

Recalibrating Suspicion in an Era of Hazy Legality

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After a century of employing varying levels of prohibition enforced by criminal law, the United States has entered an era where individual states are rethinking marijuana policy, and the majority of states have in some way decided to make cannabis legally available. In 1996, California formally legalized marijuana for medical purposes;¹ in 2012, Washington and Colorado became the first states to legalize recreational marijuana.² As of the date of this writing, eleven states and the District of Columbia have legalized marijuana possession for recreational purposes; thirty-three states have legalized marijuana possession for medical purposes.³ A number of other states have decriminalized marijuana, rendering its possession not quite legal, but treatable as a civil rather than a criminal

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1. See Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996); see also *California Proposition 215, the Medical Marijuana Initiative (1996)*, BALLOTEDIA (2010), [https://ballotpedia.org/California_Proposition_215_the_Medical_Marijuana_Initiative_\(1996\)](https://ballotpedia.org/California_Proposition_215_the_Medical_Marijuana_Initiative_(1996)) [<https://perma.cc/E9JA-7GY5>].

2. See Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN BUS. (Nov. 8, 2012), <https://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/> [<https://perma.cc/QAC8-VJ3Y>] (both states approved legalizing recreational marijuana by ballot initiative).

3. See *Marijuana Overview*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 17, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/7846-JJA2>]. While all states that have legalized recreational marijuana also have legalized marijuana for medical use, the governing regulatory schemes in states differ depending on whether or not the use is medical. For example, recreational marijuana use in all states is limited to persons over the age of twenty-one; a patient can get a prescription for medical marijuana, however, even if they are under the age of twenty-one. Compare WASH. REV. CODE § 66.44.270(2) (1998) (prohibiting possession by minor), with WASH. REV. CODE § 69.51A.220 (2015) (authorizing use of medical marijuana by people under eighteen).

infraction.⁴ In the majority of states, at least under state law, it is no longer a certainty that a person in possession of marijuana is committing a crime.⁵

This relatively recent shift in substantive criminal law has implications for constitutional criminal procedure. Law enforcement officers have long used the smell of marijuana, or other suspicion that a person is in possession of marijuana, as a reason to engage in a Fourth Amendment seizure of the individual or a search of their premises or possessions.⁶ The odor of marijuana connected to an automobile has been particularly useful for police, as the automobile exception to the Fourth Amendment permits a full search of a car without a warrant where the officer has developed probable cause.⁷ The lower standard of reasonable suspicion that governs temporary stops of individuals has also permitted the odor of marijuana to justify an initial encounter with an individual;⁸ a number of other doctrines, including consent searches, have meant that an alleged waft of marijuana odor might end with an arrest for a completely different offense.⁹

The question of what police should do when they allege an odor of cannabis in a state that has decriminalized or legalized the substance is one that has been asked not just by lawyers and judges, but by mainstream popular news sources.¹⁰ Unfortunately, the post-legalization era is not straightforward—it is not certain that in a state that has decriminalized or legalized marijuana, from a doctrinal perspective, there could never be reasonable suspicion or probable cause if an officer smells marijuana. The status of marijuana is itself complicated in many jurisdictions, and courts

4. See *Marijuana Overview*, *supra* note 3.

5. See, e.g., WASH. REV. CODE § 69.50.4013 (2017) (possession of a controlled substance criminal statute in Washington does not apply to persons over the age of twenty-one in possession of small amounts of cannabis).

6. There are countless reported cases where the smell of marijuana justifies a Fourth Amendment search, and as I detail in this Article, many of these opinions have issued in jurisdictions that have decriminalized cannabis or legalized its medical use. See, e.g., *United States v. White*, 732 Fed. App'x 597, 598 (9th Cir. 2018); *State v. Cheatham*, 375 P.3d 66, 68 (Ariz. 2016); *State v. Seckinger*, 920 N.W.2d 842, 851 (Neb. 2018).

7. See *California v. Carney*, 471 U.S. 386, 391 (1985) (holding that automobiles enjoy less of an expectation of privacy than homes or offices aside from the mobility of the vehicle); *Carroll v. United States*, 267 U.S. 132, 146–47 (1925); see also *California v. Acevedo*, 500 U.S. 565, 579–80 (1991) (holding that a warrantless vehicle search may include containers within the vehicle).

8. See, e.g., *United States v. Perdoma*, 621 F.3d 745, 749 (8th Cir. 2010) (holding that the smell of marijuana provided reasonable suspicion for initial encounter, justifying subsequent police steps).

9. For a thorough explanation and critique of the breadth of consent searches, see Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509 (2016).

10. See Michael Rubinkam, *In an Era of Legal Pot, Can Police Search Cars Based on Odor?*, AP NEWS (Sept. 13, 2019), <https://apnews.com/0ba2cf617a414174b566af68262ef937> [<https://perma.cc/E9V9-GHQ2>]. Leading drug law scholar Alex Kreit anticipated these trends in his academic literature. See generally Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741 (2016).

are not in unanimous agreement about how to address cannabis in this new era of legalization and decriminalization.¹¹ This symposium Article will offer a description of what has happened in the past few years, as well as ideas for how jurisdictions can use the changing legal status of cannabis to reshape criminal procedure more broadly. This Article will recommend that law enforcement no longer be permitted use the smell of marijuana as a reason to search someone or some place, as this is contrary to Fourth Amendment protections and to efforts to reform criminal justice. Part I of this Article will give an overview of the state of marijuana law across the country and its implications for criminal procedure. Part II will describe how courts are currently addressing this issue. Part III will recommend how both the courts and legislatures can enact reforms to clarify Fourth Amendment Rights in the new era of decriminalized cannabis.

I. THE NEW ERA OF HAZY LEGALITY

Marijuana use remains illegal under federal law,¹² creating federalism issues that other scholars have described in the marijuana context and that I have documented in the safe consumption site sphere.¹³ Even under state law, there are still restrictions on marijuana use that make possession illegal under some circumstances. For example, because recreational marijuana use in all states is limited to persons twenty-one and over, police might suspect illicit use where a minor is involved.¹⁴ Additionally—because states restrict locational use for marijuana—depending on the kind or level of odor, police might suspect that a person is using marijuana in a prohibited place.¹⁵ In states where medical marijuana has been legalized, presumably only a minority of individuals are authorized to enjoy its use or possession. In states where cannabis has been decriminalized, its status as a prohibited substance—at least according to some state courts which have addressed the issue—makes it complicated to determine what police are supposed to do.¹⁶ Marijuana

11. *See infra* Part II.

12. *See* Controlled Substances Act, 21 U.S.C. §§ 801–971 (2018).

13. For my take on the safe consumption site issue, see Deborah Ahrens, *Safe Consumption Sites and the Perverse Dynamics of Federalism in the Aftermath of the War on Drugs*, 124 DICKINSON L. REV. (forthcoming 2020).

14. *See* Claire Hansen, *Where is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS & WORLD REP. (July 29, 2019), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization> [<https://perma.cc/5MRD-AD44>].

15. *See, e.g.*, Angela Brown, *Where You Can and Can't Smoke Pot in Washington State*, TRIPSAVVY (Dec. 5, 2019), <https://www.tripsavvy.com/washington-marijuana-smoking-regulations-4134899> [<https://perma.cc/S349-DXCS>].

16. *See, e.g.*, Pacheco v. State, 214 A.3d 505, 508 (Md. 2019).

sales are also subject to extensive regulation in states that have legalized,¹⁷ meaning that the sale or transfer of marijuana might violate state law under a variety of circumstances, and depending on the amount of illicit trade that continues post-legalization, it is possible that many or most marijuana transfers could be unlawful.¹⁸

Still, even if the use or possession of marijuana may lead to suspicion under some circumstances, the explanatory power of marijuana for a seizure may be less robust than it was in an era where marijuana was not just illicit but a significant priority for law enforcement. Marijuana legalization—as, hopefully, the beginning of both a nationwide movement on marijuana and part of a shift towards a public health approach to addressing the harms of substance abuse disorders—offers us an opportunity to reconsider how we permit law enforcement to police individuals. I have argued elsewhere that marijuana legalization means that we should reconsider how to deal with past convictions for what is no longer illicit behavior. Legalization gives us a chance as a society to develop new ways to address behavior.¹⁹

Courts and legislatures are currently primed for the possibility of changing the legal landscape with respect to marijuana law. State courts—even in jurisdictions that have not fully legalized marijuana for recreational purposes—are now more skeptical that an alleged cannabis odor means criminal activity is afoot.²⁰ Justices on the Supreme Court have expressed concern about the doctrines the Court has developed that permit, among other things, police to use an alleged smell of marijuana to initiate encounters for unrelated reasons.²¹ Legislatures exploring legalization are cognizant of the impact legalization might have on law enforcement, and

17. See, e.g., *Cannabis Regulations*, CAL. CANNABIS PORTAL, <https://cannabis.ca.gov/cannabis-regulations/> [<https://perma.cc/D2U5-KQAE>] (linking to California's various regulations for legal cannabis industry); Jordan Wellington, *Lessons from State Implementation of Marijuana Legalization*, REG. REV. (Jan. 14, 2019), <https://www.theregreview.org/2019/01/14/wellington-lessons-state-marijuana-legalization/> [<https://perma.cc/E6SB-94CM>] (describing different kinds of regulations jurisdictions currently employ).

18. See, e.g., Claire Hansen, *Illegal Pot Still Plagues States Where Weed is Legal*, U.S. NEWS & WORLD REP. (July 23, 2019), <https://www.usnews.com/news/national-news/articles/2019-07-23/illegal-pot-still-plagues-states-where-weed-is-legal> [<https://perma.cc/9GV2-RD7L>] (estimating that 78% of sales in California and 90% of sales in Massachusetts were illegal post-legalization); Sean Williams, *California's Cannabis Black Market Is Insanely Larger than Its Legal Market*, MOTLEY FOOL (Sept. 14, 2019), <https://www.fool.com/investing/2019/09/14/californias-cannabis-black-market-is-insanely-larg.aspx> [<https://perma.cc/AH34-VLHC>] (arguing that legal marijuana sales in California reached about \$2.5 billion in 2018, as opposed to around \$8.7 billion for black market cannabis, perhaps in part because of state taxation).

19. Deborah Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY (forthcoming 2020).

20. See *infra* notes 29–65 and accompanying text.

21. See *infra* notes 79–81 and accompanying text.

are generating proposals to direct law enforcement on how to address marijuana going forward.²² As discussed above, the fact that recreational marijuana has been decriminalized or even fully legalized does not mean that all cannabis activity in a state becomes legal. This has raised several legal questions for courts to examine in jurisdictions which have decriminalized cannabis in some way.

II. MARIJUANA HAZE AS A PRETEXT: THREE STATE SUPREME COURT CASES DISCUSSING CANNABIS ODOR AND SEARCHES

In this era of decriminalization and legalization, courts are being forced to grapple with how to treat the smell of marijuana odor in the Fourth Amendment context. As discussed above, the fact that recreational marijuana has been decriminalized or even fully legalized does not mean that all cannabis activity in a state becomes legal. When police encounter marijuana smells, those smells might still be evidence of illegal activity.²³ Sometimes the concern is age: while some persons under the age of twenty-one would have access to marijuana legally via prescription, the majority of minors in possession of marijuana are almost certainly in possession illegally.²⁴ Alternatively, perhaps the concern is place, as all states restrict where marijuana may be consumed.²⁵ Maybe the marijuana is unlicensed: each state that permits the cultivation and sale of recreational marijuana also has a regulatory scheme that issues a limited number of licenses to cultivators and retailers and taxes the product heavily; to some extent, in all jurisdictions there continue to be marijuana sales outside of the regulatory scheme that in turn continue to violate criminal law.²⁶ Then again, maybe the concern is driving, as one of the

22. See *infra* notes 98–99 and accompanying text.

23. See Hansen, *supra* note 14. In recreational legalization jurisdictions, it remains unlawful for a person under the age of twenty-one to possess marijuana. If an officer smelled cannabis odor and believed the user to be under twenty-one, they would likely have probable cause. See *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (“Probable cause exists where the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” (internal quotation mark omitted)).

24. According to the Department of Health and Human Services, in 2016, 23% of high school seniors reported using marijuana within the past month. See Off. of Population Aff., *Marijuana Use in Adolescence*, U.S. DEP’T OF HEALTH AND HUM. SERV. (Apr. 8, 2019), <https://www.hhs.gov/ash/oah/adolescent-development/substance-use/marijuana/index.html#ftn2> [<https://perma.cc/D9PD-VW8G>]. While I have been unable to locate statistics on the percentage of teens who have medical marijuana prescriptions, it seems implausible that the figure is anywhere near 23%.

25. See Brown, *supra* note 15.

26. Such a market might persist because of the difficulty some communities may have in accessing the limited number of legalized retailers or because of the price premium created by the extent to which legal cannabis is taxed. Traditionally, illicit drug prices were high in part to reflect the

central arguments against legalizing cannabis has been that people will drive while under the influence of marijuana, which remains a criminal offense and is often addressed under legalization.²⁷ For all of these reasons, the new era of legalization does not necessarily automatically mean that marijuana is no longer of interest to police.

The doctrinal issue of how to handle the odor of marijuana in a legalization era is wrapped up in bigger issues about how we police our communities and what it means to move past a failed punitive criminal law-oriented approach to drug policy. In the years since states have begun to legalize marijuana, a number of state courts have readdressed the role of cannabis in establishing sufficient suspicion for a search or seizure. The following subsections summarize the facts and holdings of the most notable recent cases across jurisdictions, which have fully legalized recreational cannabis, have removed criminal penalties from low-level possession offenses, have legalized cannabis for medical purposes, or both.

A. *People v. Hill*²⁸

In January of 2020, the Illinois Supreme Court heard oral argument in *People v. Hill*, a case in which the underlying events took place in 2017, somewhere in the interval between the time when Illinois decriminalized possession of small amounts of marijuana and legalized medical marijuana,²⁹ and when Illinois fully legalized recreational marijuana in the state.³⁰ The underlying facts do not appear to be in dispute. In *Hill*, a law

risk vendors assumed in dealing; persons selling illegally took on the risk of police detection as well as the risk of tangling with persons who might rob or otherwise commit crimes against them. With the advent of cellphone-driven drug trade, particularly in marijuana markets, drug sales are less exposed. It is difficult to determine the extent to which a black market for cannabis continues in legalization jurisdictions, particularly as the continued existence of such markets often is reported by law enforcement officials who may have opposed legalization in the first place. *See, e.g., Arianna MacNeill, Increased Crime Around Pot Dispensaries Hasn't Materialized, but Black Market Still Thriving, Say Authorities*, BOSTON.COM (Nov. 20, 2019), <https://www.boston.com/news/local-news/2019/11/20/marijuana-legalization-law-enforcement-safety> [<https://perma.cc/J7AW-EBA5>] (one Massachusetts police chief estimates that 75% of Massachusetts adults who use marijuana obtain it illegally). The scale of the issue might affect the analysis of what role marijuana should continue to play in probable cause and reasonable suspicion under traditional doctrines.

27. *See Drugged Driving: Marijuana-Impaired Driving*, NAT'L CONF. STATE LEGISLATURES (Mar. 8, 2019), <https://www.ncsl.org/research/transportation/drugged-driving-overview.aspx> [<https://perma.cc/5ACA-SBEE>] (providing a map of state marijuana-impaired driving laws and descriptions of some of those laws).

28. *People v. Hill*, 123 N.E.3d 1236 (Ill. App. Ct. 2019).

29. Illinois legalized medical cannabis in 2013 with HB0001. *See Compassionate Use of Medical Cannabis Program Act*, 410 ILL. COMP. STAT. 130/ (2013).

30. *See Scott Neuman, Illinois Governor Signs Law Legalizing Recreational Use of Marijuana*, NPR (June 26, 2019), <https://www.npr.org/2019/06/26/736117895/illinois-governor-signs-law->

enforcement officer said that he observed a car suddenly reduce speed and saw that the passenger seat was reclined. The officer said that, in his experience, such behavior was consistent with people either trying to avoid rival gang members or police detection where the person knew he had an outstanding warrant.³¹ The officer followed the car and pulled up next to it to observe the passenger.³² According to the officer, the passenger looked like a person he knew to have an outstanding traffic warrant; the officer radioed for backup, trailed the car for about thirty blocks, activated his blue lights, and testified that the car took several blocks to stop once signaled, which he said in his experience was consistent with persons in a vehicle trying to conceal contraband.³³

According to videotape from the encounter, once the car pulled over and the officer approached it, the driver asked what he had done wrong, and the officer explained that he had mistaken the passenger for another person who was wanted for an offense.³⁴ The officer then told the driver and passenger that he could smell raw cannabis in the vehicle and could see a marijuana bud in the backseat of the car.³⁵ At that point, the officer searched the entire car and found a rock of crack cocaine under the driver's seat; Charles Hill, the driver of the vehicle, was charged with cocaine possession.³⁶

The trial court found that the stop of the vehicle was not supported by reasonable suspicion and, therefore, suppressed the evidence found during the search.³⁷ The court of appeals reversed, holding that the officer had an articulable suspicion that the passenger was a person wanted for an offense.³⁸ While the driver had not committed any infractions that would merit a seizure, the suspicion that the passenger was wanted was sufficient for the initial seizure of the car, and the reasonableness of that suspicion was supported by the driver's behavior after the officer activated his blue lights.³⁹

legalizing-recreational-use-of-marijuana [<https://perma.cc/AVH2-AUA4>] (recreational marijuana is legal in Illinois as of January 1, 2020).

31. *Hill*, 123 N.E.3d at 1239.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1240. The appellate opinion does not indicate that Hill was charged with any cannabis-related offense. *See id.* at 1239; *see also* Brief for Petitioner at 5, *People v. Hill*, 123 N.E.3d 1236 (Ill. Ct. App. 2019) (No. 124595). Hill's appellate attorney's brief indicates that only a residue of cannabis was recovered from the car. *Id.*

37. *Hill*, 123 N.E.3d at 1240.

38. *Id.* at 1248.

39. *Id.* at 1239–40.

Once it determined that the officer's initial seizure of Hill was constitutional, the court went on to reject Hill's argument that, even if the initial stop were to have been found lawful, the smell of cannabis cannot alone support probable cause to search a car in a jurisdiction that has decriminalized possession of small amounts of the substance.⁴⁰ The appellate court concluded that, while Hill could not be jailed for possession of a small amount of marijuana, decriminalization did not render such possession lawful.⁴¹ Because an officer who smells raw cannabis cannot tell how much cannabis he is smelling, and as some level of cannabis possession remained illegal under Illinois law, the appellate court believed that the vehicle search was supported by probable cause.⁴²

At oral argument, the state supreme court justices acknowledged both the fact that the case was, to some respect, time-bound by the state's more recent legalization of marijuana, and that, even so, the court's conclusion about the constitutionality of searching a car under these circumstances could have implications even in a post-legalization era.⁴³ Much of the oral argument concerned the status of cannabis where it was decriminalized and legalized for medical purposes but where it was not generally legal to possess for recreational purposes.⁴⁴

Neither the appellate court's opinion nor the supreme court's oral argument significantly grappled with the broader context of decriminalization and criminal justice reform. After all, the people of Illinois chose first to decouple marijuana from the strict punitive policies of our failed War on Drugs and then to recognize marijuana use as legitimate recreational activity—important realities that ought to affect expectations of privacy and the reasonableness of police practices. Here, however, those major legislative reforms are treated as technical legal changes that place some hurdles in the path of police officers pursuing familiar reasons and excuses for surveillance and restraint but do not fundamentally change their regime.

40. *Id.* at 1240.

41. *Id.* at 1247–48 (quoting *In re O.S.*, 112 N.E.3d 621, 633 (Ill. Ct. App. 2018), as noting that “decriminalization is not synonymous with legalization” and that possession of larger amounts of cannabis remained subject to criminal penalties).

42. *Id.*

43. See generally Oral Argument, *People v. Hill*, 123 N.E.3d 1236 (Ill. Ct. App. 2019) (No. 124595), http://www.illinoiscourts.gov/Media/On_Demand.asp [<https://perma.cc/EEJ3-EHYR>].

44. *Id.*; see also Brief for Petitioner, *supra* note 36, at 11 (arguing that while possession of contraband can support probable cause, an item is no longer contraband if its possession is legal for some purposes and subjected only to civil penalties for others).

*B. People v. McKnight*⁴⁵

The *McKnight* case, unlike *Hill*, took place in a post-recreational-legalization world. Like *Hill*, it involved a defendant who was charged with a non-cannabis offense where there was a possibility that cannabis was detected.⁴⁶ In this case, however, the smell was detected by a trained canine rather than a human nose—Kilo, the dog in question, was trained to detect a variety of substances, including still-illicit drugs and now-recreationally-legalized marijuana.⁴⁷ An officer on patrol in an unmarked car saw a truck parked the wrong way in a one-way alley; the officer followed the truck, which then parked for fifteen minutes in front of a house where officers had seized drugs two months earlier.⁴⁸ Once the driver failed to signal a turn, the officer pulled him over and said that he recognized the passenger as someone who had, at some point, used methamphetamine.⁴⁹ When Kilo alerted the officer to the vehicle, the officer ordered the driver, Kevin Keith McKnight, and his passenger out of the vehicle and conducted a search of the car; he found a pipe with methamphetamine residue in a storage compartment under the rear seat of the car.⁵⁰ This kind of fact pattern—involving an unmarked car, police interest allegedly triggered by a minor anomaly, surveillance, the use of a minor violation as pretext to engage, a police dog, and a pat-down—is the familiar substance of Fourth Amendment cases.

This time, however, the court's decision came out differently. While the trial court denied McKnight's motion to suppress evidence of the methamphetamine, the appellate court unanimously reversed his conviction, and the Colorado Supreme Court affirmed.⁵¹ While the court noted that cannabis remained contraband under many state law circumstances and all federal law circumstances,⁵² it held that Colorado's Fourth Amendment constitutional corollary rendered the dog sniff a search that needed to be supported by probable cause—which was not available when one of the substances the dog was trained to detect was a legal substance in which Colorado residents enjoyed a reasonable expectation of privacy.⁵³ In so doing, the court noted that it might “end up alone on a

45. *People v. McKnight*, 446 P.3d 397 (Colo. 2019).

46. *Id.* at 400–01.

47. *Id.* at 400.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 400–01.

52. *Id.* at 399.

53. *Id.* at 408 (“[A]n exploratory sniff of a car from a dog trained to alert to a substance that may be lawfully possessed violates a person's reasonable expectation of privacy in lawfully possessing that item.”); *id.* at 413 (surrounding circumstances here did not provide probable cause for canine sniff search).

jurisprudential island,” but that it was “an island on which Colorado voters have deposited us.”⁵⁴

The dissenters were unpersuaded, for reasons that I have already explained, as cannabis legalization does not necessarily lead inexorably to the conclusion that police can never search for it.⁵⁵ One justice underscored the fact that cannabis remains criminalized under federal law.⁵⁶ Another justice questioned whether a person could ever have a reasonable expectation of privacy where an odor is emanating from a car in public, even if the person enjoyed such an expectation in the item or activity that generated the scent.⁵⁷

C. Pacheco v. State⁵⁸

A few months ago, in yet another recent cannabis case, the Court of Appeals of Maryland opened its opinion with the Bob Dylan quote, “The times they are a-changin’.”⁵⁹ In *Pacheco v. State*, the court went on to conclude that those changes had a real but limited impact on state search and seizure law, holding that the odor of marijuana—in a jurisdiction where possession of the drug has been decriminalized—provides sufficient suspicion to order an individual out of his car, but not enough to search his person.⁶⁰ *Pacheco* involved another car investigated by police for strained reasons. Here, the car came to the attention of officers on foot patrol in Maryland because the person was sitting in a car in the parking lot of a laundromat, when, in the officer’s experience, “people take their laundry in and they stay in the [l]aundromat” to access the venue’s wi-fi and televisions.⁶¹ The officers said they smelled freshly-burnt marijuana from the direction of the car, saw that Pacheco was alone in the car, and saw a small marijuana cigarette on the car’s center console.⁶² At that point, the officers asked Pacheco to give them the joint, ordered him out of the car, searched him and the car, and found cocaine in his pocket and a marijuana stem in the car.⁶³ The officers gave him a civil citation for marijuana possession (admitting that they did not have probable cause to arrest him for the criminal offense of possession of a more substantial

54. *Id.* at 410.

55. *Id.* at 414–15 (Coats, J., dissenting); *id.* at 420 (Samour, J., dissenting).

56. *Id.* at 416 (Coats, J., dissenting) (“I do not believe the language of the marijuana initiative, even when considered in conjunction with other constitutional or statutory provisions, can be understood to recognize a reasonable expectation of privacy in committing federal crime . . .”).

57. *Id.* at 420 (Samour, J., dissenting).

58. *Pacheco v. State*, 214 A.3d 505 (Md. 2019).

59. *Id.* at 508.

60. *Id.* at 517.

61. *Id.* at 508.

62. *Id.* at 508–09.

63. *Id.* at 509.

quantity of cannabis) and arrested him for possession of cocaine with intent to distribute.⁶⁴

The trial court had denied Pacheco's motion to suppress the cocaine from evidence, holding that the officer had probable cause to arrest Pacheco and, therefore, to search his person.⁶⁵ The court of appeals concluded that the smell of marijuana provided probable cause to search Pacheco's vehicle, even though the Maryland legislature had decriminalized possession of small amounts of cannabis; in doing so, the court noted that Pacheco had not disputed that point.⁶⁶ The court concluded, however, that the officer did not have probable cause to arrest Pacheco and conduct a search of his person incident to arrest.⁶⁷ Because small amounts of marijuana had been decriminalized, the officers did not have probable cause to arrest Pacheco for anything at the time he was searched, and the cocaine, thus, should have been suppressed.⁶⁸ In other words, cannabis remained contraband that could justify a vehicle search, but it did not permit a reasonable officer to believe that a person had committed a criminal act.

While the opinion was measured and technical in many ways, it also referenced the changing times, not just through the Dylan lyric but also by mentioning that Maryland's legislative decriminalization of marijuana responded to concern about the disproportionate rates of arrest by race.⁶⁹ As this Article notes in the next section, states that have legalized cannabis have seen a drop in the number of black and Latinx persons who are searched by police, but that is because the overall number of searches declines—legalization seems to have, at least in some states, reduced the overall number of searches, but it has not so far reduced racial disparities.⁷⁰

III. OPPORTUNITIES FOR NEW DIRECTIONS

Decriminalization and legalization offer us an opportunity to reconsider how courts should use the odor of marijuana in evaluating the existence of reasonable suspicion or probable cause. Marijuana has long been a gateway smell used by police to permit them to take other action.⁷¹ Sometimes, doubtlessly, that has been because the offense police have been interested in investigating has been possession of marijuana, but,

64. *Id.*

65. *Id.*

66. *Id.* at 516.

67. *Id.* at 517.

68. *Id.* at 517–18.

69. *Id.* at 514.

70. *See infra* note 89 and accompanying text.

71. *See, e.g.*, Cynthia A. Sherwood et al., *Even Dogs Can't Smell the Difference*, 55 TENN. B.J. 12 (2019) (noting that, for some time, the smell of marijuana has justified broad searches of premises).

often, the smell of marijuana has been used to justify police activity where the offense police are interested in investigating is not marijuana-related.⁷² Because of this practice, courts need guidance for how to proceed in cases involving police who claim that they or their animals smell cannabis.

A. *The Courts Should Clarify Hazy Legality*

The three cases outlined in the previous section are the three major state supreme court cases in what could be termed as a marijuana reformation era. While one case has not yet concluded⁷³ and the other two diverge in ways that may reflect the differences in the legal status of marijuana in those states,⁷⁴ the cases have a great deal in common. Police focused on individuals who were behaving in ways that the police thought indicated that they were up to no good, but this conduct did not provide police with any objective basis to stop or seize the individuals. Police began observing or following the individuals, and—assuming we credit the factual findings of the various trial courts—at some point developed a salable reason to search or seize the individuals that bore no relationship to the reason the individuals ultimately were arrested. The United States Supreme Court has raised similar questions about how marijuana smell should be used by law enforcement officers. The lack of clarity at the federal level gives states an opportunity to lead reform.

1. Clarity in Supreme Court Jurisprudence

The Supreme Court has for some time now formally permitted officers to engage in pretextual Fourth Amendment searches and seizures.⁷⁵ At least some of the justices, however, have become more concerned with the Court's direction on pretextual Fourth Amendment events, as was made clear in *D.C. v. Wesby*.⁷⁶ In *Wesby*, a group of partygoers showed up at a semi-vacant house for a gathering that seemed to be of the do-it-yourself-bachelor-party variety; when police arrived to

72. See *supra* notes 28–69 and accompanying text for three such cases discussed in this Article.

73. See *People v. Hill*, 123 N.E.3d 1236 (Ill. Ct. App. 2019).

74. See *People v. McKnight*, 446 P.3d 397 (Colo. 2019); *Pacheco v. State*, 214 A.3d 505 (Md. 2019).

75. See *Whren v. United States*, 517 U.S. 806 (1996).

76. *Dist. of Columbia v. Wesby*, 138 S. Ct. 577 (2018). *Wesby* was a sleeper of a case—at least to date, there are no law review articles or case comments on Westlaw with “Wesby” in their titles—and to the extent that the case garnered mainstream news notices, it was primarily because of the colorful, absent party host in the case, Peaches. See, e.g., Ann E. Marimow, *This Notorious House Party Made It All the Way to the Supreme Court. It Was Hosted by a Mystery Woman Named ‘Peaches.’* WASH. POST (Oct. 4, 2017), https://www.washingtonpost.com/local/public-safety/peaches-was-a-mystery-in-a-supreme-court-case-but-here-is-who-she-was/2017/10/04/9d58808c-a93d-11e7-92d1-58c702d2d975_story.html [<https://perma.cc/T54F-EPXL>] (offering the background of the party host and describing how the “bubbly” woman would hire dancers for gatherings that she organized).

investigate a noise complaint, they found a number of partygoers, an absent host, and, among other things, allegedly, a smell of marijuana.⁷⁷ While no one was arrested for a marijuana-related offense (and as far as the case reflects, it seems police found no marijuana—as I argue later in this Article, that may or may not reflect that the officers invented the odor⁷⁸), police hauled twenty-one people into the police station with shifting justifications for arrest.⁷⁹ Sixteen of the arrestees brought a section 1983 Civil Rights Act suit alleging that police had violated their Fourth Amendment rights in arresting them and recovered at the trial court.⁸⁰ The Supreme Court held that police were protected by qualified immunity, and that in any event, police had committed no Fourth Amendment violation.⁸¹

The two concurrences, however, marked frustration with the Court's approach. Justice Sotomayor thought that the Court should have resolved the case on qualified immunity grounds rather than reaching the underlying Fourth Amendment question.⁸² Justice Ginsburg's concurrence, however, offered the more provocative point of departure. In the opening sentence of the concurrence, Justice Ginsburg announced that "[t]his case . . . leads me to question whether this Court, in assessing probable cause, should continue to ignore why police in fact acted."⁸³ This approach would be a departure from the path the Court has taken since *Whren*.⁸⁴ This is not the first time Justice Ginsburg has expressed discomfort with the *Whren* approach,⁸⁵ although it is the clearest.

In *Whren*, the Court considered an automobile stop that led to a drug arrest.⁸⁶ While there were several reasons to believe that the police stopped the vehicle for reasons other than to investigate a traffic infraction—under the police department's regulations, for example, vice squad members like the officers in this case were not supposed to initiate traffic stops—the Court determined in *Whren* that it would not interrogate an officer's

77. *Wesby*, 138 S. Ct. at 583.

78. See *infra* notes 94–95 and accompanying text.

79. Originally, officers arrested the partygoers for unlawful entry, a D.C. offense similar to trespassing; at the station, the lieutenant decided to charge them instead with disorderly conduct. Eventually, all charges were dropped. See *Wesby*, 138 S. Ct. at 584.

80. *Id.* at 584–85.

81. *Id.* at 590–93.

82. *Id.* at 593 (Sotomayor, J., concurring).

83. *Id.* (Ginsburg, J., concurring).

84. See generally *Whren v. United States*, 517 U.S. 806 (1996).

85. See Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 916 (2015) (noting that in *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam), Justice Ginsburg concurred in a decision where a moving violation was used as pretext for a drug investigation but voiced concern that *Whren* failed to limit police discretion and urged the court to be prepared to address future abuses).

86. *Whren*, 517 U.S. at 808–09.

motives for a Fourth Amendment seizure.⁸⁷ As long as the officer in fact, objectively, had reasonable suspicion or probable cause to take action, the Court announced, the seizure was constitutionally permissible.⁸⁸

Whren has been the subject of a great deal of scholarly criticism, much of it centered around the extent to which *Whren* provides cover for racial profiling, specifically, and racist law enforcement, generally.⁸⁹ While there are some possible equal protection claims people might raise if they believe that police and prosecutors are systematically engaging in racist law enforcement, those claims generally are difficult to win, or even to get discovery to support.⁹⁰ The extent to which drug laws have broadly been enforced largely along race and class lines is connected to, but also amplified by, the ability of police officers to use an objective level of suspicion. This objective level of suspicion, often for a minor offense, is used to mask actual motivations for engagement.⁹¹

My argument here is that the legalization of marijuana offers an opportunity for courts and legislatures to rethink pretextual police encounters and to stop permitting low-level offenses—particularly those that often involve a degree of police intrusion to uncover—to drive policing. Police stops and arrests based on suspicion of marijuana-related activity have been largely predicated on an allegedly objective suspicion of low-level marijuana-related activity—the smell of burning marijuana indicating that a small amount is being consumed for personal use; the alert of a drug dog to a personal item or vehicle indicating that marijuana

87. *Id.* at 813–14.

88. *Id.* at 819.

89. An exhaustive footnote listing all critical work would consume a decent portion of this Article. See, e.g., Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 727–28 (2000) (arguing that a state that offers broader protections than *Whren* via its state constitution better protects the rights of minorities); William M. Carter, Jr., *Whren's Flawed Assumptions Regarding Race, History, and Unconscious Bias*, 66 CASE W. RES. L. REV. 947, 950 (2016) (criticizing *Whren's* inattention to implicit associations between race and propensity towards criminality); Chin & Vernon, *supra* note 85, at 889 (arguing that *Whren* unnecessarily immunizes race-based law enforcement decisions); David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); James Robertson, *How Whren Protects Pretext*, 116 YALE L.J. POCKET PART 374 (2007) (federal judge noting the extent to which the unanimity in *Whren* entrenches its use for pretextual stops); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

90. While empirical studies of traffic stops suggest that race is a factor, equal protection claims are difficult for plaintiffs to win. See, e.g., Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 741–42 (2002).

91. See, e.g., Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1852 (2004); Jeff D. May et al., *Pretext Searches and Seizures: In Search of Solid Ground*, 30 ALASKA L. REV. 151, 154 (2013).

is being possessed or transported. Legalization, as this Article notes, does not mean that police could never suspect that a person in possession of marijuana is committing an illegal act—there are circumstances where police might have probable cause that illegal cannabis activity is afoot in a state that has legalized marijuana. Nevertheless, concern about the use of low-level drug suspicion to trigger intensive police surveillance, particularly in minority communities, played a part in motivating decriminalization and legalization of marijuana.⁹²

Whether or not the Supreme Court is willing to rethink or refine its *Whren* framework—which cases like *Carpenter v. United States*⁹³ suggest it may be—state legislatures should consider treating marijuana legalization as an opportunity to delineate what comprises reasonable suspicion or probable cause in a jurisdiction, and both legislatures and state courts should take this opportunity to reconsider the extent to which they follow *Whren* and permit pretextual policing.

B. Reform Fourth Amendment Law to Reflect the Lessons of Criminal Justice Reform

Courts should no longer use marijuana odor as part of a Fourth Amendment seizure analysis because the harm caused by these intrusive policies is what helped spur marijuana legalization in the first place. Marijuana legalization offers us a chance to reconsider the balance between criminal and regulatory law; to re-conceptualize the role of policing in communities, particularly where that role has been anchored in the War on Drugs; and to continue to shift to a public health model of addressing substance use, rather than a policing-and-prosecution model. As communities legalize marijuana and consider public health solutions for even the most serious substances linked to substance abuse disorders,⁹⁴ I have argued that other laws predicated on the criminalization of drugs also need to transform to reflect shifting social priorities;⁹⁵ marijuana legalization is a similar opportunity for us to address the role minor crimes have paid in major intrusions.

92. See, e.g., Janell Ross, *Legal Marijuana Made Big Promises on Racial Equity—and Fell Short*, NBC NEWS (Dec. 31, 2018), <https://www.nbcnews.com/news/nbcblk/legal-marijuana-made-big-promises-racial-equity-fell-short-n952376> [<https://perma.cc/R7KP-6Q3H>] (describing “sweeping claims” of racial justice in legalization campaigns).

93. *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (rethinking longstanding Fourth Amendment doctrine in light of modern conditions).

94. As I documented with respect to a perceived epidemic of methamphetamine use around 2005/2006, many communities shifted their focus from arrest and incarceration as possible solutions to this perceived epidemic by introducing regulatory and educational programs rather than authorizing new criminal offenses or punishments. See Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 843 (2010).

95. Ahrens, *supra* note 19.

The reasons why communities have supported marijuana legalization also suggest that eliminating the role of marijuana in Fourth Amendment seizure analysis is appropriate. One of the major reasons that advocates have supported legalization has been because of the idea that the government has “better things to do” than pursue pot smokers.⁹⁶ Advocates also have emphasized the extent to which legalization hopefully reduces racial discrimination.⁹⁷ Certainly the prospect of raising money through licensing and taxing cannabis entrepreneurs helped drive legalization campaigns as well.⁹⁸

When police allege that they smell marijuana, they may also use that as a reason to ask a person to consent to a search. If they say they smell cannabis but do not find it, that may be reason to wonder if they smelled it in the first place, or if, frequently, a smell is indeed present without being accompanied by seizable cannabis.⁹⁹ If police know that they can justify a search if they articulate that they smelled marijuana, they may say they smelled marijuana whether they did or did not, and our only means of evaluating their veracity may be observing how often—or how infrequently—a search uncovered cannabis.¹⁰⁰ The ability to use the smell

96. Illinois Governor J.B. Pritzker, for example, ran a successful gubernatorial campaign in part by arguing directly that law enforcement has better things to do than pursue people possessing marijuana. See John O’Connor, *Illinois Becomes 11th State to Allow Recreational Marijuana*, ASSOCIATED PRESS (June 25, 2019), <https://apnews.com/7b793d88f3c84417b83db0f770854960> [<https://perma.cc/P6YJ-GHDZ>]. Campaigns in other states and in the District of Columbia also have focused on the priority of redirecting policing and police resources. See Caitlyn Fitzpatrick, *New Slogans Revealed for Marijuana Legalization Campaign*, PATCH (Sept. 15, 2014), <https://patch.com/district-columbia/georgetown/new-slogans-revealed-marijuana-legalization-campaign-0> [<https://perma.cc/EZC8-6XZA>] (showing one of the campaign slogans for marijuana legalization in Washington, D.C. was “vote to refocus police priorities”).

97. See Fitzpatrick, *supra* note 96 (showing one of the slogans for marijuana legalization in D.C. was “legalization ends discrimination”); Ross, *supra* note 92 (noting that advocates for legalization in California, Maine, Nevada, and Michigan all highlighted racial injustice as a reason for legalization).

98. Advocates for legal recreational cannabis in Colorado, for example, campaigned in part based on the prospect of increased tax revenues for the state. See Matt Ferner, *Why Marijuana Should Be Legalized: ‘Regulate Marijuana Like Alcohol’ Campaign Discusses Why Pot Prohibition Has Been A Failure*, HUFFINGTON POST (Aug. 28, 2012), https://www.huffpost.com/entry/why-marijuana-should-be-legalized_n_1833751 [<https://perma.cc/6VSE-JBYA>] (interviewing organizers of Colorado marijuana legalization initiative).

99. See Brief for Petitioner, *supra* note 36 (officer said that he smelled cannabis but only found residue in the car).

100. See Samantha Melamed, *Philadelphia Police Are Searching More Cars for Marijuana—but Finding Less of It, Critics Say*, PHILA. INQUIRER (Oct. 31, 2019), <https://www.inquirer.com/news/philadelphia/philadelphia-police-racial-profiling-marijuana-vehicle-stops-20191031.html> [<https://perma.cc/JWR4-TCAL>] (noting that the smell of marijuana “has recently become one of the most common reasons police give for searching vehicles[,]” but that the Defender Association of Philadelphia has determined that police have found marijuana only a fraction of the time when they have used its odor to justify a search and that “a waft of weed provides convenient cover”). It is probably impossible to know what percentage of the time police are mistaken; what percentage of the time police smell an odor from earlier events in situations where the cannabis has been consumed; and what percentage of

to justify searches may also exacerbate racial disparities.¹⁰¹ In addition to the courts, state legislatures can also use the opportunity created by legalization to shape how courts and law enforcement use marijuana odor in future searches.

C. Legislatures Should Pass Laws to Reflect Changing Times

Most of this Article discusses the ways in which courts have addressed and could address cannabis in a legalization era. Legislatures, however, have the option of streamlining this process by simply eliminating law enforcement's ability to rely on the presence of marijuana or its odor to effectuate a stop or a search in the same legislation that legalizes marijuana. Rather than leaving it to courts to wrestle with the thorny issue of whether and to what extent the odor of marijuana should permit searches and seizures—and leaving it to trial judges to determine whether or not they believe officers when they claim they smelled marijuana—legislatures could clarify through law that cannabis odors cannot justify Fourth Amendment events under most circumstances.

Some states are considering doing just that. While New York has not yet legalized recreational marijuana, it has considered legislation that would limit the ability of officers to search based on marijuana odor.¹⁰² That bill would have prevented police from using the odor of marijuana, raw or burnt, to support a search, detention, seizure of property, or arrest.¹⁰³ I have argued elsewhere that states should, when they legalize marijuana, expunge all cannabis convictions, including those for trafficking.¹⁰⁴ Similarly, states should enact legislation at legalization that prohibits officers from using the smell of raw or burnt cannabis, or the suspicion of its possession, as justification for a search or seizure outside of narrowly and specifically described circumstances, particularly where a person is suspected of driving under the influence based on driving behavior. By implementing these proposals, states can lead the effort to reform how marijuana is used as evidence both by law enforcement officers and courts, and ensure a person's right to privacy is honored.

the time police are simply lying, but studies such as this one suggest that police are using the odor of marijuana to justify actions in at least some situations where there is no marijuana.

101. *Id.* (stating the Defender Association found that 84% of persons searched after an officer claims to smell marijuana are black; such searches uncovered marijuana only 12.6% of the time with black drivers as opposed to 20.3% with white drivers).

102. See Maki Becker, *Pot Legalization Bill May Prevent Police Searches of Cars Based on Smell*, BUFFALO NEWS (May 18, 2019), <http://buffalonews.com/2019/05/18/marijuana-legalization-bill-could-prevent-police-searches-of-cars-based-on-smell-of-pot> [https://perma.cc/2F4M-PTR7].

103. *Id.*

104. Ahrens, *supra* note 19.

CONCLUSION

The poll numbers that represent popular support for marijuana legalization,¹⁰⁵ as well the pace at which jurisdictions have legalized various uses for cannabis, suggest that several more states are likely to legalize in the next few years;¹⁰⁶ some presidential candidates and members of Congress have pledged to seek federal legalization as well.¹⁰⁷ This movement offers an opportunity to reframe the relationship between law enforcement and the people they police—either through adapting the analytic framework used by courts or by introducing legislation to constrain police activity. Even in jurisdictions where marijuana possession long has been considered a low-priority criminal offense, its detection has afforded police the ability to detain people and search people and property in the name of enforcement. It has also permitted police to testify about the activity they observe in order to justify the actions they have taken.

Descriptively, courts have begun to recognize that the odor of marijuana cannot provide cover for all police actions, even in jurisdictions that have decriminalized rather than legalized. Certainly, in jurisdictions where marijuana has been legalized, the odor of marijuana should not be usable to develop suspicion to support a Fourth Amendment event under most circumstances where it historically sufficed. It would be helpful, as this Article has argued,¹⁰⁸ if state legislatures would include in legislation legalizing marijuana provisions that specifically direct that police can only

105. See Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [<https://perma.cc/23VQ-QDJA>].

106. As of this writing, several states, including New York, Minnesota, and New Jersey, are possibly poised to legalize marijuana for recreational use. See Blake Dodge, *Marijuana Legalization 2020: These States Could Legalize Weed in the New Year*, NEWSWEEK (Dec. 27, 2019), <https://www.newsweek.com/marijuana-legalization-2020-these-states-could-legalize-weed-in-the-new-year-1479337> [<https://perma.cc/G78F-FEW8>].

107. As of this writing, still-participating presidential primary candidates Michael Bennet, Pete Buttigieg, Tulsi Gabbard, Amy Klobuchar, Deval Patrick, Bernie Sanders, Tom Steyer, Elizabeth Warren, and Andrew Yang all have positioned themselves as supportive of federal marijuana legalization. Paul Demko, *Legalizing Marijuana*, POLITICO (Feb. 19, 2020), <https://www.politico.com/2020-election/candidates-views-on-the-issues/marijuana-cannabis-legalization/legalizing-marijuana/> [<https://perma.cc/6LPW-VMV7>]. Senator Cory Booker introduced legislation to legalize marijuana federally in 2019. See Carmin Chappell, *Cory Booker Introduces Bill to Legalize Marijuana Nationwide, with Support from Fellow 2020 Candidates*, CNBC (Feb. 28, 2019), <https://www.cnbc.com/2019/02/28/cory-booker-introduces-bill-to-legalize-marijuana-nationwide.html> [<https://perma.cc/4GW3-9WBN>] (noting that the bill was co-sponsored by then-fellow-presidential candidates Kirsten Gillibrand, Kamala Harris, Bernie Sanders, and Elizabeth Warren). The House Judiciary Committee approved a measure to legalize marijuana at the end of 2019. See Berkeley Lovelace Jr., *House Committee Approves Landmark Bill Legalizing Marijuana at the Federal Level*, CNBC (Nov. 20, 2019), <https://www.cnbc.com/2019/11/20/house-committee-approves-bill-decriminalizing-marijuana-on-the-federal-level.html> [<https://perma.cc/76EW-UZG9>] (predicting that the full House would likely approve the bill but that the Senate might not consider it).

108. See *supra* notes 100–01 and accompanying text.

use the odor of marijuana in cases where a person really is being investigated for a marijuana offense. Cannabis legalization offers an opportunity to instruct police that they may not pretextually conduct searches or seizures based on marijuana odor. It also offers courts an opportunity to reconsider doctrines that historically have permitted police to engage in a variety of intrusive interactions. As we hopefully enter an era where we are transforming our approach to substance use and our broader approach to criminal justice, we have a chance to shape our legal system into one that is thoughtful, intentional, and productive around policing's role in drug policy.