penalties for trafficking, producing, cultivating, possessing, and importing and exporting the drugs listed in the various Schedules, including marijuana.⁹⁴ The marijuana offenses listed in Part I are slightly more lenient than under the Narcotic Control Act,

87. See *Cannabis Report*, *supra* note 5, at 285. Canada's most significant change in policy was a more focused effort to curb trafficking, both local and international. See *id.* Other laws relating to drug trafficking, such as money laundering and enterprise crime, also became areas of emphasis in combating trafficking. See *id.*

88. See *id.* at 285-86. This particular bill never passed beyond the report stage and died when the 1993 session of parliament ended. See *id.* at 286.

89. See CDSA, *supra* note 9.

90. See *id.* Bill C-85 was proposed again in 1994 under a different name by Beatty's successor, Diane Marleau. See *Cannabis Report*, *supra* note 5 at 286. The new proposal was passed in the House of Commons on October 30, 1995. See *id.* The bill went on to the Senate, numbered as Bill C-8, was passed into law, and became effective on June 20, 1996. See *id.*

91. See *id.* at 285-86.

92. See CDSA, *supra* note 9, sched. II. The CDSA contains eight schedules that outline the types of controlled substances. See *id.* The Schedules enumerate the controlled substances (over 150 of them), with offenses such as possession and trafficking being defined in other parts of the act. See *Cannabis Report*, *supra* note 5, at 286-87. Schedule I contains opiates like opium, morphine, and cocaine. See CDSA, *supra* note 9. Schedule III contains amphetamines and hallucinogenic drugs. See *id.* Schedule IV contains barbiturates and steroids. See *id.* Schedule V contains miscellaneous substances that can be abused, like inhalants. See *id.* Schedule VI contains so-called "precursors," designer drugs like ecstasy. See *id.*

93. See Dubois, *supra* note 29. See discussion *infra* Part I.D.1., for an explanation of how Schedules VII and VIII operate.

94. See CDSA, *supra* note 9, §§ 4-7. Section 4 describes offenses and punishment for possession. See *id.* § 4. Section 5 lists offenses and punishments for trafficking. See *id.* § 5. Section 6 lists offenses and punishments for importing and exporting. See *id.* § 6. Section 7 lists offenses and punishments for production. See *id.* § 7.

and marijuana is separated from more dangerous drugs through use of the Schedules.⁹⁵

1. *Marijuana Offenses and Punishments*

Penalties for possession of marijuana, contained in section four of Part I, vary based on the amount possessed and whether the offender had any prior drug convictions. Possession is punishable by a maximum of five years in prison and a minimum \$1,000 fine.⁹⁶ Possession of less than thirty grams of marijuana results in a less severe sentence, carrying a maximum penalty of six months in prison and a \$1,000 fine.⁹⁷

Trafficking offenses, contained in section five of Part I, are much more serious.⁹⁸ Trafficking over three kilograms of marijuana is punishable by a maximum of life imprisonment.⁹⁹ Trafficking an amount lower than three kilograms brings the offense under the purview of Schedule VII, making the offender subject to imprisonment of up to five years.¹⁰⁰ Section six describes offenses for importing and exporting controlled substances, which are punishable by a maximum of life imprisonment in the case of marijuana.¹⁰¹ Section seven deals with the production of illicit drugs, punishing the production or cultivation of marijuana by up to seven years in prison.¹⁰²

The existence of the Schedules to classify various substances, along with even more lenient penalties for marijuana violators, reflects a shift to a philosophy that penalties for drug offenses should vary based on the harm caused by that particular drug, with marijuana resting relatively low on the

95. See *Cannabis Report*, *supra* note 5, at 288. For example, possession of a Schedule I substance, like cocaine, is punishable by a maximum of seven years in prison. See CDSA, *supra* note 9, § 4(3). Section 4(1) makes it illegal to possess any substance listed on Schedules I, II, or III. See *id.* § 4(1).

96. See CDSA, *supra* note 9, § 4(4).

97. See *id.* § 4(5). The statute says a person in possession of a Schedule II substance "in an amount that does not exceed the amount set out for that substance on Schedule VIII is guilty of an offen[s]e punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both." *Id.* Most of the statutes are worded similarly. See *id.* § 4. Schedule VIII, like Schedule II, lists cannabis but in amounts less than thirty grams. See *id.* Schedule VIII results in lighter sentences for those possessing small amounts of cannabis. See *id.* § 4(5).

98. See CDSA, *supra* note 9, § 5. Similar to section 4(1), section 5(1) forbids the trafficking of substances contained on Schedules I, II, and III. See *id.* § 5(1). Section 5(2) forbids possession for the purpose of trafficking. See *id.* § 5(2).

99. See *id.* § 5(3).

100. See *id.* § 5(4). Schedule VII operates in the same way as Schedule VIII. See *id.* Schedule VII lists cannabis in amounts less than three kilograms, the trafficking of which results in the lighter penalty. See *id.*

101. See CDSA, *supra* note 9, § 6(3).

102. See *id.* § 7(2)(b).

totem pole.¹⁰³ Although most of their policy suggestions were not made part of the CDSA, treating marijuana offenses differently from offenses with seemingly more harmful drugs is reminiscent of the strategy suggested by the Le Dain Commission in 1972, which focused on the relative harm caused by each drug and not simply its illicit status.¹⁰⁴

2. Medical Exemptions

Passed on June 20, 1996, section 56 of the CDSA allows the Minister of Health to exempt individuals or groups of individuals from any or all provisions of the CDSA.¹⁰⁵ This means that the Minister has the discretion to authorize the use of marijuana to treat disease, but because no legal source of marijuana existed, as a practical matter, this section had little impact.¹⁰⁶ The Governor in Council has additional authority, under section 55(1), to create regulations concerning the medical application of the substances in the CDSA, including cannabis.¹⁰⁷ Section 55(1) led to the creation of the Marihuana Medical Access Regulations (Regulations) in July of 2001.¹⁰⁸ These Regulations allow individuals to apply to the Office of Cannabis Medical Access¹⁰⁹ for a permit to possess marijuana to be used in the treatment of their

103. Compare CDSA, *supra* note 9, § 4(3)(a), (punishing the possession of even small amounts of cocaine, a Schedule I substance, with a seven-year prison term), with, § 4(5)(a) (punishing the possession of small amounts of cannabis, a Schedule VIII substance, with a \$1,000 fine or a six month prison term).

104. See *Cannabis Report*, *supra* note 5, at 273-76.

105. See CDSA, *supra* note 9, § 56. Section 56 states:

The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

Id.

106. See *Regina v. Parker*, [2000] 49 O.R.3d. 481, 518. In *Parker*, the Ontario Court of Appeal gave the federal government one year to improve access to medical marijuana and exempted Parker from prosecution in the meantime. See *id.* at 484. The ruling was based on the notion that forcing a person to choose between his continued health and going to prison is unconstitutional. See *id.* at 481. The lack of a practical medical exemption violated Parker's right to "life, liberty, and security of the person" under the Canadian Charter of Rights and Freedoms. Canada Act, 1982, ch. 11, sched. B, Pt. I, § 7 (Eng.).

107. See CDSA, *supra* note 9, § 55(1).

108. See Marihuana Medical Access Regulations, C.R.C. ch. 227, Preamble (2001) (Can.). The court's ruling in *Parker* also precipitated the formation of these regulations. See *Canada Improves Access to Medical Marijuana for the Seriously Ill*, Canada Online, at <http://www.canadaonline.about.com/cs/marijuana/a/medmarijuana.htm> (last visited Oct. 27, 2003). "Marihuana" is an alternate spelling of marijuana that is sometimes used in Canadian writings. See *id.* See also CDSA, *supra* note 9, sched. II.

109. See Office of Cannabis Medical Access, Health Canada, available at <http://www.hc-sc.gc.ca/hecs-sesc/ocma/> (last visited Oct. 6, 2003). The Office is used to administer the new Marihuana Medical Access Regulations and coordinate all Canadian initiatives relating to marijuana, including research into developing a supply of safe marijuana for ill Canadians to use. See *id.*

illnesses, a license to grow marijuana for that purpose, or a license allowing a third party to grow marijuana for them.¹¹⁰

Three categories of symptoms make individuals eligible to receive permits. Category 1 includes symptoms caused by terminal illness or the treatment of terminal illness.¹¹¹ Category 2 symptoms are ones associated with the treatment of AIDS, cancer, HIV, multiple sclerosis, spinal injuries, epilepsy, and severe arthritis.¹¹² Category 3 is a “catch-all” that allows access to marijuana for the treatment of symptoms not named in Category 1 or 2.¹¹³ As of October 4, 2002, 405 authorizations to possess marijuana, 263 production licenses, and eighteen third-party production licenses have been granted by the Regulations.¹¹⁴

The current Minister of Health, A. Anne McLellan,¹¹⁵ has not officially conceded that marijuana is an effective treatment of illness symptoms, claiming instead that the Regulations are in place because of the popular belief among patients and physicians that smoking marijuana eases the pain and suffering of the gravely ill.¹¹⁶ Although McLellan feels that this belief is widespread enough to justify limited access, scientific research should continue to better determine the benefits and risks of marijuana as a medicine.¹¹⁷

II. A NEW REFORM MOVEMENT: THE CANNABIS REPORT OF 2002

The Canadian government’s marijuana policy seems to flow through the same patterns as the United States, beginning with an early and somewhat

110. See Marijuana Medical Access Regulations, C.R.C. ch. 227, § 2 [hereinafter MMAR]. MMAR allows individuals with permits to possess marijuana for medicinal purposes. See *id.* § 24. The regulations permit marijuana to be grown for personal medical use. See *id.* § 34. It also permits a “designated person” to grow marijuana for another’s medical use. See *id.* The Canadian government is currently working toward producing its own supply of marijuana to supply successful applicants. See Office of Cannabis Medical Access, *supra* note 109, at <http://www.hc-sc.gc.ca/hecs-sesc/ocma/information3.htm> (last visited Oct. 27, 2003). In December of 2000, the government, through a competitive process, selected Prairie Plant Systems, Inc. to grow a quality-controlled supply of medical marijuana and conduct laboratory testing; Prairie Plant Systems was authorized to eventually distribute marijuana to successful applicants. See *id.* The company has not yet provided a satisfactory product. See *id.*

111. See MMAR, *supra* note 110, § 1. Section 1 defines all crucial terms in the Regulations, including “category 1 symptom,” “category 2 symptom,” and “category 3 symptom.” *Id.*

112. See *id.* The symptoms associated with these diseases include nausea, anorexia, weight loss, severe pain, seizures, and muscle spasms. See *id.* § 73.

113. See *id.* § 1. Section 1 defines a Category 3 symptom as one “other than a category 1 or 2 symptom, that is associated with a medical condition or its medical treatment.” *Id.*

114. See Office of Cannabis Medical Access, *supra* note 109.

115. See The Honourable A. Anne McLellan, Anne McLellan: Working With You for Edmonton West, available at <http://www.annemclellan.ca/about.html> (last visited Oct. 27, 2003). McLellan serves in the House of Commons, representing Edmonton West. See *id.* She was elected to the House of Commons in November of 2000 and appointed Minister of Health in January of 2002 by Prime Minister Jean Chrétien. See *id.*

116. See Office of Cannabis Medical Access, *supra* note 109.

117. See *id.*

puzzling prohibition based, at least in part, on racism.¹¹⁸ Increased usage led to a more strict policy during the 1980's and 90's.¹¹⁹ The main difference between Canadian and United States' marijuana policy is that Canada has been more willing to critique and reevaluate its own policies based on scientific evidence.¹²⁰ The 600-plus page report, "Cannabis: Our Position for a Canadian Public Policy," (the Report) issued by the Senate Special Committee on Illegal Drugs (the Senate Committee) is certainly proof.¹²¹

A. *The Senate Committee's Research*

The Senate Committee separated its research strategy into five areas. First, it set out to examine social, economic, historical, criminological, and political issues surrounding the use and regulation of marijuana.¹²² Second, it wanted to gather information on the medical and pharmacological properties that marijuana may or may not possess and its effectiveness in treating disease or symptoms of disease.¹²³ Third, the Senate Committee examined the legal aspects of marijuana on a national level.¹²⁴ Fourth, it wanted to examine marijuana-related political and legal issues at the international level, focusing on U.S.-Canada relations and Canada's status as a member of many international drug treaties and conventions.¹²⁵ Finally, it set out to investigate behavioral and moral standards of Canadians themselves, looking at tolerance levels among the populace, behavioral norms, and other issues.¹²⁶

To successfully and fully investigate these five axes, the Senate Committee took two paths. It first set out to synthesize current scientific and social data on marijuana use and abuse contained in existing literature,

118. See Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAULL REV. 483, 493 (1997). In the 1930's, Hispanics were referred to as "reefer-mad Mexicans." *Id.* It is asserted that marijuana became a concern during the Great Depression when Mexicans began to immigrate and work for low pay on Southwestern farms. See Holly Sklar, *Reinforcing Racism with the War on Drugs*, Z Magazine, at <http://www.zmag.org/zmag/articles/dec95sklar.htm> (last visited Oct. 27, 2003).

119. See *Cannabis Report*, *supra* note 5, at 285.

120. Compare discussion *infra* Part I.C. (noting the reforms suggested by the Le Dain Commission), with H.R. 135, 104th Cong., 1st Sess. (1995) (noting Congressional attempts to forbid funding for research into drug legalization).

121. See *Cannabis Report*, *supra* note 5, at 8-10. The Senate Special Committee on Illegal Drugs had its beginnings in 1995 to address concerns with the almost enacted CDSA. See *id.* The elections of 1997 interrupted this process. See *id.* Senator Pierre Claude Nolin, who would eventually chair the Committee, moved for its creation in 1999, and the motion passed in April of 2000. See *id.* The Committee dissolved in October and was reformed in March of 2001. See *id.* However this time its scope was not drug policy on the whole, but was limited only to cannabis. See *id.*

122. See *Cannabis Report*, *supra* note 5, at 16.

123. See *id.*

124. See *id.* at 17.

125. See *id.*

126. See *id.* at 18. More than 100 people with diverse backgrounds testified before the Committee during forty days of public hearings in Ottawa and other locations. See *id.* at 21.

including a Senate Committee-sponsored public opinion survey, and second, it heard testimony in public hearings from witnesses from a variety of fields.¹²⁷ The Senate Committee was relentless in ensuring its own objectivity and tirelessly examined its most basic philosophies about the operation of government, the core purposes of criminal law, and the constantly changing relationship between government and citizen.¹²⁸

B. Crucial Findings

The Senate Committee's research was extensive.¹²⁹ Data received by the Senate Committee indicates that thirty percent of the population between the ages of twelve and sixty-four has tried marijuana at least once.¹³⁰ Two million Canadians have used marijuana in the past twelve months.¹³¹ Most people who experiment with marijuana stop using it, and most people who use long-term were introduced to the drug at a young age, with the average age of introduction being fifteen.¹³² The Senate Committee found that cannabis use itself is not a cause of delinquency, crime, or violence.¹³³ Seventy percent of all drug charges involve marijuana, with forty-three percent of the charges being for marijuana possession.¹³⁴ Cannabis has a significantly lower addiction rate when compared to alcohol and tobacco.¹³⁵ An examination of "danger factors" led to the conclusion that alcohol and tobacco are, in some respects, more harmful to the individual and society than marijuana.¹³⁶

Most importantly, based on all the data it received, the Committee concluded that, "for the vast majority of recreational users, cannabis use presents no harmful consequences for physical, psychological or social well-being in either the short or the long term."¹³⁷ Their policy suggestions emanate from the basic idea that marijuana simply is not that harmful to the individual or

127. See *Cannabis Report*, *supra* note 5, at 22.

128. See *id.* at 22-50.

129. See *id.* App. II-III. Appendix II lists the witnesses heard by the Committee. See *id.* App. II. Appendix III lists the research papers submitted to the Committee. See *id.* App. III.

130. See Senate of Canada, Special Comm. on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy*, Summary Report 15 (Sept. 2002), at <http://www.parl.gc.ca/illegal-drugs.asp> (last visited Oct. 27, 2003) [hereinafter Summary Report].

131. See *id.*

132. See *id.*

133. See *id.*

134. See *Cannabis Report*, *supra* note 5, at 365.

135. See *id.* at 156. This was based on a U.S. study, which determined that thirty-two percent of fifteen-year-olds to fifty-two-year-olds who became addicted after a single use of tobacco. See *id.* Of those who used alcohol once, 15% became addicted; whereas 4.2% of one-time cannabis users became addicted. See *id.*

136. See *id.* at 161. The "danger factors" include the degree of physical dependence, psychic dependence, neurotoxicity, general toxicity, and danger to society. See *id.* In most of these categories alcohol and tobacco were given a "high" or "very high" rating, while cannabis received a "low" or "very low" rating in all categories. See *id.*

137. *Id.* at 165.

society, when compared with heroin and cocaine or even alcohol and tobacco.¹³⁸

C. *The Senate Committee's Recommendations*

On the whole, the Senate Committee's recommendations are a drastic departure from Canada's current marijuana policy. Their significance is highlighted by the fact that drug use is such a politically volatile issue that divides the Canadian public almost in half.¹³⁹ Taking bold stances on controversial issues is a difficult thing for politicians to do, which seems to lend some political genuineness to the Senate Committee's policy recommendations.

1. *Changes in Recreational Use Policy*

Since its unexplained addition to the Opium Act in 1923,¹⁴⁰ recreational use of marijuana has been illegal in Canada, and the CDSA prohibition of this type of use is fairly typical when compared with the United States policies against possession.¹⁴¹ The Senate Committee has recommended sweeping amendments to the CDSA that would permit Canadian citizens over sixteen years of age to obtain marijuana.¹⁴²

Believing the CDSA lacks a basic objective, the Senate Committee first recommended amending the law to include a "general aims" section.¹⁴³ The primary aim should be "[t]o reduce the injurious effects of the criminalization of the use and possession of cannabis and its derivatives."¹⁴⁴ Another aim of the bill, contrary to the implied aim of the current CDSA, would be to permit persons over sixteen years old to obtain marijuana at licensed distribution centers.¹⁴⁵ A final aim would be to recognize the mental and physical risks of excessive marijuana use and to regulate the production and use of marijuana to prevent excessive use.¹⁴⁶

The first substantive amendments suggested include the granting of licenses to allow Canadian residents to distribute marijuana with several

138. See Summary Report, *supra* note 130, at 27.

139. See Bertrame, *supra* note 6.

140. See *Cannabis Report*, *supra* note 5, at 256.

141. See 21 U.S.C. § 844 (2003) (prohibiting the possession of a controlled substance).

142. See Summary Report, *supra* note 130, at 52.

143. See *id.*

144. *Id.* The consequences referred to here are the arrests of over 20,000 Canadians for marijuana possession, the profits made by organized crime as a result of illegal cannabis trafficking, and others. See *Cannabis Report*, *supra* note 5, at 617.

145. See Summary Report, *supra* note 130, at 52. The Committee proposed that consumption in public places frequented by children under 16 years of age should not be permitted. See *id.* at 53.

146. See *id.* at 52.

restrictions. Distributors must not sell to individuals under sixteen years old and would be forbidden from advertising their product in any way, including displays.¹⁴⁷ Those seeking distributors' licenses must not have criminal records, and they may only obtain marijuana from licensed producers.¹⁴⁸

The Senate Committee also recommended that Canadian residents be able to obtain licenses to produce cannabis, both for sale to licensed distributors and personal use.¹⁴⁹ It suggested amending the CDSA to allow for an exemption to permit cannabis cultivation in small quantities¹⁵⁰ for personal use on the condition that it cannot be exchanged for consideration, monetary or otherwise, or promoted by the grower in any other way.¹⁵¹ A license to produce for sale would also be permitted, as long as the grower keeps detailed records of sales, THC quantities, and production conditions.¹⁵² Tobacco companies would be forbidden from obtaining these licenses, and licensed growers would not be allowed to advertise.¹⁵³

These changes, obviously, would transform the CDSA into a law designed to expressly permit what it previously forbade. Marijuana would essentially be sold in a way quite similar to tobacco in the United States, complete with restrictions on advertising and other substantial government regulations.¹⁵⁴

2. Changes in Medical Use Policy

Since 1996, the Canadian government has allowed the use of marijuana for therapeutic purposes, but only after the adoption of the Marijuana Medical Access Regulations has the Department of Health actually started to grant permits to use medical marijuana.¹⁵⁵ The Regulations have provided Canadians with grave illnesses the opportunity to petition the government for permits to use marijuana.¹⁵⁶ Despite this, the Senate Committee does not think

147. *See id.* at 53.

148. *See id.* at 52.

149. *See id.* at 53.

150. *See Summary Report, supra* note 130, at 53. The Committee did not suggest a specific amount of marijuana that would be acceptable to grow. *See id.*

151. *See id.*

152. *See id.* THC is short for "delta-9-tetrahydrocannabinol." *See As a Matter of Fact: Marijuana*, Well.com, at <http://www.well.com/user/woa/fspot.htm> (last visited Oct. 27, 2003). THC is the primary psychoactive ingredient in marijuana, and the level of THC indicates the strength of the marijuana. *See id.* The Committee recommended THC content of thirteen percent or less. *See Summary Report, supra* note 130, at 53.

153. *Summary Report, supra* note 130, at 53. The Committee did not provide any specific reasoning behind these restrictions. *See Cannabis Report, supra* note 5, at 617.

154. *See* Edward J. Schoen et al., *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech—Now You See it, Now You Don't*, 39 AM. BUS. L.J. 467, 484-88 (2002) (discussing U.S. restrictions on tobacco, specifically with regard to advertising).

155. *See* Office of Cannabis Medical Access, *supra* note 109.

156. *See* discussion *supra* Part I.D.2.

the current Regulations extend far enough to make marijuana accessible to the average person in need.¹⁵⁷

The amendments to the Regulations recommended by the Senate Committee are designed to make access much easier and broaden the class of those eligible to benefit from marijuana's therapeutic properties. For example, the Senate Committee would include those who suffer from chronic accident-related pain, migraines, and chronic headaches, along with those currently eligible.¹⁵⁸ It would eliminate the "last resort" provision in the current Regulations, which states that all conventional therapies must have been tried or considered before marijuana use would be permitted.¹⁵⁹ It would eliminate the current "category" system and simply enumerate the medical conditions and symptoms for which marijuana can be used.¹⁶⁰ The Senate Committee proposes that the patient be able to buy the marijuana from distributors instead of having to grow it himself or find a third party to do so.¹⁶¹ Current Regulations allow only dried marijuana to be used,¹⁶² but the Senate Committee's proposal would broaden that to include all cannabis derivatives with the dosage to be determined by the patient in consultation with the distribution center, as opposed to the doctor setting the dosage under the current Regulations.¹⁶³

Similar to the provisions for recreational distribution, the Senate Committee recommends that a Canadian resident be able to obtain a license to distribute marijuana for medical purposes.¹⁶⁴ The only differences between the medical distribution license and the recreational distribution license is that the medical distributor must keep records on buyers' medical conditions and side effects and take steps to ensure the product's safety for medical use.¹⁶⁵ Licenses to produce cannabis for medical purposes would operate in a similar manner to those for recreational use, under the restrictions set forth by the

157. See *Cannabis Report*, *supra* note 5, at 308. "[I]t is apparent that the MMAR have become a barrier to access." *Id.* "Rather than providing a compassionate framework, the regulations are unduly restricting the availability of cannabis to those who may receive health benefit from its use." *Id.* This would be in direct conflict with the primary purpose of the Regulations themselves. See *id.*

158. See Summary Report, *supra* note 130, at 51.

159. See *Cannabis Report*, *supra* note 5, at 317. Currently the Regulations state that when a person applies to the Office of Cannabis Medical Access, a physician must recommend marijuana and contend that "all conventional treatments for the symptom have been tried, or have at least been considered." CDSA, *supra* note 9, § 6(3)(b). The applicant must also demonstrate that these conventional treatments were or would be ineffective. See *id.*

160. See *Cannabis Report*, *supra* note 5, at 317.

161. See *id.*

162. See MMAR, *supra* note 110. Section One defines "authorization to possess as" permission to possess dried marijuana. See *id.*

163. See *Cannabis Report*, *supra* note 5, at 317.

164. See Summary Report, *supra* note 130, at 51.

165. See *id.* at 51-52.

Senate Committee.¹⁶⁶ The only difference is that if a producer sells recreational cannabis to distributors, it may not also sell medical cannabis.¹⁶⁷

The Senate Committee concluded that the low participation in the medical marijuana program shows that the current Regulations fail to grant the kind of access they were intended to provide.¹⁶⁸ While this may be true, the low participation rate could just as easily be due to other factors to which the Senate Committee gives little weight. Specifically, marijuana is not an approved drug product.¹⁶⁹ Scientific evidence is inconclusive as to its therapeutic benefits.¹⁷⁰ Doctors who recommend marijuana to patients may be in derogation of professional rules relating to alternative medicines.¹⁷¹ And finally, smoking marijuana is an unhealthy delivery mechanism.¹⁷² It is unclear why these factors were dismissed as likely causes of low participation among mainstream society. The fact that medical marijuana can be obtained illegally from Canadian “compassion clubs” is also dismissed.¹⁷³ The Senate Committee suggests that these clubs would still play a crucial role, under their proposed scheme, either as licensed distributors or producers.¹⁷⁴

All factors considered, the Senate Committee’s recommendations regarding medical marijuana are far less radical than the ones suggested for recreational use. The Senate Committee appears to be focusing more on expanding eligibility to receive medical marijuana than completely eradicating the current regulatory regime. Although scientific evidence is inconclusive about the actual benefits of marijuana as a medicine, the Canadian government has already made a qualified commitment to provide it to those who believe

166. *See id.*

167. *See id.* at 51.

168. *See Cannabis Report, supra* note 5, at 308. Health Canada informed the Committee that as of May 2002, 498 applications have been received, and 255 were granted. *See id.* The Regulations were designed to improve upon the Section 56 exemption under the CDSA. *See CDSA, supra* note 9. Under § 56, 658 exemptions were granted; 501 were still active as of May 2002. *See Cannabis Report, supra* note 5, at 308.

169. *Cannabis Report, supra* note 5, at 309.

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.* at 313. Although the clubs do engage in activity that is technically criminal under the CDSA, some judges have been unwilling to crack down on employee defendants. *See, e.g., R. v. Lucas*, File No: 113701C (Provincial Court of B.C., Victoria, July 5, 2002), at <http://www.johnconroy.com/lucas.pdf> (last visited Oct. 27, 2003). After Lucas pled guilty to possession for the purposes of trafficking, the judge did not impose a jail sentence, stating, “[T]he federal government has so far been unable to ensure any legal supply of marijuana . . . This is a particular hardship for those who cannot grow it.” *Id.* at 19. Similar clubs exist in the United States as well, mainly on the West Coast. *See Katrina Onstand, Rx: Marijuana*, CHATELAINE, Nov. 1997, at 164. Many of the clubs in the U. S. have been raided and shut down by the state and federal police. *See Pete Brady, California War Heats Up*, CANNABIS CULTURE MAGAZINE, at <http://www.cannabisculture.com/articles/2571.html> (last visited Oct. 27, 2003).

174. *See Cannabis Report, supra* note 5, at 315.

it will alleviate their suffering.¹⁷⁵ The Senate Committee's goal of refining this commitment is reasonable, and at least one Canadian judge agrees, stating that "federal regulations . . . made it extremely difficult for applicants to obtain approval to use marijuana."¹⁷⁶

3. *Prevention and Harm Reduction*

The Senate Committee concedes that the war on marijuana is one that cannot be won, calling the goal of cannabis policy to reduce supply and consumption a "complete failure."¹⁷⁷ This conclusion leads to a fork in the road: down one road is the policy of decriminalization, and down the other road is the policy of legalization.¹⁷⁸ The Senate Committee chose the latter, feeling that decriminalization would cause the government, from a policy standpoint, to ignore the potential problems marijuana presents.¹⁷⁹ Canada's proposed legalization scheme, obviously, will increase the availability of marijuana. The Senate Committee also focused its attention on how to prevent abuse and minimize the social and health problems caused by marijuana abuse, not only through the regulations described above, but through prevention and harm reduction programs.¹⁸⁰ Although the Senate Committee did not identify and develop these programs itself, it made important observations to guide legislators.¹⁸¹

Most importantly, it stated that prevention should not be designed to control and manipulate young people through inflammatory statements about marijuana but to give them the knowledge to make informed decisions.¹⁸² The Senate Committee believes that "alarmist rhetoric" on the effects of marijuana is counterproductive.¹⁸³ Such propaganda is quickly undermined when young people see their friends smoking marijuana at parties without "frying their brains."¹⁸⁴

The Senate Committee, as a way to fight the damaging effects of marijuana use, also suggested using the technique of harm reduction.¹⁸⁵ Harm reduction programs are different from prevention programs because their goal is not to discourage use, but to encourage responsible use, resulting in a

175. *See supra* Part I(D)(1).

176. *R. v. Lucas*, File No: 113701C.

177. *See Summary Report, supra* note 130, at 33-4.

178. *See id.*

179. *See Summary Report, supra* note 130, at 34.

180. *See id.* at 15-16. Chapter Seven of the Summary Report contains a good encapsulation of the Committee's findings with respect to the harms caused by marijuana. *See id.* at 15-17.

181. *See id.* at 26.

182. *See id.*

183. *See Cannabis Report, supra* note 5, at 398.

184. *See id.*

185. *See id.* at 412.

minimization of harm to the individual and society.¹⁸⁶ In reference to marijuana, these programs would take the form of discouraging certain types of abuse, such as driving while under the influence of marijuana and smoking in ways more damaging to health.¹⁸⁷

Because these programs seem to implicitly encourage use, or at least end government disapproval of use, they would be likely to meet public resistance, similar to programs that distribute free needles to drug addicts or condoms to students.¹⁸⁸ Nevertheless, they are probably necessary steps to prevent a new class of users from turning into abusers.

4. *International Issues*

As a major economic power, Canada is a participant in many international drug treaties, including the Single Convention on Narcotic Drugs,¹⁸⁹ the Convention on Psychotropic Substances,¹⁹⁰ and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹⁹¹ These treaties impose obligations on member nations, and the Senate Committee believes these obligations to be "utterly irrational" and having "nothing to do with scientific or public health considerations."¹⁹² The Senate Committee's policy suggestions would violate Canada's obligations to create criminal penalties for drug offenses, including possession, distribution, and cultivation of cannabis.¹⁹³

The Senate Committee recommended that Canada notify the international community of its intent to request that cannabis be removed from the

186. *See id.* at 410. A classic example of a harm reduction would be needle exchange programs for heroin users. *See id.* These programs were designed to prevent intravenous drug users from sharing needles and thus transmitting the HIV virus. *See id.* at 411. While they do not discourage heroin use, they minimize a harmful side effect: the spread of AIDS. *Id.*

187. *See id.* Although the Committee did not recommend making it illegal, driving while under the influence of marijuana would be treated cautiously, despite the finding that cannabis alone has little impact on driving skills. *See Summary Report, supra* note 130, at 17. "Deep inhalation," which increases damage to the respiratory system, would also be discouraged under possible harm reduction programs. *See Cannabis Report, supra* note 5, at 411.

188. *Cannabis Report, supra* note 5, at 411.

189. *See* Single Convention on Narcotic Drugs, Mar. 30, 1961, pmbi., 18 U.S.T. 1407 [hereinafter Single Convention]. Much like the CDSA, the Single Convention divides drugs into schedules, with cannabis placed among heroin and cocaine on the most dangerous list. *See id.* App. Under the treaty, member nations must adopt criminal penalties for drug crimes, with imprisonment preferred. *See id.* art. 36. The treaty took effect in Canada in 1964. *See Cannabis Report, supra* note 5, at 439 n.1.

190. *See* Convention on Psychotropic Substances, Feb. 21, 1971, pmbi., 32 U.S.T. 543. This treaty took effect in Canada in 1988. *See Cannabis Report, supra* note 5, at 439 n.2.

191. *See* Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, pmbi., 28 I.L.M. 493. This treaty took effect in Canada in 1990. *See Cannabis Report, supra* note 5, at 439 n.3.

192. *Cannabis Report, supra* note 5, at 439.

193. *See* Single Convention, *supra* note 189, art. 2.

schedules of drug treaties, effectively declassifying it.¹⁹⁴ Canada would then have to choose whether to remain in contravention of those treaties until the amendment is made or temporarily withdraw from the treaties.¹⁹⁵ The Senate Committee suggested the latter because it would enable Canada to more effectively lobby for the exclusion of cannabis from the schedules of these treaties.¹⁹⁶

Aside from violations of these agreements, the Senate Committee had to consider the impact of a policy change on relations with its southern neighbor, the United States. Exporting cannabis from Canada and selling marijuana to non-Canadian residents would remain illegal.¹⁹⁷ These two provisions were designed to prevent Canada's policy choices from spilling over into the United States.¹⁹⁸ Nevertheless, this may be an unavoidable side effect, as it was during the era of Prohibition in the 1920's.¹⁹⁹

Relations with the United States have already been tested over the issue of medical marijuana. When Canada began its program, the government attempted to buy cannabis seeds from the United States National Institute on Drug Abuse²⁰⁰ to establish a farm.²⁰¹ Their offer was rejected, and the government was forced to use seeds confiscated from criminals.²⁰² The medical program has also inspired some Americans to cross the border to obtain medical marijuana without fear of punishment.²⁰³ A more indirect problem was recognized by former U.S. Drug Enforcement Agency head Asa Hutchinson,²⁰⁴ who indicated that mere talk of legalization "increases the

194. See *Cannabis Report*, *supra* note 5, at 467-68.

195. See Summary Report, *supra* note 130, at 49.

196. See *id.*

197. See *id.*

198. See *id.* Restricting sale to Canadian residents only was recommended to avoid the problem of "drug tourism." See Korf, *supra* note 12, at 119.

199. See Nate Hendley, *Northern Lights: Canada Ponders Pot Decriminalization as America Fumes*, IN THESE TIMES, Sept. 2, 2002, at 4. During alcohol prohibition in the 1920's, bootleggers in Canada made a living exporting alcohol to America. See *id.*

200. See *About NIDA*, National Institute on Drug Abuse, at <http://www.drugabuse.gov/about/aboutNIDA.html> (last visited Oct. 27, 2003). The NIDA's mission is to "lead the Nation in bringing the power of science to bear on drug abuse and addiction." *Id.*

201. See Hendley, *supra* note 199, at 4.

202. See *id.*

203. See Clifford Krauss, *Ill Americans Seek Marijuana's Relief in Canada*, N.Y. TIMES, Sept. 8, 2002, at 1-4. Some who face drug charges in the U. S. have applied for asylum in Canada, like former California gubernatorial candidate Steve Kubby. See *id.* Kubby has adrenal cancer and believes that without marijuana his blood pressure would soar, causing a heart attack. See *id.* Others move "from couch to couch" at the homes of medical marijuana advocates. *Id.*

204. See *DHS Organization*, U. S. Dept. of Homeland Security, at <http://www.dhs.gov/dhspublic/display?theme=11&content=583> (last visited Oct. 27, 2003). After leaving the DEA, Hutchinson was appointed by President George W. Bush to a leadership position in the new Department of Homeland Security. See *id.* Hutchinson now serves as Secretary for Border and Transportation Security. See *id.*

rumblings in [the United States] that we ought to reexamine our policy. It is a distraction from a firm policy on drug use."²⁰⁵ The Senate Committee, however, believes that Canada should be a leader in North American drug policy and inciting a reexamination of United States marijuana policy is viewed as a positive step in their eyes, not a "distraction."²⁰⁶

III. THE PAST AND PRESENT OF DUTCH MARIJUANA POLICY

Due to its drug policies, the Netherlands has been called everything from "a markedly relevant example to the world"²⁰⁷ to "[a] latter-day Sodom and Gomorrah."²⁰⁸ Like any other policy, the Netherlands' policy on marijuana developed in a historical context that is completely unique. In order to understand the policy, that context must be briefly explored.

A. *The Modern History of Marijuana in the Netherlands*

Marijuana use in the Netherlands was almost nonexistent before World War II.²⁰⁹ Immediately following the war, marijuana use appeared to be isolated to artists and writers.²¹⁰ At this point, authorities were powerless to prosecute these people because marijuana was not yet prohibited.²¹¹ When marijuana was banned in 1953, enforcement of the new law was concentrated primarily on American soldiers stationed in Germany and visiting the Netherlands while on leave.²¹² Dutch citizens obtained marijuana from sailors and then sold it to the soldiers.²¹³ These Dutch smugglers and American soldiers comprised most of the arrests for marijuana offenses in this early period.²¹⁴ Sentences for possession were rather light.²¹⁵ For example, a painter arrested with two marijuana cigarettes was convicted and sentenced to a three-month suspended sentence.²¹⁶

205. Hendley, *supra* note 199, at 4.

206. See Summary Report, *supra* note 130, at 49.

207. J.P. Grund et al., *Is Dutch Drug Policy an Example to the World?*, in BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY 311 (Ed Leuw ed., 1996).

208. Dickey & Endt, *supra* note 7, at 18.

209. See Marcel de Kort, *A Short History of Drugs in the Netherlands*, in BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY 3-15 (Ed Leuw ed., 1996) (describing the pre-World War II history of drugs in the Netherlands).

210. See *id.* at 16.

211. See *id.*

212. See *id.*

213. See *id.*

214. See *id.*

215. See De Kort, *supra* note 209, at 16.

216. See *id.*

This more tolerant attitude changed in the 1960's, when a much broader base of individuals began to use marijuana more visibly.²¹⁷ These users found themselves subjected to harsher penalties, with authorities handing down sentences of a few months for possession of even small amounts of marijuana.²¹⁸ This new approach immediately proved ineffective, as marijuana use increased with the rise of Sixties youth culture.²¹⁹ "Non-deviant" groups began to regularly smoke marijuana and use other drugs like LSD,²²⁰ and their prosecution resulted in the criminalization of otherwise law-abiding citizens.²²¹ Political reaction to this increase may have been the first real indicator of the uniqueness of Dutch government. Rather than cracking down harder on those who defied the law, the Dutch government "felt compelled to negotiate rather than to give orders . . ."²²²

This progressive philosophy eventually resulted in the formation of the Baan Commission, an official group formed by the Dutch government to reevaluate its drug strategies in 1968.²²³ The Commission issued its official report in 1972.²²⁴ Their conclusions were not significantly different from those of the Canadian Senate Committee. It found that the criminalization of marijuana stigmatized youths who used the drug and led to a continuing spiral of antisocial behavior.²²⁵ It also pointed out that criminalization drives availability underground, and in order to obtain marijuana, young people forcibly came into contact with users and suppliers of hard drugs.²²⁶ Preventing marijuana users from coming into contact with hard drugs became an essential

217. *See id.*

218. *See id.* Authorities would "hunt intensively" for even a few grams of marijuana during the 1960's. *See id.*

219. *See id.*

220. *See Drug Facts: LSD*, Office of National Drug Control Policy, at <http://www.whitehousedrugpolicy.gov/drugfact/lsd/> (last visited Oct. 27, 2003). LSD stands for lysergic acid diethylamide and is commonly referred to as "acid." *See id.* LSD is a hallucinogenic substance that has varying effects that depend on the amount taken. *See id.*

221. *See* Henk Jan van Vliet, *A Symposium on Drug Decriminalization: The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 HOFSTRA L. REV. 717, 722 (1990).

222. *Id.* at 720. The most recognized detractors of marijuana laws were a group of loosely organized individuals called "Provos." *See* Ed Leuw, *Initial Construction and Development of the Official Dutch Drug Policy*, in BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY 23, 25 (Ed Leuw ed., 1996). The Provos were mainly a presence in Amsterdam and would publicly smoke marijuana in the presence of city officials to "provoke" them. *See id.* Public sentiment was generally in agreement with the Provos, and government overreaction to some of these demonstrations led to the dismissal of the mayor and police commissioner of Amsterdam. *See id.* Some Provos formed a political party and won a few seats on the city council, openly smoking marijuana at meetings. *See id.*

223. *See* De Kort, *supra* note 209, at 19.

224. *See Cannabis Report*, *supra* note 5, at 489.

225. *See id.*

226. *See id.* Whereas "hard" drugs generally include cocaine, heroin, opium, and similar drugs, while marijuana is considered a "soft" drug. *See id.* at 489.

goal of Dutch drug policy, a phenomenon known as “separation of the markets.”²²⁷

The Baan Commission led to eventual reforms of the Opium Act in 1976 which resulted in the decriminalization of marijuana.²²⁸ Being a member of the Single Convention on Narcotic Drugs, the Netherlands was not permitted to legalize marijuana, instead treating it similarly to tobacco and alcohol.²²⁹ In order to accomplish its “separation of the markets” goal, the Netherlands resorted to a policy of *de facto* decriminalization, in which marijuana crimes were still illegal but, through an administrative mandate, were not prosecuted.²³⁰ The Netherlands chose this route, and the policy remains in effect today.

B. The Current Policy

Similar to the CDSA, the Opium Act separates drugs into schedules based on the relative harms they cause.²³¹ Hard drugs like cocaine, heroin, LSD, and amphetamines are placed on Schedule I, whereas cannabis and its derivatives are placed on Schedule II.²³² Due to the “expediency principle,”²³³ possession, trafficking, manufacturing, and importing and exporting substances in either Schedule remain illegal under the Opium Act, but, in practice, punishments vary a great deal.

Under the expediency principle, soft drug offenses remain illegal, but the Ministry of Justice sets “Guidelines” that prioritize certain offenses, such as trafficking hard and soft drugs, over ones deemed of less importance, such as soft drug possession and consumption.²³⁴ The Guidelines direct the Public Prosecutions Department²³⁵ to investigate and prosecute some offenses but not others.²³⁶ For example, possession of less than five grams of soft drugs is given the lowest priority.²³⁷ As a practical matter, possession of less than

227. See Strategy Report, *supra* note 7, at 438. See also *Cannabis Report*, *supra* note 5, at 490.

228. See van Vliet, *supra* note 221, at 724.

229. See *id.* at 723.

230. See *Cannabis Report*, *supra* note 5, at 276-77.

231. See *Fact Sheet Drug Policy*, Netherlands Institute of Mental Health and Addiction, at <http://trimbos.nl/Downloads/Producten/A5%20download%20engels%2013%2008%202003.pdf> (last visited Oct. 27, 2003).

232. See *id.*

233. Eric Thomas Berkman, *Sacrificed Sovereignty?: Dutch Soft Drug Policy in the Spectre of Europe Without Borders*, 19 B.C. INT’L & COMP. L. REV. 173, 179 (1996).

234. See *id.*

235. See *About the Public Prosecutions Service*, Het Openbaar Ministerie, at http://www.openbaarministerie.nl/english/engl_frm.htm (last visited Sept. 24, 2003) (copy on file with the author). The Public Prosecution Department has sole discretion over which criminal cases go to court. See *id.*

236. See van Vliet, *supra* note 221, at 731.

237. See *Fact Sheet Drug Policy*, *supra* note 231.

thirty grams of marijuana is not even investigated, much less prosecuted.²³⁸ This unique policy effectively maintains the Netherlands' compliance with the Single Convention, while at the same time permitting marijuana use.²³⁹

The "separation of the markets" concept would be completely ineffective if Dutch citizens were not able to grow or purchase marijuana legally, even if possession had been decriminalized. They would have been forced to purchase from the same dealers that sold marijuana before decriminalization, thus exposing themselves to hard drugs in the process. For this reason, the Guidelines exempt certain types of drug dealers, "coffee shop" owners, from criminal prosecution.²⁴⁰ The Guidelines state that such a dealer will be prosecuted only when he "publicly projects himself as a dealer or runs his business provokingly in other ways," namely through advertising.²⁴¹ But the retail marijuana trade became so established, especially in Amsterdam,²⁴² that coffee shops no longer needed to advertise at all.²⁴³ The AHJO-G criteria²⁴⁴ also govern the coffee shops,²⁴⁵ forbidding the shops from advertising, selling to children under eighteen years of age, selling more than five grams of soft drugs, and selling any amount of hard drugs.²⁴⁶

The market separation theory has been very effective.²⁴⁷ Asking for hard drugs in an Amsterdam coffee shop has been called as absurd as it is to ask "an average butcher's shop . . . for a zebra steak."²⁴⁸ However, in recent years, the number of coffee shops has declined significantly.²⁴⁹

238. See Berkman, *supra* note 233, at 179.

239. See van Vliet, *supra* note 221, at 724.

240. See *id.* at 724, 734.

241. *Id.* at 732. While the coffee shops are normally left alone, some have been deemed, to have violated the Guidelines through the use of signs depicting cannabis leaves or suggestive names like "Stoneage," "Outer Limits," "Grasshopper," and "Just-a-Puff." *Id.* at 735. Selling hard drugs within the coffee shop was also a way to quickly invite prosecution. See *id.* at 734.

242. See *Map of the Netherlands*, WorldAtlas.Com, at <http://www.worldatlas.com/webimage/countrys/europe/ciamaps/nl.htm> (last visited Oct. 27, 2003). Amsterdam, the capitol of the Netherlands, is located near the center of the country and is less than fifty miles from the North Sea. See *id.*

243. See van Vliet, *supra* note 221, at 734.

244. See *Fact Sheet: Cannabis Policy Update 2002*, Netherlands Institute of Mental Health and Addiction, at <http://trimbos.nl/default.asp?id=3827&back=1> (last visited Oct. 27, 2003). "AHJO-G" is a Dutch acronym, standing for (A) "no advertising," (H) "no sale of hard drugs," (J) "no admission to coffee shops for minors," (O) "no nuisance," and (G) "no sale of large quantities." *Id.*

245. See *id.*

246. See *Fact Sheet Drug Policy*, *supra* note 231.

247. See *id.*

248. [V]an Vliet, *supra* note 221, at 731.

249. See *Progress Report on the Drug Policy in the Netherlands*, Ministry of Health Welfare and Support 27, available at <http://www.minvws.nl/documents/gvm/Rapport/drugs-progress-eng.pdf> (last visited Oct. 10, 2003). Municipalities are permitted to regulate coffee shops and eighty-one percent had banned them outright by August of 2001. See J.F.O. McAllister, *Europe Goes to Pot*, TIME, Aug. 20, 2001, at 60. Also, municipal governments are permitted to prohibit coffee shops altogether; some "border towns" use that authority to combat drug trafficking. See *Fact Sheet: Cannabis Policy Update 2002*, *supra* note 243. The recent

C. Effectiveness of Dutch Decriminalization

Unlike the Americans or Canadians, the Dutch never viewed marijuana as a social evil that should be eradicated.²⁵⁰ While American and Canadian policy viewed marijuana, and drugs in general, as a character flaw that could be eliminated through deterrence and supply control, the Dutch have never subscribed to this philosophy.²⁵¹ Given that the goal of Dutch policy since 1976 has been to limit the harms caused by marijuana and prevent users from exposure to more dangerous drugs, its effectiveness cannot be analyzed by examining the volume of users, which is the traditional American or Canadian measuring sticks for successful policy.

With this in mind, it is certainly a curious phenomenon that the number of marijuana users in the Netherlands has stabilized since decriminalization in 1976, as opposed to the obvious prediction of a steady increase in use.²⁵² Despite greater availability of marijuana in the Netherlands, use has neither declined nor increased when compared with the United States.²⁵³

The real success of the Dutch marijuana policy lies in the separation of hard drug markets from soft drug markets.²⁵⁴ By integrating marijuana use into societal norms, the Netherlands has prevented the multitude of casual experimenters from thrusting themselves into criminal drug dealing circles.²⁵⁵

movements to reduce the number of coffee shops is due primarily to the nuisance created by large numbers of shops and an increased willingness to strictly enforce the AHJO-G criteria. *See id.*

250. *See* Leuw, *supra* note 1, at xiii.

251. *See id.*

252. *See Cannabis 2002 Report*, Ministry of Public Health of Belgium, at 16, available at http://trimbos.nl/Downloads/English_General/Cannabis2002_Report.pdf (last visited Oct. 27, 2003) [hereinafter *Belgian Report*]. This report is the result of a joint effort among Health Ministries of Belgium, France, Germany, the Netherlands, and Switzerland to scientifically analyze marijuana and the impact of drug legislation. *See id.* at 4. One study analyzed the prevalence of marijuana use among high school students, the most likely group to begin using the drug, and found that twenty-nine percent had used marijuana at least once in 1995, while twenty-eight percent had used at least once in 1999. *See id.* at 16. Over the same period in the United States, that statistic increased from thirty-four percent to forty-one percent. *See id.* In the Netherlands in 1995, fifteen percent had used in the previous month, compared with fourteen percent in 1999. *See id.* Identical use in the United States increased from sixteen percent to nineteen percent. *See id.* In the Netherlands in 1995, six percent of students used marijuana six or more times in the last month, and that number decreased to five percent in 1999. *See id.* Over the same period, U.S. figures increased from seven percent to nine percent. *See id.* *See also* Dirk J. Korf, *Trends and Patterns in Cannabis Use in the Netherlands*, Senate Special Committee on Illegal Drugs, at <http://parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/presentation-e/korf-e.htm>. (last visited Sept 25, 2003) (copy on file with the author). This report contained similar statistics from a similar study to the Canadian Senate Committee. *See id.*

253. *See* Korf, *supra* note 252.

254. *See* Strategy Report, *supra* note 7, at 438. *See also Cannabis Report*, *supra* note 5, at 490.

255. *See* van Vliet, *supra* note 221, at 728.

This led to a demand reduction for drugs that are universally recognized as harmful, specifically heroin.²⁵⁶ Thus, as marijuana becomes the exclusive drug of choice for young people, fewer are turning to heroin.²⁵⁷

IV. COMPARISON OF THE CANADIAN PROPOSAL TO CURRENT DUTCH POLICY

If the Canadian proposal and the Dutch policy illustrate anything, it is that different cultures and different times breed vastly different policies. The policies themselves have different goals and contain different legal mechanisms, but they are intended to operate in similar manners and have similar effects on their respective societies.

A. *Philosophy and Context*

The Canadian proposal sprung from very different roots and for very different reasons than its Dutch counterpart. The Canadian initiative began at the urging of government officials themselves.²⁵⁸ While a growing number of Canadians increasingly support the relaxation of marijuana laws, this group is not yet a majority.²⁵⁹ This lack of solidarity among the people may result in resistance if the policy is implemented. Conversely, the Dutch changed their policy in a time of and in response to social rebellion by its youth, which would certainly make the policy change more palatable to citizens.²⁶⁰ Also, drug abuse was not considered a major problem in the Netherlands, whereas Canada faces the same types of problems that exist in the United States.²⁶¹

The primary goal of the Dutch policy was to separate hard drug markets from soft drug markets, resulting in a reduction of the harms caused to the individual and society.²⁶² In essence, their policy was enacted to achieve that effect.

The Canadian policy initiative comes from a much different background. Unlike the Netherlands in 1976, Canada has a long tradition of marijuana prohibition, despite the policy's mysterious origin.²⁶³ Canada's proposal is also based on a different goal. As opposed to achieving desired effects like

256. See McAllister, *supra* note 249, at 60.

257. See *id.* The average age for a heroin addict in the Netherlands is forty, a number that has steadily risen since decriminalization. See *id.* The Netherlands has even established a retirement home for heroin addicts. See *id.*

258. See generally *Cannabis Report*, *supra* note 5.

259. See Beltrame, *supra* note 6, at 22. Current polls indicate that forty-seven percent of Canadians favor a change in marijuana policy. See *id.*

260. See *supra* Part III.A. This refers primarily to the Provo movement that created unrest in the 1960's. See de Kort, *supra* note 209, at 16.

261. See Leuw, *supra* note 1, at xviii.

262. See *supra* Part III.B.

263. See *Cannabis Report*, *supra* note 5, at 253.

separation of the markets, the Canadian proposal is designed to update the law to better reflect a modern scientific understanding of marijuana.²⁶⁴ It also indicates a fundamental change in how criminal law should be viewed, believing in protecting people from hurting each other, not from hurting themselves.²⁶⁵

B. Legal Mechanisms

The legal and political systems in Canada and the Netherlands are obviously different, and each is tailored for a specific kind of liberal drug policy. The Netherlands' desire to remain in compliance with the Single Convention led it to the policy of *de facto* decriminalization, while Canada's desire to encourage others to reconsider restrictive marijuana policies is better suited for a policy of legalization.²⁶⁶

The Dutch chose to keep marijuana technically illegal to remain in compliance with their international obligations.²⁶⁷ Their criminal justice system is structured in a way that would be in conflict with the common practice of the judicial system in Canada.²⁶⁸ The Executive can instruct prosecutors to not enforce certain provisions of the law, in this case, certain marijuana offenses²⁶⁹ through the official Guidelines, as opposed to informal practice.²⁷⁰

Aside from the fact that Canada wants to bring international attention to the marijuana issue and that provisions similar to the Dutch "Guidelines" do not exist in Canadian law, the system of *de facto* decriminalization would not reflect their core philosophy: that marijuana is simply not harmful enough to be prohibited by law, and criminal law should not attempt to protect man from himself.²⁷¹

C. Policies in Practice

The Dutch have successfully maintained their institution of decriminalization for over twenty-five years and have seen some positive impacts.²⁷² Still viewed as extremely liberal, the Dutch policy seems almost restrictive when

264. *See id.* at 365.

265. *See* Summary Report, *supra* note 130, at 12.

266. *See Cannabis Report*, *supra* note 5, at 276-77.

267. *See* van Vliet, *supra* note 221, at 724.

268. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 974 (1983). In Canada, prosecutors tend to dispose of cases through plea bargaining. *See id.*

269. *See* van Vliet, *supra* note 221, at 731.

270. *See id.*

271. *See* Summary Report, *supra* note 130, at 12.

272. *See supra* Part III.C.

viewed in light of the Canadian proposal; the Dutch policy is facially more stringent because marijuana technically is still illegal.²⁷³

The two major differences are that, unlike in the Netherlands, Canadians would be allowed to grow their own marijuana, whereas non-residents of the Netherlands can purchase marijuana in the coffee shops.²⁷⁴ Similar to the coffee shop system, Canadian consumers would primarily purchase their marijuana from licensed distributors, who must meet criteria similar to the restrictions, like the advertising prohibition imposed upon the coffee shops.²⁷⁵ Both countries disapprove of smoking in public areas where underage citizens might be exposed prematurely to marijuana.²⁷⁶

The exact shape the Canadian policy would take is unclear. The Netherlands' policy manifested itself through the network of coffee shops, but the Canadian proposal could just as easily take a different form. It is conceivable that legitimate businessmen would apply to be licensed distributors, but some may fear the public relations ramifications that may ensue. The Senate Committee has attempted to avoid the problem of drug dealers surfacing as licensed distributors by placing limits on potential distributors to those who have not been convicted of a prior offense.²⁷⁷

CONCLUSION

The Canadian Senate's recommendations are the synthesis of extensive scientific research, sociological data, and self-examination.²⁷⁸ After an examination of this evidence, it became clear to the Senate Committee that Canada was on the wrong legislative path and had been for seventy-five years. Their original marijuana policy was based on myth and rumor, and those who made the decision had no understanding of the dangers of marijuana.²⁷⁹ The current proposal is based on scientific evidence, empirical data that demonstrates a much fuller understanding of marijuana and its impact on human physiology, and society in general.²⁸⁰

273. See *supra* Part III.B.

274. See *Fact Sheet: Cannabis Policy Update 2002*, *supra* note 243. Selling to non-residents is not one of the AHJO-G criteria used to close down coffee shops. See *id.*

275. See *supra* Part II.C.1.

276. See Summary Report, *supra* note 130, at 53. In Canada, users must stay in their homes or go to licensed distribution centers. See *id.* Similarly, in the Netherlands users must travel to a coffee shop to use marijuana. See Benjamin Dolin, *National Drug Policy: The Netherlands*, Senate Special Committee On Illegal Drugs, at <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/ille-e/library-e/dolin1-e.htm> (last visited Oct. 27, 2003).

277. See Summary Report, *supra* note 130, at 52. It should be noted that those convicted of marijuana offenses under prior legislation would be granted amnesty and would be permitted to apply for distribution and production permits. See *id.*

278. See *Cannabis Report*, *supra* note 5, at 16-18.

279. See *id.* at 257.

280. See *generally Cannabis Report*, *supra* note 5.

Many questions remain. Will its proposal, in full or in part, be translated into actual legislation? This is difficult to determine, but conventional wisdom regarding republican democracy and highly controversial issues would suggest that a policy change this extreme will not happen soon.²⁸¹ The issue of strict enforcement of anti-drug laws serves to “boost politicians’ popularity by providing them with uncontroversial and gratuitous rallying themes and election platforms.”²⁸² The willingness to reexamine an institution as old as drug prohibition is an indicator of a change in thinking of top government officials in a modern industrialized nation. That alone is a significant step toward legalization.

The Senate Committee’s data indicates that marijuana is no more harmful than alcohol or tobacco and that it was banned because of a lack of understanding of its true nature. Nevertheless, the Senate Committee neglected to ask itself one important question: if scientists knew then what they know now about the harmful physical and social effects of alcohol and tobacco, would they have been prohibited as well? This question, too, has no definitive answer, but if alcohol and tobacco had been permanently banned due to their harmful effects, perhaps the Senate Committee’s report would include recommendations that they be legalized as well.

Data from the Netherlands seems to indicate that a liberal marijuana policy has little impact on use itself.²⁸³ Data from the United States certainly does not contradict this proposition.²⁸⁴ Despite spending millions to reduce supply and demand for marijuana, its use remains steady in the United States.²⁸⁵ This seems to indicate that, whether legal or illegal, a certain percentage of the population will use marijuana. While this may be true, it does not automatically follow that marijuana should be legalized or decriminalized. A certain percentage of people will similarly use cocaine or heroin, regardless of their illegality. The crucial policy decision, therefore, should be based on the degree of harm caused by marijuana. If, through scientific and sociological research, marijuana proves to be less harmful than other legal substances, like tobacco and alcohol, it would seem difficult to justify a prohibitionist policy. This justification seems even more difficult when viewed in light of Dutch data suggesting that the penumbra of harms caused by marijuana use can be minimized.²⁸⁶ If, however, a legislature objectively

281. *See id.* at 283-84. Previous reforms, suggested by the Le Dain Commission, similar to those recommended by the Committee were discussed but never passed. *See supra* text accompanying notes 80-84. The Institute of Medicine, at the request of the White House, drafted a report noting the benefits of marijuana in the treatment of disease, but no action has been taken on this recommendation. *See* Institute of Medicine, *supra* note 8, at 177.

282. Leuw, *supra* note 1, at xvi.

283. *See* Belgian Report, *supra* note 252, at 16.

284. *See id.*

285. *See id.*

286. *See* McAllister, *supra* note 249, at 728.

determines that marijuana use presents an unacceptable risk of harm to the individual and society, prohibition would certainly be appropriate.

The Senate Committee has determined that marijuana is not as harmful to the individual or society as other legal drugs, like alcohol and tobacco.²⁸⁷ Embracing this conclusion led to the Senate Committee's philosophical shift in perspective on criminal law, believing that "only offenses [sic] involving significant direct danger to others should be matters of criminal law."²⁸⁸ The Senate Committee has endorsed the idea that criminal law should protect man from harm caused by others, not himself. This proposition certainly has some merit. Whether a large industrialized nation like Canada is capable of implementing such a drastic policy change remains to be seen.

287. See *Cannabis Report*, *supra* note 5, at 365.

288. Summary Report, *supra* note 130, at 12.