

Is there a Rational Basis for NH's War on Marijuana Anymore?

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This paper examines the specific vulnerability of New Hampshire's War on Marijuana to scrutiny under the so-called rational basis review standard. Among other things, it examines the relationship between rational basis review and the concept of rationality. It argues that rational basis review, if applied in its traditional form to marijuana prohibition by criminal law in New Hampshire, would not, in fact, be a rationality test. Rather, it would be a test that defaults to judicial deference in the face of laws that are irrational and cause great harm to people. It supports this argument by demonstrating that New Hampshire's claim to care about the goal of citizen health and safety as its justification for marijuana prohibition is undermined by the ways in which New Hampshire has adopted policies in other domains that are at least as harmful to citizens as harms posed by marijuana. It also does so by relying upon substantial evidence that the means of achieving the goal of public health and safety through criminal prohibition are demonstrably ineffective.

I. Introduction

The year is 2036. The revolution so many now fear is in full swing, and former Congresswoman Alexandra Ocasio-Cortez (“AOC”) has been elected Governor of New York.¹ She campaigned on a public health, racial justice, and environmentalist platform.² A central pillar of that platform is her desire to combat the ravages of obesity, heart disease, and cancer.³ Secretly, she has also decided that centuries of attacks on racial minorities can no longer be redressed through efforts at accommodations with the diminishing white population in her state.⁴ She would like to turn the community against this group by focusing on what data indicate are the most annoying (at least) subset of them: Bros.⁵ She sees this strategy as both justified and helpful in consolidating her political position against their efforts to regain control.⁶ She knows,

¹ Cue John Williams’ theme for the Empire from the Star Wars saga.

² Charlotte Alter, ‘Change is Closer than We Think.’ *Inside Alexandria Ocasio-Cortez’s Unlikely Rise*, TIME (Mar. 21, 2019, 5:59 AM), <https://time.com/longform/alexandria-ocasio-cortez-profile/> [<https://perma.cc/TMC8-W5AU>].

³ CDC, <https://www.cdc.gov/heartdisease/facts.htm> [<https://perma.cc/VGT5-UP82>] (heart disease is the leading cause of death among all categories of adults in the United States); CDC, <https://www.cdc.gov/obesity/adult/causes.html> [<https://perma.cc/X747-P3LB>] (obesity is associated with the leading causes of death including diabetes, heart disease, stroke, and cancer); WORLD HEALTH ORGANIZATION, *Cancer*, https://www.who.int/health-topics/cancer#tab=tab_1 [<https://perma.cc/5UE5-QHK2>] (cancer is the second leading cause of death annually).

⁴ See Kate Masur, *Until Justice Be Done*, xiii (2021) (tracking the fight for racial justice in the United States during the first eight decades after independence); Scott Farris, *Freedom on Trial* xi–xii (2021) (tracking the fight for racial justice in the aftermath of the United States Civil War); Randal Kennedy, *Race, Crime, and the Law* 21 (1997) (“Racial bigotry has been and remains a significant pollutant within the administration of justice.”). The dangers American society poses to racial minorities range from obviously dangerous activity to the shockingly mundane. See Carol Anderson, *The Second: Race and Guns in a Fatally Unequal America* 6–7 (2021) (summarizing treatment of racial minorities vis-a-vis the regulation and use of guns in America); see also Angie Schmitt, *Right of Way: Race, Class and the Silent Epidemic of Pedestrian Deaths in America* 3 (2020) (elderly and racial minorities are at higher risk of traffic deaths).

⁵ Mike Carrier, *Making the Most of Toxic Masculinity Before it Dies Out*, THE NEW YORKER (July 21, 2021), <https://www.newyorker.com/humor/daily-shouts/making-the-most-of-toxic-masculinity-before-it-dies-out> [<https://perma.cc/KE6R-N4N2>] (describing observations about “Bro” culture); Gene Demby, *Jeah! We Mapped Out the 4 Basic Aspects of Being a Bro*, NPR (June 21, 2013), <https://www.npr.org/sections/codeswitch/2013/06/21/193881290/jeah-we-mapped-out-the-four-basic-aspects-of-being-a-bro> [<https://perma.cc/4XHC-QVNY>] (referring to a subculture of “fratty masculinity.”).

⁶ Cf. Michelle Alexander, *The New Jim Crow* 2–3 (2020 ed.) (describing the use of criminal law to reestablish political dominance over the descendants of freed slaves); see also Beccaria, *On Crimes and Punishments and Other Writings* 7 (Richard Belamy ed. 2003) (“If we open our history books we shall see that the laws, for all that they are or should be contracts among free men, have rarely been anything but the tools for the passions of a few men or the offspring of a fleeting and haphazard necessity.”).

from history, that criminalizing and incarcerating this group is one powerful strategy she could pursue as a means to powerful political ends.⁷

To these ends, she and her loyal aides/minions conduct clandestine market research. She discovers that a leading cause of death among the Bros (and many, many others) is heart disease.⁸ She also discovers that Bros love burgers, a food with ingredients that cause heart disease and cancer.⁹ She believes Bros eat them anyway, in great volume, especially when recreating. They do so on the weekends during niche cultural gatherings in which they light up and smoke out in their backyards while discussing the central points of cultural connection with each other. Even outside these events, Bros love to have their burgers with other harmful substances, including soft drinks, alcohol, potato chips, and other hallmarks of the Bros' cultural diet.¹⁰ All of these substances are also linked to that same killer of Bros: heart disease. She makes a decision. She is going to wage a War on Burgers.¹¹ She will do so by designating burgers for treatment equivalent to a Schedule 1 Controlled Substance.¹² She will criminalize

⁷ Cf. Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER'S MAGAZINE (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> [<https://perma.cc/XZH4-YKKR>] (“You want to know what this was really all about?” [John Ehrlichman, former Nixon advisor] asked with the bluntness of a man who, after public disgrace and a stretch in federal prison, had little left to protect. “The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”); Bruce Barcott, *Weed the People* 37 (2015) (“Nixon officials knew two things about college kids: most didn’t vote, and the ones who did voted against Nixon. The administration pressed to put marijuana in Schedule I, ‘at least until the completion of certain studies’[sic] that were then under way.”).

⁸ See Ed Rosenthal, *Marijuana Grower’s Handbook* (2010) (including a table indicating that “poor diet and physical inactivity” cause 365,000 deaths per year, while marijuana causes none) (citing www.drugwarfacts.org).

⁹ Alexandria Sifferlin, *Most Americans Think Burgers are Healthy*, TIME (May 23, 2016), <https://time.com/4345052/burgers-healthy-red-meat/> [<https://perma.cc/56LW-7YGF>].

¹⁰ See, e.g., Marion Nestle, *Soda Politics: Taking on Big Soda (And Winning)* 64–74 (2015) (research links soda with the consumption of other unhealthy foods and a host of serious health conditions).

¹¹ Cf. Stephen Silver, *Joe Biden’s War on Hamburgers? Sorry, that’s Just BS Fake News*, THE NATIONAL INTEREST (Apr. 26, 2021), <https://nationalinterest.org/blog/politics/joe-biden%E2%80%99s-war-hamburgers-sorry-thats-just-bs-fake-news-183699> [<https://perma.cc/64DF-CJ8L>].

¹² David Remnick, *Alexandria Ocasio-Cortez is Coming for Your Hamburgers*, THE NEW YORKER (Mar. 3, 2019),

and prohibit the possession and selling of burgers in any form in New York. She will deploy multiple law enforcement agencies to arrest and incarcerate Bros for this illegal conduct.

Everyone knows where Bros and burgers are most concentrated and so she will fund her new police force in those areas to engage in crackdowns.¹³ She will rely upon prosecutors to leverage lengthy minimum prison sentences to ensure guilty pleas and prison, even for Bros innocent of violating her new laws.¹⁴

Her revolution has succeeded and her legislature, comprised of many non-Bros who like and have had burgers, but dislike Bros, is compliant. They know that they and their staffers will still be able to eat burgers, as long as they don't upset AOC and cause her to seek retaliation. The likelihood that they will be busted for black market burgers is almost zero. Plus, they can always travel to New England, where burgers are still legal. They pass the law with a record that focuses on the health risks of burgers to all of us. In walk the ACLU and many burger businesses, bringing a lawsuit that challenges the policy. AOC has appointed many judges to the New York bench and has also controlled the federal appointments in New York. Doom and gloom surround those legal strategists with a shallow perspective on the independence of judges.

The bookish ones who may have clerked for some of these judges cannot find better precedent for assessing the policy outside of drug prohibition. One decision is from a federal

<https://www.newyorker.com/news/daily-comment/alexandria-ocasio-cortez-is-coming-for-your-hamburgers> [<https://perma.cc/X2CY-YJCF>]; see also Michael Pollan, *This is Your Mind on Plants* (2021) (“But shouldn’t we be able to distinguish foods from drugs? Faced with the very dilemma, the Food and Drug Administration punted, offering a circular definition of drugs as ‘articles other than food’ that are recognized in the pharmacopoeia—that is, drugs by the FDA. Not much help there.”).

¹³ Cf. Sarah Brady Siff, *A History of Early Drug Sentences in California: Racism, Rightism, Repeat*, 24 Fed. Sent’g Rep. 80, 85 (2021) (“A deeply authoritarian and unconstitutional form of drug control was unleashed on Black and Latino neighborhoods in Los Angeles during the 1950s.”).

¹⁴ Cf. Jed S. Rakoff, *Why the Innocent Plead Guilty and Go Free and Other Paradoxes of Our Broken Legal System* 20 (2021) (describing how the so-called Rockefeller Laws in New York prohibited the sale of various Schedule I substances and imposed lengthy minimum prison sentences for those who violated state law).

district court in California applying federal constitutional law.¹⁵ The other is from New Hampshire applying state constitutional law.¹⁶ Each involved a challenge to the state and federal controlled substance of marijuana, another fun-loving, illegal substance enjoyed by millions of Americans. Each also applied the so-called “rational basis review test” and found that marijuana prohibition passed constitutional muster.¹⁷ Under one variant of this test, a law will survive a constitutional challenge if it is “rationally related to any legitimate government purpose.”¹⁸ Some have said that it “frequently amounts to no review at all.”¹⁹ In many cases, courts will uphold a law under rational basis review unless the challenger can negate “every conceivable basis which might support it.”²⁰ In other circumstances, the rational basis test morphs into a standard that has carried more bite, as exhibited in cases where courts have struck down policies that intentionally discriminate against the LGBTQ+ community.²¹ In our scenario, New Hampshire will have followed the federal district court in California. It will have done so, despite the presentation of the utter inefficacy of the prohibition of marijuana under state and federal law, as presented through a complaint laced with decades and decades of uncontested data about the failures of prohibition.²²

¹⁵ *See infra*.

¹⁶ This is, of course, a case that has not yet been brought or decided and is imagined.

¹⁷ Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 *GEO. J. L. & PUB. POL’Y* 401 (2016) (explaining that the “rational basis test is the minimum level of [judicial] review.”).

¹⁸ *See id.* at 401, 402 (2016) (italics omitted, footnote omitted).

¹⁹ Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 *WASH. L. REV.* 281, 288 (2011).

²⁰ *FCC v. Beach Commc’ns*, 508 U.S. 301, 314–15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

²¹ *See* Brenda Berry, *Rational Basis Loses Its Bite: Justice Kennedy’s Retirement Removes the Most Lethal Quill from LGBT Advocate’s Equal Protection Quiver*, 69 *SYR. L. R.* 69, 70 (2019) (tracking how anti-LGBT policies have fallen under a more exacting variant of rational basis review).

²² *See infra*. The general ineffectiveness of prohibition is highly documented. *See, e.g.*, Mark Thornton, *The Economics of Prohibition* 3 (2014) (“Recent studies of decrees against cocaine, heroin, and marijuana suggest that these prohibitions impose heavy costs and are extremely difficult to enforce. Beyond such costs, I argue that effective prohibition is impossible to achieve, because the unintended consequences of prohibition itself preclude any benefits.”).

That data will have demonstrated that marijuana prohibition was not, and is not, grounded in any defensible science, has failed to meet any of its stated ends, raised serious, provable claims regarding racism, bigotry, and political opportunism at its inception and in enforcement, and has had devastating consequences to people of all walks of life.²³ No matter, New Hampshire's court will have proclaimed; the prohibition still can be cloaked with the concept of "reason" by virtue of a ruling that purports to ground the determination in "reason," through the application of rational basis review.²⁴

This essay challenges the notion that such an outcome could be justified. If the traditional test is applied, something other than "reason" will be behind the application of the rational basis test. The New Hampshire War on Marijuana provides a particularly good platform for examining the notion of "rationality" as it relates to the "rational basis review" formulation adopted by courts. New Hampshire advertises itself as a freedom-loving state. Its motto, "Live Free or Die," is embraced as law in its state constitution. It doubles and triples down on libertarian-oriented protections against government intrusion upon property and privacy.²⁵

And yet, while neighboring states like Massachusetts, Maine, and Vermont have ended prohibition, New Hampshire remains the lone northern New England state to remain staunchly prohibitionist with regard to marijuana. This outlier position remains true, notwithstanding the

²³ See *infra*.

²⁴ Cf. John Gardner and Timothy Macklem, *Reasons*, in *The Oxford Handbook of Jurisprudence & Philosophy of Law* (2002 Scott Shapiro and Jules Coleman, eds.) (discussing the nature and role of reasons and rationality in legal thought and otherwise) (hereinafter "Gardner and Macklem"); see also Hugo Mercier and Dan Sperber, *The Enigma of Reason* 7 (2017) (describing reasons and reasoning as intimately connected concepts related to our desire to communicate within a social structure that demands interactivity and cooperation); Derek Parfit, *Reasons and Persons* 4 (1984) ("According to all theories about rationality, we ought to try to act rationally."). But see Justin E.H. Smith, *Irrationality: A History of the Dark Side of Reason* 6 (2019) ("Any triumph of reason, we might be expected to understand these days, is temporary and reversible.").

²⁵ See, e.g. N.H. Const. Part I, Arts. 2 (regarding the right to liberty and happiness); 2-a (right to bear arms); 2-b (right to privacy from government intrusion); 4 (rights of conscience); 12 (right to property); 12-a (right against takings without a public purpose); 13 (right not to bear arms); 19 (against unreasonable seizures); 22 right to free speech and press).

fact that New Hampshire has turned the state sale of a competing intoxicant, liquor, into a state-sponsored revenue monger resulting in consumption levels that double the national average.²⁶

This is all while New Hampshire embraces other vices, including its long-standing reliance on the most regressive form of gambling, the lottery, to fund public education.²⁷ Meanwhile, thousands upon thousands of people in New Hampshire consume all sorts of substances that are far more harmful, and engage in all sorts of dangerous behavior, from driving in cars without seatbelts,²⁸ to riding motorcycles without helmets,²⁹ to permitting the sale of fireworks,³⁰ all as a recognized part of the liberty the state embraces. These self-harming activities, of course, include our consumption of mountains of burgers, as New Hampshire citizens remain free to kill themselves eating terrible foods that unquestionably harm them and our children in ways that marijuana never could. It also includes our decision to congregate in restaurants for that purpose, as we effectuate our new protected right to expose ourselves, maskless and without vaccines, to the Delta and Omicron variants of COVID-19.³¹

²⁶ See Sarah P. Haughwout & Megan E. Slater, *Surveillance Report, Apparent Per Capital Alcohol Consumption: National, State and Regional Trends, 1977–2016*, National Institute on Alcohol Abuse and Alcoholism, U.S. Dept of Health and Human Services at 40 (Apr. 2018) (New Hampshire has the highest rate of alcohol consumption in the nation and doubles the national average), <https://pubs.niaaa.nih.gov/publications/surveillance110/CONS16.pdf>

²⁷ See *New Hampshire Lottery Commission Racing and Charitable Gaming*, [Transparentnh.nh.gov](https://www.nh.gov/transparentnh/glossary/lottery-and-charitable.htm), <https://www.nh.gov/transparentnh/glossary/lottery-and-charitable.htm> [<https://perma.cc/G7YX-2SNL>] (“Established originally in 1964 as the first legal state-run lottery in the United States, the New Hampshire Lottery Commission operates to benefit New Hampshire education... We take pride in setting the example of dedicating our profits, almost \$2 billion to date, for public education. When you play the lottery, everyone wins.”)

²⁸ *You Asked, We Answered: Why Doesn't Everyone Wear Seat Belts in N.H.*, NHPR (Nov. 13, 2017) (law requiring seatbelts for adults has never been passed, though seatbelts drastically reduce traffic fatalities) <https://www.nhpr.org/nh-news/2017-11-13/you-asked-we-answered-why-doesnt-everyone-wear-seat-belts-in-n-h>, [<https://perma.cc/PVW5-FSRV>].

²⁹ *Motorcycle Helmet Law*, Citizens Count, <https://www.citizenscount.org/issues/motorcycle-helmet-law> [<https://perma.cc/Z9QM-M7BJ>].

³⁰ New Hampshire Division of Safety, *Permissible Firework Safety Brochure*, available at <https://www.nh.gov/safety/divisions/firesafety/special-operations/fireworks/documents/PermissibleFireworksSafetyBrochure.pdf> (“Annually, the United States Consumer Product Safety Commission reports that there are approximately 11,900 firework related injuries treated each year in U.S. hospital emergency departments.”).

³¹ See *Sununu Signs 'Medical Freedom' Immunization Bill*, ASSOCIATED PRESS (July 25, 2021), <https://apnews.com/article/business-health-coronavirus-pandemic-bills-immunizations-8bd5cccf3558d761bb59643ee2c6761> [<https://perma.cc/U65W-C22S>].

The New Hampshire Supreme Court has even added a new example to the list of protected self-harming activities in which we may now engage in the state. It ruled, in *State v. Mack*,³² that a religious adherent who used a drug of much greater consciousness-altering potency, psilocybin, as part of his practice, could not be prosecuted under New Hampshire law. This ruling raises at least one question: How can any court draw a line between the use of controlled substances that are protected as a matter of religious practice, versus the use of controlled substances for other, consciousness-altering users?³³ Does the recognition of protected use within one sphere of religious practice add to claims regarding irrationality with respect to marijuana?³⁴

Mack illustrates how the subjective, experiential demands of the entire range of drug users, from those who use serious consciousness-altering substances, to those who smoke marijuana and partake in its less substantial mind-altering qualities, add an important factor to the debate about the rationality of marijuana prohibition.³⁵ A law that limits the range of experiences for humans, as a matter of their state of mind or consciousness, constitutes a powerful intrusion upon an area of personal liberty hitherto minimized in the debate about

³² 249 A.3d. 423 (N.H. 2020).

³³ See Aldous Huxley, *The Doors of Perception* (2009 ed.) (“The urge to transcend self-conscious self-hood is, as I have said, a principal appetite of the soul.”); see also *Aliera v. N.H. Dep’t of Ins.*, No. 217-2020-cv-162, slip op. at 8–9 (N.H. Super. Ct., July 16, 2020), https://npr-brightspot.s3.amazonaws.com/legacy/sites/nhpr/files/202007/2020-07-10_order_re_motion_to_dismiss.pdf (ruling that the state could not hold forth on religious orthodoxy under state constitutional law).

³⁴ Cf. Pollan, *supra* note 12 at 3 (“The government recognizes the First Amendment right of Native Americans to ingest peyote as part of the free exercise of their religion, but under no circumstances do the rest of us enjoy that right, even if we use peyote in a similar way. So here is a case where it is the identity of the user rather than the drug that changes its legal status.”). We are not the first to raise concerns regarding the protection of some customs for special religious protection on the grounds of arbitrariness. See Eric Berkowitz, *Dangerous Ideas: A Brief History of Censorship in the West from the Ancients to Fake News* 21 (2021) (In ancient Greece, Diogenes the Cynic lived in a barrel, masturbated in public, and had the temerity to tell Alexander the Great to stop blocking his sunlight—all, he said, to expose (among other things) the arbitrariness of Greek customs).

³⁵ See Mitch Earleywine, *Understand Marijuana: A New Look at the Scientific Evidence* 3 (2002) (“many people worldwide inhale marijuana smoke in an effort to alter consciousness.”).

marijuana as it has taken place in courts.³⁶ This observation is relevant with respect to marijuana, where trailblazing artists and thinkers have established a mountain of evidence that marijuana (and other controlled substances) has played a powerful role in their experience of the world and their ability to express their experience in art and thought.³⁷ When viewed from this perspective, marijuana prohibition appears more like a thought-control policy of the sort represented in 1984 than a defensible public health and safety initiative.³⁸

And so in New Hampshire, with its otherwise freedom-loving, risk-endorsing, environment, with the “rational basis” moniker in mind, we ask, what “reason” or “reasons” explain, so as to justify, at this point in history, the special status of marijuana as a substance of self-harm in light of all of the other ways we permit self-harm?³⁹ To answer this question, we note that in other contexts, where courts have invoked a test akin to Socratic refutation,⁴⁰ courts

³⁶ See Steve DeAngelo, *The Cannabis Manifesto* 4 (2015) (“Today, I credit cannabis with catalyzing my first genuine spiritual experience.”); Huxley, *supra* note 33 at 14 (“[I]t had always seemed to me possible that, through . . . taking the appropriate drug, I might so change my ordinary mode of consciousness as to be able to know, from the inside, what the visionary, the medium, even the mystic were talking about.”).

³⁷ See Marcus Boon, *Walter Benjamin and Drug Literature* in Walter Benjamin, *On Hashish* 1–2 (2006) (“While Louis Armstrong and his sidekick Mezz Mezzrow were making pot-smoking fashionable in New York City, and Commissioner of Narcotics Harry Anslinger was beginning his congressional campaign against the evils of smoking weed, Benjamin, ever the connoisseur of the ‘recently outmoded,’ lay in a hotel bed in Marseille eating hashish in the style of the great *literatuers* of the nineteenth century.”); Barcott, *supra* note 7 at 35–36 (“The creativity, exploration and introspection fostered by cannabis and other hallucinogens sparked [The Beatles’] evolution from peppy hand-holding tunes to experimental, boundary-pushing art.”); Richard J. Bonnie and Charles H. Whitebread II, *The Marijuana Conviction: A History of Marijuana Prohibition in the United States* 2 (1999 ed.) (describing use of marijuana by Victor Hugo, Baudelaire, and Balzac, “[w]ho shared their experiences in writing”).

³⁸ Cf. Huxley, *supra* note 33 at 78 (“To be enlightened is to be aware, always, of total reality in its immanent otherness....”); see also Barcott, *supra* note 7 at 36 (“From 1965 to 1969 cannabis evolved from its earlier role as a mild intoxicant and artistic stimulant into something far more profound: a catalyst for cultural and political change.”); and Pollan, *supra* note 12 at 2 (“As an example, coffee and tea, which have amply demonstrated their value to capitalism in many ways, not least by making us more efficient workers, are in no danger of prohibition, while psychedelics—which are no more toxic than caffeine and considerable less addictive—have been regarded, at least in the West since the mid-1960s, as a threat to social norms and institutions.”).

³⁹ See, e.g. Stephen Pinker, *Rationality: What it is; Why it Seems Scarce; Why it Matters* 37 (2021) (“A rational agent must have a *goal*, whether it is to ascertain the truth of a noteworthy idea, called theoretical reason, or to bring about a noteworthy outcome in the world, called practical reason...”).

⁴⁰ See C.D.C. Reeve, *Philosopher-Kings: The Argument of Plato’s Republic* 4 (2006) (describing Socratic refutation).

have invalidated policies where that process revealed only irrational distinctions behind as the explanation for policies that subject otherwise good people to serious state-inflicted injury.⁴¹

Challenges to the War on Marijuana in New Hampshire would suffer a similar fate. In this context, data developed by the ACLU illustrate that New Hampshire relies upon its marijuana laws to arrest racial minorities at rates that stand akin to those present with the seat of the defeated Confederacy.⁴² Rationality challenges, thus far, have not confronted this data, but instead have focused on a narrow balancing metric: whether marijuana has any medically beneficial use. So far, such challenges have answered the question in the negative.⁴³ Such an approach subverts a principal benefit courts can offer through the special procedures of litigation: a targeted assessment of truth through specialized procedures meant to eradicate prejudice and promote rationality-based fact-finding. Thus, the most deferential form of the rationality test would fail to fully integrate and account for findings that marijuana prohibition, like other forms of prohibition, is hopelessly and perpetually ineffective at achieving any of its dubious aims, despite the millions and millions of dollars prohibition costs the state through budgetary outlays and through growing opportunity costs.⁴⁴

⁴¹ See David Boies and Theodore B. Olson, *Redeeming the Dream: The Case for Marriage Equality* 284 (2014) (refusing each and every proffered reason for drawing a distinction between same-sex marriage and civil unions); see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (“Even under the most deferential standard of review, however, the Court must insist on knowing the relation between the classification adopted and the object attained.”) (citation and internal quotation omitted); *id.* (“Yet, to survive rational basis review, a law must do more than disadvantage or harm a particular group,” and ruling that anti-same-sex marriage law fails rational basis review).

⁴² See ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>.

⁴³ Major figures in the medical field have had to apologize for spreading misinformation about marijuana. Barcott, *supra* note 7 at 17 (“‘I am here to apologize,’ he wrote on CNN’s website. ‘I mistakenly believed the Drug Enforcement Agency listed marijuana as a schedule 1 substance because of sound scientific proof.’ In fact, Gupta wrote, the DEA had no such proof.”).

⁴⁴ See *id.* at 64 (“The problems raised by alcohol cannot, it goes without saying, be solved by prohibition. The universal and ever-present urge to self-transcendence is not to be abolished by slamming the currently popular Doors in the Wall. The only reasonable policy is to open other, better doors in the hope of inducing men and women to exchange their old bad habits for new and less harmful ones.”).

Indeed, evidence of decades of enforcement demonstrates that the aims that remain achievable through the current enforcement regime are of the sort that the law, and particularly the laws of New Hampshire, proscribe: the aim of exacting retributive harm against offenders, particularly in cases involving “victimless crime.”⁴⁵ If justice is a virtue, human degradation stands on thin ice as a proxy.⁴⁶ Following others who have asked questions about futile, self-harming wars, we ask: “Who will be the last person to have his or her life marred by a criminal conviction arising from New Hampshire’s dubious marijuana prohibition policy?” In some ways, we are also asking, “Who will be the first judge to take the minimally courageous step of imposing reason within the justice system in order to prevent unreason from marring the life of another, otherwise decent American citizen?” To wonder if any judge ever will is to say quite a lot about the decayed and decaying character of American judges and their commitment to justice.

In further describing the strange life of marijuana prohibition in New Hampshire, Part II outlines New Hampshire law, which draws heavily on federal policies. Part III places New Hampshire’s policy of marijuana prohibition in context with respect to those self-harming activities that remain legal. Part IV examines the degraded concept of reason embraced by standard versions of rational basis review. In the end, it maintains that something other than “reason” would need to be deployed in order for a court to analyze a marijuana charge in New

⁴⁵ N.H. Const., Part I, Art. 18 (“The true design of all punishments being to reform, not to exterminate, mankind.”).

⁴⁶ See The Republic of Plato 13 (Bloom trans. 2016 ed.) (“For it has become apparent to us that it is never just to harm anyone.”); see also John Gardner, *Introduction*, H.L.A. Hart, *Punishment and Responsibility* xvi (2008 ed.) (“Pursuing suffering-of-the-guilty as an intrinsic good is immoral because considered intrinsically . . . suffering is always and only an evil.”). The moniker, “war”, so frequently and recklessly used in relation to domestic policies, should raise alarms in this regard for more sensitive thinkers. See Bertrand Russell, *The Conquest of Happiness* 23 (2013 ed.) (“To discover a system for the avoidance of war is a vital need of our civilization; but no such system has a chance while men are so unhappy that mutual extermination seems to them less dreadful than continued endurance of the light of day.”).

Hampshire and determine that such a charge should stand when faced with a constitutional challenge.

II. An “Island of Prohibition”:⁴⁷ New Hampshire’s War on Marijuana

Readers, of course, will have the experience of traveling in jurisdictions like New Hampshire where “marijuana” is “illegal,” yet “CBD,” or cannabidiol, is available at gas stations or grocery stores, and even at standalone dispensaries.⁴⁸ These businesses remain open and not subject to mass shutdowns by law enforcement.⁴⁹ Is this “marijuana” or not, some may ask? And so we get to the first problem with marijuana prohibition, its definitional elusiveness.⁵⁰ Perhaps the best way to proceed is to say, generally speaking, that “marijuana” is a term used to describe a plant and its many potential products belonging to the species *Cannabis sativa* L.⁵¹ This plant produces chemical compounds, including delta-9-tetrahydrocannabinol (THC), that are ancient and widely used intoxicants when ingested by humans.⁵² The most well-known legal definition of marijuana is supplied by the federal Controlled Substances Act, of which more will be said later.⁵³ This law defines “marihuana” as:

[A]ll parts of the plant *Cannabis sativa* L., whether

⁴⁷ Dan Tuohy & Annie Ropeik, *New Hampshire House Votes for Marijuana Legalization*, NEW HAMPSHIRE PUBLIC RADIO (Jan. 9, 2018), <https://www.nhpr.org/nh-news/2018-01-09/new-hampshire-house-votes-for-marijuana-legalization#stream/0> [https://perma.cc/D5MV-ZAR3].

⁴⁸ WEED MAPS, *Is CBD Oil Legal in New Hampshire?* (June 28, 2021), <https://weedmaps.com/learn/cbd/is-cbd-oil-legal-in-new-hampshire> [https://perma.cc/QJB2-Q7QC].

⁴⁹ Kevin Landrigan, *CBD Regulation in NH Likely a Year Off*, THE UNION LEADER (Apr. 16, 2021), https://www.unionleader.com/news/politics/state/cbd-regulation-in-nh-likely-a-year-off/article_68359999-4a4e-53dd-b2db-6c3e9323c48d.html [https://perma.cc/75X2-LBVQ]; Jason Moon, *N.H. DHHS Confirms that Edible CBD is Not Approved for Sale in N.H.*, NEW HAMPSHIRE PUBLIC RADIO (June 5, 2019), <https://www.nhpr.org/health/2019-06-05/n-h-dhhs-confirms-edible-cbd-is-not-approved-for-sale-in-n-h> [https://perma.cc/9JDD-5CNF].

⁵⁰ See, e.g., Larry Alexander, Kimberly Kessler, with Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* 171 (2009) (challenging punishment based upon results-based theories of culpability alone).

⁵¹ See Lester Grinspoon, M.D. and James B. Bakalar, *Marihuana: The Forbidden Medicine* 1 (1993) (“The marihuana, cannabis or hemp plant is one of the oldest psychoactive plants know to humanity.”); *Id.* (its “fiber has been used for cloth and paper for centuries and was the most important source of rope until the development of synthetic fibers.”); see also Eileen Konieczny, RN with Lauren Wilson, *Healing with CBD* 8 (2018) (describing CBD as a therapeutic cannabis derivative that “won’t get you high like its cannabinoid cousin . . . (THC).”).

⁵² Robert A. Mikos, *Marijuana Law, Policy and Authority* 17 (2017)

⁵³ *Id.* at 23 (excerpting 21 U.S.C. § 802(16)).

growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. *Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.*⁵⁴

The extreme breadth of this definition became grist for debate within a New Hampshire-based litigation that ascended to the United States Court of Appeals for the First Circuit. In *New Hampshire Hemp Council, Inc. v. Marshall*,⁵⁵ a litigant argued that “marihuana,” as defined by the Controlled Substances Act, should not be interpreted to capture “industrial hemp” generated from cannabis stalks that contain very low THC concentrations.⁵⁶ The First Circuit, in a lucidly written decision by one of its most accomplished and admired judges, Hon. Michael Boudin, concluded that even “industrial hemp” is, nevertheless, captured by the broad prohibitions contained within the federal statutory definition, despite powerful arguments demonstrating that industrial hemp had received a carveout under prior federal law.⁵⁷

In terms of the project of this article and its focus on New Hampshire’s approach, the same First Circuit decision explained New Hampshire’s approach to controlled substance prohibition as follows:

Here, the existing New Hampshire drug statute is designed, in specifying which drugs are controlled, to mirror the federal listings. New Hampshire's law initially defined substances by cross-reference to the then-existing federal schedules of controlled drugs, *see* 1985 N.H. Laws § 293:8; *State v. Cartier*, 133 N.H. 217, 575 A.2d 347, 350 (N.H.1990), but provided that changes in the federal schedules are to be adopted automatically, unless a

⁵⁴ *Id.*

⁵⁵ 203 F.3d 1 (2000).

⁵⁶ *Id.* at 3.

⁵⁷ *See id.* at 7 (antecedents of the federal marijuana ban excepted industrial hemp from the definition of prohibited substances).

designated state official makes a contrary ruling after a hearing. *See* N.H.Rev.Stat. Ann. § 318–B:1–a(V) (1995).⁵⁸

In other words, New Hampshire adopted the federal definition of “marijuana,” in all of its vast expansiveness, even unthinkingly, given the automatic tracking of the definition to federal law. Industrial hemp thus remained illegal under state law if it was derived from *Cannabis sativa* L. This remained so until Congress intervened in so-called Farm Bills in 2014, legalizing “industrial hemp,” and in 2018, removing “hemp” from the definition of marijuana under the Controlled Substances Act and removing CBD from the definition as well.⁵⁹ Hence, the proliferation of CBD in New Hampshire, though confusion persists regarding the status of CBD for regulatory and commercial purposes.⁶⁰

With respect to the forms of cannabis still captured under the definition of marijuana, possession and use of marijuana here remains a felony, punishable by a significant prison sentence which increases in length for repeat offenders.⁶¹ These penalties have remained unchanged in recent decades, and New Hampshire continues to arrest and incarcerate people for marijuana offenses.⁶² In this project, New Hampshire deploys numerous state and federal agencies and spends millions of dollars each year subjecting marijuana crimes to the criminal

⁵⁸ *Id.* at 4.

⁵⁹ Harold H. Hilborn, *2018 Farm Bill Legalizes Hemp, But Obstacles to Sale of CBD Products Remain* (Mar. 5, 2019), <https://www.natlawreview.com/article/2018-farm-bill-legalizes-hemp-obstacles-to-sale-cbd-products-remain> [<https://perma.cc/4MDB-7SUV>].

⁶⁰ Danielle Dresdent & Eloise Theisin, *What is the Difference Between Hemp CBD and Cannabis CBD*, MEDICAL NEWS TODAY (JULY 23, 2020), <https://www.medicalnewstoday.com/articles/hemp-cbd-vs-cannabis-cbd#hemp> [<https://perma.cc/8RDD-S6PD>]; Robert Hoban, *CBD Has Never Been a Controlled Substance*, FORBES (June 24, 2020), <https://www.forbes.com/sites/roberthoban/2020/06/24/cbd-has-never-been-a-controlled-substance/?sh=1912359d4569> [<https://perma.cc/TB3B-QP3G>]; New Hampshire Board of Veterinary Medicine, *Current Laws and Policies Regarding on Cannabis products, including Marijuana, Hemp and CBD Oil*, <https://www.agriculture.nh.gov/publications-forms/documents/cannabis-laws-policies.pdf>.

⁶¹ *See infra*.

⁶² *See infra*.

justice system.⁶³

New Hampshire's continued embrace of criminal prohibition causes it to be an outlier, both nationally and within the region. Although it is one of thirty-six states that allows medical marijuana and one of twenty-seven that has decriminalized marijuana, New Hampshire is one of the thirty-two states where marijuana is still illegal for recreational use.⁶⁴ New Hampshire, with its liberty attachments, nevertheless remains more strictly prohibitionist, where one in three Americans live in a state where marijuana is legal.⁶⁵ New Hampshire also remains one of the two states in New England where marijuana is still illegal for recreational use.⁶⁶ The other, Rhode Island, is on the precipice of legalization.⁶⁷ New Hampshire's status is a curious one, given that it was the last state to pass comprehensive drug laws, even drawing criticism from

⁶³ Jeffery Miron, *The Budgetary Effects of Ending Drug Prohibition*, CATO INSTITUTE (July 23, 2018), <https://www.cato.org/tax-budget-bulletin/budgetary-effects-ending-drug-prohibition> [<https://perma.cc/Z7Q3-HS9Q>] (noting that in 2016 New Hampshire spent approximately \$ 65.2 million enforcing marijuana prohibition); see CITIZENS COUNT, *Marijuana Decriminalization*, (Apr. 12, 2014), <https://www.citizenscount.org/issues/marijuana-decriminalization> [<https://perma.cc/DE7E-ZM45>]; see also, e.g., *United States v. Apicelli*, 839 F.3d 75, 78 (1st Cir. 2016) (federal marijuana prosecution); *United States v. Fowle*, No. 14-CR-086-01-LM, 2020 WL 6582373, at *2 (D.N.H. Nov. 10, 2020) (District of New Hampshire case noting that a defendant was convicted of violating federal marijuana laws in 2015 and violated his supervised release by using marijuana); *State v. McCarthy*, No. 469-2017-CR-01888, 2018 WL 2106769, at *1 (N.H. Super. Ct. May 01, 2018) (state marijuana prosecution);

⁶⁴ Elizabeth Garber-Paul & Ryan Bort, *The United States of Weed*, ROLLING STONE (Apr. 22, 2021, 1:00 PM), <https://www.rollingstone.com/feature/cannabis-legalization-states-map-831885/> [<https://perma.cc/SC3X-TKS4>]; see RSA §§ 126-X:3, 318-B:2-C; Even though South Dakota voters approved a referendum legalizing marijuana in 2020, it was struck down by the South Dakota Supreme Court on procedural grounds. See Stephen Groves, *South Dakota Supreme Court Rules Against Pot Legalization*, ASSOCIATED PRESS (Nov. 24, 2021), <https://apnews.com/article/health-business-marijuana-legalization-recreational-marijuana-marijuana-987c36ced5a5dc2188a0667e9a8879cb> [<https://perma.cc/6WTB-UZ99>]; see generally *Thom v. Barnett*, No. 29546, 2021 WL 5501582 (S.D. Nov. 24, 2021).

⁶⁵ Natalie Fertig and Mona Zhang, *1 in 3 Americans Now Lives in a State Where Recreational Marijuana is Legal*, POLITICO (Nov. 4, 2020), <https://www.politico.com/news/2020/11/04/1-in-3-americans-lives-where-recreational-marijuana-legal-434004> [<https://perma.cc/X9AL-A9JJ>].

⁶⁶ Ivan Pereira, *After Connecticut Legalizes Marijuana, only 2 New England States Now Prohibit Cannabis*, ABC NEWS (June 23, 2021, 7:38 PM), <https://abcnews.go.com/US/connecticut-legalizes-marijuana-england-states-now-prohibit-cannabis/story?id=78427390> [<https://perma.cc/8UHG-EYDH>]; see also Tom Angell, *Legal Cannabis "Inevitable" in RI, House Speaker Says*, MARIJUANA MOMENT (July 9, 2021), <https://www.marijuanamoment.net/legal-cannabis-inevitable-in-ri-house-speaker-says-newsletter-july-9-2021> [<https://perma.cc/63BZ-V6W5>]; Ethan DeWitt, *New Hampshire Marijuana Legislation Still in Play at the State House*, CONCORD MONITOR (Feb. 21, 2021, 2:19 PM), <https://www.concordmonitor.com/New-Hampshire-marijuana-legalization-bills-postoned-2022-Legislature-38607085> [<https://perma.cc/PV7A-XBG2>] (hereinafter DeWitt I).

⁶⁷ Angell, *supra* note 66.

federal authorities for its recalcitrance.⁶⁸ This is true even though there is widespread public support; New Hampshire is unlikely to legalize marijuana soon.⁶⁹ The world has not imploded where marijuana legalization has blossomed. A brief summer trip through the placid Berkshires of Massachusetts reveals that recreational marijuana has sprouted at almost every corner of this famously cultured enclave (see pictures of the storefronts, below), without any discernable cost to the safety of citizens there.

The current state of marijuana prohibition is, demonstrably, the vestige of reactionary policies adopted by conservative governments in the wake of the 1960s, when marijuana became a symbol of political dissent and police began to crack down on the hippie subculture by cracking down on the drug.⁷⁰ After the United States Supreme Court struck down the Marihuana Tax Act in *Leary v. United States*,⁷¹ President Nixon put drug prohibition on the policy front-burner, initiating the passage of the Controlled Substances Act of 1970.⁷² This Act labeled marijuana as a Schedule I Drug, a designation it bears to this day.⁷³ This typology is based on the conclusion that it has no medical value, has a high potential for abuse, and thus, is illegal in all forms.⁷⁴ New Hampshire did not take any significant steps concerning the regulation of marijuana until 1963, when it finally passed the Uniform Narcotic Drug Act and made it a felony

⁶⁸ See Donald J. Cantor, *The Criminal Law and the Narcotics Problem*, 51 J. CRIM. L. & CRIMINOLOGY 512, 516, 518 (noting that Harry Anslinger thought New Hampshire had inadequate laws regulating narcotics and that New Hampshire was the last state to pass strict drug legislation); see generally, Barcott, *supra* note 7 at 6 (2015) (“At the end of 2014 the U.S. reached a tipping point: for the first time ever, a majority of Americans lived in states with some form of marijuana legality.”).

⁶⁹ *Supra* note 66; UNH Survey Center, "Approval of Sununu's COVID-19 Handling Rebounds in NH; Large Majority Support Marijuana Legalization 5/25/2021" (2021), available at, https://scholars.unh.edu/survey_center_polls/656.

⁷⁰ See MARTIN LEE, *SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA – MEDICAL, RECREATIONAL, AND SCIENTIFIC*, (2012), 112–15.

⁷¹ 395 U.S. 6 (1969). The Supreme Court reasoned that the 1937 law violated the Fifth Amendment privilege against self-incrimination because an individual who requested a marijuana tax stamp in compliance with the law had to admit that they intended to commit a crime by possessing or selling marijuana.

⁷² Comprehensive Drug Abuse Prevention and Control Act of 1970, P. L. No. 91.513, 84 Stat. 1236 (1970)

⁷³ Lee, *supra* note 70 at 115–19.

⁷⁴ 21 U.S.C. § 801 *et seq.*

to possess or use marijuana.⁷⁵ New Hampshire, which was, again, the last state to pass comprehensive drug laws, was one of a few states that did not adopt the Uniform Act when it was originally pushed by Anslinger in the 1930s.⁷⁶ Even though it similarly declined to pass the Uniform Controlled Substances Act,⁷⁷ New Hampshire passed its own Controlled Drug Act in 1969, which significantly increased the penalties for marijuana use.⁷⁸ Although New Hampshire's Controlled Drug Act has since been amended, the 1969 Act remains the foundation of the current statute regulating drug use in the state.⁷⁹

By amendment, New Hampshire partially decriminalized marijuana in 2017.⁸⁰ Under the current law, it is a violation for someone twenty-one or older to possess three-quarters of an ounce or less of marijuana or five grams or less of hashish.⁸¹ Such violation is only subject to a \$100 fine for a first offense.⁸² However, possession beyond these “personal-use amounts” is still a crime.⁸³ It is a misdemeanor to possess more than three-quarters of an ounce of marijuana or marijuana-infused product that contains more than a personal-use amount of the drug.⁸⁴

⁷⁵ Uniform Narcotic Drug Act, 1963 N.H. Laws ch. 276.

⁷⁶ See Cantor, *supra* note 68 at 516, 518 (noting that in 1961, New Hampshire was one of four states that did not pass the Uniform Law and one of two that Anslinger did not think had narcotics laws of “comparable efficiency.” In fact, New Hampshire was the last state to pass a comprehensive drug law); Harry J. Anslinger, Organized Protection against Organized Predatory Crime--Peddling of Narcotic Drugs, VI, 24 J. CRIM. L. & CRIMINOLOGY at 636, 649, 651–53.

⁷⁷ New Hampshire is one of three states that did not pass the Uniform Controlled Substance Acts of 1970, 1990, or 1994. See UNIF. CONTROLLED SUBSTANCE ACT, Table of Jurisdictions Wherein Either the 1970, 1990, or 1994 Versions of the Act or a Combination Thereof Has Been Adopted, 1 U.L.A. 1 (2021).

⁷⁸ Compare Uniform Controlled Drug Act, ch. 421, 1969 N.H. Laws 693 (codified at RSA 318-B) with Uniform Narcotic Drug Act 1963 N.H. Laws ch. 276. For example, a marijuana violation under Uniform Narcotic Act was punishable by two to five years and prison and a \$2,000 fine, whereas a similar violation of the Controlled Drug Act was punishable by up to ten years in prison and a \$2,000 fine.

⁷⁹ Compare N.H. REV. STAT. ANN. § 318-B with Uniform Controlled Drug Act.

⁸⁰ RSA § 318-B:2-C; Tom Angell, *New Hampshire Marijuana Decriminalization Takes Effect*, FORBES (Sep 16, 2017, 11:59 AM), <https://www.forbes.com/sites/tomangell/2017/09/16/new-hampshire-marijuana-decriminalization-takes-effect/?sh=2ace7f8a6250> [<https://perma.cc/AE26-82R9>].

⁸¹ RSA § 318-B:2-c-I, II, IV; § 318-B:26-II(d).

⁸² *Id.* at § 318-B:2-c-V; § 318-B:26-II(d).

⁸³ Compare *id.* at § 318-B:2-c with *id.* at § 318-B:26.

⁸⁴ *Id.* at § 318-B:26-II(c)

Possession of larger quantities can be a felony.⁸⁵ Individuals face up to three years in prison and a \$25,000 fine for possession with intent to sell up to an ounce of marijuana or less than five grams of hashish.⁸⁶ Similarly, possession with intent to sell an ounce or more of marijuana or five grams or more of hashish is punishable by up to seven years in prison and a \$100,000 fine.⁸⁷ For offenses involving at least five pounds of marijuana or one pound of hashish, the maximum punishment is twenty years in prison and a \$300,000 fine.⁸⁸

Even though New Hampshire has decriminalized three-quarters or fewer ounces of marijuana, this is a significant amount of the drug; three-quarters of an ounce of marijuana is about twenty-one grams, which is enough for about forty-five joints and has about 2100 and 6300 milligrams of THC.⁸⁹ In New Hampshire, this amount costs about \$250 for high-quality or \$225 for medium-quality marijuana.⁹⁰ For comparison, if the state were to legalize the drug recreationally, the 2018 legalization commission recommended that the state only allow people to possess up to one ounce.⁹¹ Marijuana is also legal for medical use.⁹² In 2013, New Hampshire passed N.H. Rev. Stat. § 126-X:2, which allows qualifying patients to possess up to two ounces of cannabis.⁹³ Qualifying patients include New Hampshire residents who have

⁸⁵ See *id.* at § 318-B:26-I-II. Even though the penalties apply the possession *with the intent to sell*, the New Hampshire Supreme Court has held that among other things, having large amounts of drugs allows the inference that the defendant intended to sell them. See *State v. Renfrew*, 444 A.2d 527, 530 (N.H. 1982); *State v. Greely*, 344 A.2d 12, 17 (N.H. 1975).

⁸⁶ *Id.* at § 318-B:26-I(d)(1).

⁸⁷ *Id.* at § 318-B:26-I(c)(5).

⁸⁸ *Id.* at § 318-B:26-I(b)(6).

⁸⁹ See CANNABIS PLACE, *How Many Milligrams Of THC Is In A Gram of Cannabis?*, (May 28, 2021), <https://www.cannabisplace.com.au/learn/how-to-measure-thc/> [<https://perma.cc/N3FH-A9NS>]; LEAFLY, *What Does Cannabis Look Like? A Visual Guide to Cannabis Quantities* (Feb. 6, 2020), <https://www.leafly.com/news/cannabis-101/visual-guide-to-cannabis-quantities> [<https://perma.cc/25T6-2J5V>].

⁹⁰ See OXFORD TREATMENT CENTER, *The Average Cost of Marijuana by State* (Sept. 15, 2020), <https://oxfordtreatment.com/substance-abuse/marijuana/average-cost-of-marijuana/> [<https://perma.cc/4WXP-7ARA>].

⁹¹ See COMM'N TO STUDY THE LEGALIZATION, REGUL., AND TAXATION OF MARIJUANA, *Final Report*, available at <http://mediad.publicbroadcasting.net/p/nhpr/files/201811/PotReport.pdf>.

⁹² RSA § 126-X-2.

⁹³ *Id.*

autism spectrum disorder, post-traumatic stress disorder, or chronic pain.⁹⁴ Other patients with a combination of qualifying diagnoses and qualifying symptoms are also eligible under the law.⁹⁵ Even with these exceptions, though, New Hampshire’s medical marijuana laws still remain among the strictest in the region.⁹⁶

There have been many unsuccessful attempts to revise New Hampshire’s marijuana laws.⁹⁷ At least one bill has been introduced every year since 2012 to legalize or study legalization.⁹⁸ The first attempts were in 2010 and 2012.⁹⁹ In 2010, the New Hampshire House referred HB 1652,¹⁰⁰ which would have legalized marijuana, for an interim study. Had the bill passed, New Hampshire would have been the first state in the country to legalize the drug for recreational use.¹⁰¹ Attempts to legalize marijuana failed to pass both the House and Senate in

⁹⁴ New Hampshire Department of Health and Human Services, *Qualifying Medical Conditions*, available at <https://www.dhhs.nh.gov/oos/tcp/medical-conditions.html>; see RSA § 126-X:1, IX, X.

⁹⁵ *Id.*

⁹⁶ Ethan DeWitt, *State’s Medicinal Marijuana Industry Has Stabilized, but Barriers to Growth Remain*, CONCORD MONITOR (July 16, 2021), <https://www.concordmonitor.com/State-s-medicinal-marijuana-industry-has-stabilized-but-barriers-to-growth-remain-41430930> [<https://perma.cc/M288-ZY45>] (hereinafter DeWitt II).

⁹⁷ See, e.g., Carla Gericke, *A Brief History of NH Marijuana Legislation*, FREE STATE PROJECT (Feb. 27, 2021), <https://www.fsp.org/brief-history-nh-marijuana-legislation/> [<https://perma.cc/N6RL-UEWQ>]; see also Tuohy & Ropeik, *supra* note 47 (noting that the New Hampshire House passed a bill to legalize marijuana in 2018); Niraj Chokshi, *The N.H. House Just Became the First State Body to OK Pot Sales, Group Says*, THE WASHINGTON POST (Jan. 15, 2014, 5:41 PM), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/01/15/the-n-h-house-just-became-the-first-state-body-to-ok-pot-sales-group-says/> [<https://perma.cc/U4CX-BPDP>] (noting that the New Hampshire House of Representatives passed a bill to legalize marijuana in 2014).

⁹⁸ Gericke, *supra* note 97.

⁹⁹ *Id.*

¹⁰⁰ An Act Allowing Purchase and Use of Marijuana by Adults, Regulating the Purchase and Use of Marijuana, and Imposing Taxes on the Wholesale and Retail Sale of Marijuana, H.B. 1652-FN-A, 2010 Sess. (N.H. 2010), <http://www.gencourt.state.nh.us/legislation/2010/hb1652.html>; H.R. JOURNAL, 161st Gen. Court., 2nd Sess., No. 5 (N.H. 2010), http://www.gencourt.state.nh.us/house/caljournals/journals/2010/houjou2010_15.html.

¹⁰¹ See Keith Speights, *Timeline for Marijuana Legalization in the United States: How the Dominos are Falling*, THE MOTLEY FOOL (Jan. 2, 2020, 1:06 PM), <https://www.fool.com/investing/timeline-for-marijuana-legalization-in-the-united.aspx> [<https://perma.cc/LL9X-HTPB>].

2012¹⁰² and 2013,¹⁰³ but in 2014,¹⁰⁴ the New Hampshire House of Representatives became the first state legislature to pass a bill to legalize marijuana.¹⁰⁵ The Senate refused to consider the bill, effectively killing it.¹⁰⁶ Likewise, a 2015 bill¹⁰⁷ to create a commission to study legal marijuana was killed in the Senate after passing the House.¹⁰⁸

In 2016, the New Hampshire House of Representatives killed three bills that would have legalized up to one ounce,¹⁰⁹ two ounces,¹¹⁰ and 2.2 pounds¹¹¹ of marijuana. Although the

¹⁰² An Act Exempting Cultivation of Marijuana from Manufacturing under the Controlled Drug Act, H.B. 1527-FN, 2012 Sess. (N.H. 2012), <http://www.gencourt.state.nh.us/legislation/2012/HB1527.html>; An Act Allowing Purchase and Use of Marijuana by Adults, Regulating the Purchase and Use of Marijuana, and Imposing Taxes on the Wholesale and Retail Sale of Marijuana, H.B. 1705-FN-A, 2012 Sess. (N.H. 2012), <http://www.gencourt.state.nh.us/legislation/2012/HB1705.html>; H.R. JOURNAL, 162nd Gen. Court., 2nd Sess., No. 10 (N.H. 2012), http://www.gencourt.state.nh.us/house/caljournals/journals/2012/houjou2012_21.html, H.R. JOURNAL, 162nd Gen. Court., 2nd Sess., No. 11 (N.H. 2012), http://www.gencourt.state.nh.us/house/caljournals/journals/2012/houjou2012_23.html.

¹⁰³ An Act Legalizing Cannabis, H.B. 337-FN, 2013 Sess. (N.H. 2013), <http://www.gencourt.state.nh.us/legislation/2013/hb0337.html>; H.R. JOURNAL, 163rd Gen. Court., 1st Sess., No. 10 (N.H. 2013), http://www.gencourt.state.nh.us/house/caljournals/journals/2013/HJ_10.pdf.

¹⁰⁴ An Act Relative to the Legalization and Regulation of Marijuana, H.B. 492-FN, 2013 Sess. (N.H. 2014), <http://www.gencourt.state.nh.us/legislation/2014/HB0492.html>; H.R. JOURNAL, 163rd Gen. Court., 2nd Sess., No. 2 (N.H. 2014), <http://www.gencourt.state.nh.us/house/caljournals/journals/2014/HJ6.pdf>.

¹⁰⁵ Chokshi, *supra* note 97 (noting that the New Hampshire House of Representatives passed a bill to legalize marijuana in 2014); Erik Altieri, *After Lengthy Floor Debate, New Hampshire House of Representatives Approves Marijuana Legalization*, NORML (Jan. 14, 2014), <https://norml.org/blog/2014/01/15/after-lengthy-floor-debate-new-hampshire-general-assembly-approves-marijuana-legalization/> [<https://perma.cc/WX4U-D34J>].

¹⁰⁶ Pat Bradley, *NH Senate Refuses to Consider Marijuana Bill*, NORTHEAST PUBLIC RADIO (Apr. 17, 2014), <https://www.wamc.org/post/nh-senate-refuses-consider-marijuana-bill> [<https://perma.cc/P96W-UFQU>].

¹⁰⁷ An Act Establishing a Commission to Study the Legalization, Regulation, and Taxation of Marijuana, H.B. 150, 2015 Sess. (N.H. 2015), <http://www.gencourt.state.nh.us/legislation/2015/HB0150.html>.

¹⁰⁸ SEN. JOURNAL, 164th Gen. Court., 1st Sess., No. 12 (N.H. 2015), https://gencourt.state.nh.us/Senate/calendars_journals/journals/2015/SJ%2012.pdf; H.R. JOURNAL, 164th Gen. Court., 1st Sess., No. 24 (N.H. 2015), http://www.gencourt.state.nh.us/house/caljournals/journals/2015/HJ_24.pdf.

¹⁰⁹ An Act Allowing Purchase and Use of Marijuana by Adults, Regulating the Purchase and Use of Marijuana, and Imposing Taxes on the Wholesale and Retail Sale of Marijuana, H.B. 1652-FN-A, 2010 Sess. (N.H. 2010), <http://www.gencourt.state.nh.us/legislation/2010/hb1652.html>; H.R. JOURNAL, 161st Gen. Court., 2nd Sess., No. 5 (N.H. 2010), http://www.gencourt.state.nh.us/house/caljournals/journals/2010/houjou2010_15.html.

¹¹⁰ An Act Legalizing the Possession and Cultivation of Marijuana for Personal Use, H.B. 1610, 2016 Sess. (N.H. 2016), http://gencourt.state.nh.us/bill_status/billText.aspx?id=667&txtFormat=html&sy=2016; *see* H.R. JOURNAL, 164th Gen. Court., 2nd Sess., No. 10 (N.H. 2016), https://www.gencourt.state.nh.us/house/caljournals/journals/2016/HJ_27.pdf (granting a motion to table to the bill).

¹¹¹ An Act Legalizing the Possession and Cultivation of Marijuana for Personal Use, H.B. 1610, 2016 Sess. (N.H. 2016), http://gencourt.state.nh.us/bill_status/billText.aspx?id=667&txtFormat=html&sy=2016; *see* H.R. JOURNAL, 164th Gen. Court., 2nd Sess., No. 10 (N.H. 2016), https://www.gencourt.state.nh.us/house/caljournals/journals/2016/HJ_27.pdf (granting a motion to table to the bill).

legislature passed a law in 2017 to study legalization,¹¹² and decriminalized small amounts of the drug,¹¹³ it rejected SB 233,¹¹⁴ which would have legalized marijuana. In 2018, the New Hampshire House voted to pass HB 656,¹¹⁵ but the bill was killed after an interim study.¹¹⁶ HB 377,¹¹⁷ which would have given the liquor commission authority to sell marijuana for recreational use was also referred for an interim study, but no further progress was made on the bill.¹¹⁸ The House voted to pass legalization bills in 2019¹¹⁹ and 2020,¹²⁰ but neither bill was passed by the Senate.¹²¹ In the 2021 session, the New Hampshire House introduced HB 237¹²²

¹¹² See RSA § 318-B:46; An Act Establishing a Commission to Study the Legalization, Regulation, and Taxation of Marijuana, H.B. 215, 2017 Sess. (N.H. 2017), http://gencourt.state.nh.us/bill_status/billText.aspx?id=175&txtFormat=html&sy=2017. The final report approved by the study declined to comment on whether to legalize marijuana; instead, it made recommendations on how the legislature should pursue legalization. See COMM'N TO STUDY THE LEGALIZATION, REGUL., AND TAXATION OF MARIJUANA, *Final Report*.

¹¹³ See RSA § 318-B:2-C.

¹¹⁴ An Act Relative to the Legalization and Regulation of Marijuana and Establishing a Committee to Study the Legalization of Marijuana, H.B. 233-FN, 2017 Sess. (N.H. 2017), http://gencourt.state.nh.us/bill_status/billText.aspx?sy=2017&id=936&txtFormat=html; SEN. JOURNAL, 165th Gen. Court., 1st Sess., No. 9 (N.H. 2017), http://gencourt.state.nh.us/Senate/calendars_journals/journals/2017/sj%209.pdf.

¹¹⁵ An Act Relative to the Home Cultivation of Marijuana Plants and the Possession of Certain Marijuana-Infused Products, H.B. 656-FN, 2017 Sess. (N.H. 2018), http://www.gencourt.state.nh.us/bill_status/billtext.aspx?sy=2018&txtFormat=amend&id=2017-2478H; see H.R. JOURNAL, 165th Gen. Court., 2nd Sess., No. 2 (N.H. 2018), https://www.gencourt.state.nh.us/house/caljournals/journals/2018/HJ_2.pdf; see also Tuohy & Ropeik, *supra* note 47.

¹¹⁶ See H.R. JOURNAL, 165th Gen. Court., 2nd Sess., No. 10 (N.H. 2018), https://www.gencourt.state.nh.us/house/caljournals/journals/2018/HJ_10.pdf; Gen. Court of N.H. Bill Status System, HB 656, available at http://gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=0543&sy=2018&sortoption=&txtsessionyear=2018&txttitle=marijuana.

¹¹⁷ An Act Relative to Marijuana Sales, H.B. 377, 2017 Sess. (N.H. 2018), http://gencourt.state.nh.us/bill_status/billText.aspx?id=181&txtFormat=html&sy=2018.

¹¹⁸ See H.R. JOURNAL, 165th Gen. Court., 2nd Sess., No. 1 (N.H. 2018), https://www.gencourt.state.nh.us/house/caljournals/journals/2018/HJ_1.pdf; Gen. Court of N.H. Bill Status System, HB 377, available at https://www.gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=0152&sy=2018&sortoption=&txtsessionyear=2018&q=1.

¹¹⁹ An Act Relative to the Legalization and Regulation of Cannabis and Making Appropriations Therefor, H.B. 481-FN-A-Local, 2019 Sess. (N.H. 2019), <http://www.gencourt.state.nh.us/legislation/2019/HB0481.html>; H.R. JOURNAL, 166th Gen. Court., 1st Sess., No. 12 (N.H. 2019), https://www.gencourt.state.nh.us/house/caljournals/journals/2019/HJ_12.pdf.

¹²⁰ An Act Relative to the Home Cultivation of Cannabis Plants and the Possession of Certain Cannabis Infused Products, s, H.B. 1648-FN, 2020 Sess. (N.H. 2020), http://gencourt.state.nh.us/_status/billText.aspx?id=1363&txtFormat=html&sy=2020; H.R. JOURNAL, 166th Gen. Court., 2nd Sess., No. 5 (N.H. 2020), https://www.gencourt.state.nh.us/house/caljournals/journals/2020/HJ_5.pdf.

¹²¹ Gen. Court of N.H. Bill Status System, HB 1648, available at http://gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=2229&sy=2020&sortoption=&txtsessionyear=2020&txtbillnumber=HB1648; Gen. Court of N.H. Bill Status System, HB 481, available at http://www.gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=0614&sy=2021&txtsessionyear=2021&txtbillnumber=hb481&sortoption=&q=1.

¹²² An Act Relative to the Legalization and Regulation of Cannabis and Making Appropriations Therefor, H.B.

and HB 629¹²³ to legalize marijuana and allow for home cultivation.¹²⁴ In January 2022, the Republican-controlled House voted to legalize possession and cultivation of marijuana, yet again.¹²⁵

Despite clear, and bi-partisan support for efforts to end prohibition, however, Governor Sununu, the current governor, has promised to veto any legalization efforts, making it unlikely that marijuana will be legalized while he is governor.¹²⁶ In response to the government's unwillingness to legalize marijuana, state representatives are considering and have proposed constitutional amendments that would legalize marijuana with the approval of 67% of New Hampshire voters.¹²⁷ According to another report, "A leading House Republican with bipartisan support is proposing to create a state-run monopoly to operate the retail sale of marijuana to adults."¹²⁸ The status of marijuana is now even protected in New Hampshire under employment law. In *Paine v. Ride-Away, Inc.*,¹²⁹ the New Hampshire Supreme Court found that the use of therapeutic marijuana may be a reasonable accommodation for those with disabilities.

237-FN-A, 2021 Sess. (N.H. 2021), http://gencourt.state.nh.us/bill_status/billText.aspx?id=13&txtFormat=html&sy=2021.

¹²³ An Act Relative to the Home Cultivation of Cannabis Plants and the Possession of Certain Cannabis-infused Products, H.B. 629, 2021 Sess. (N.H. 2021), http://gencourt.state.nh.us/bill_status/billText.aspx?id=25&txtFormat=html&sy=2021.

¹²⁴ MPP, Advocates Seek to End State's "island of prohibition" Status, MARIJUANA POLICY PROJECT (June 30, 2021), <https://www.mpp.org/states/new-hampshire/> [<https://perma.cc/KMT4-2GV2>].

¹²⁵ Kyle Jaeger, *GOP-Controlled New Hampshire House Votes to Legalize Marijuana Possession and Cultivation*, MARIJUANA MOMENT (Jan. 6, 2022), <https://www.marijuanamoment.net/gop-controlled-new-hampshire-house-votes-to-legalize-marijuana-possession-and-cultivation/> [<https://perma.cc/5GMM-FA7K>];

Gen. Court of N.H. Bill Status System, HB 629, available at http://gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=0021&sy=2021&txtsessionyear=2021&txttitle=cannabis&sortoption=billnumber.

¹²⁶ Anna Brown-Citizens Count, *For Some Bills, the Legislative Session is Just Beginning*, NH BUSINESS REVIEW (June 28, 2021), <https://www.nhbr.com/for-some-bills-the-legislative-session-is-just-beginning/> [<https://perma.cc/66RH-PURS>].

¹²⁷ Kyle Jaeger, *New Hampshire Lawmakers Take First Step Marijuana Legalization on 2022 Ballot*, MARIJUANA MOMENT (Sept. 15, 2022), <https://www.marijuanamoment.net/new-hampshire-lawmakers-take-first-step-to-put-marijuana-legalization-on-2022-ballot/> [<https://perma.cc/VVJ2-GZAV>].

¹²⁸ See Kevin Landrigan, *New plan to legalize pot for adults emerges*, N.H. Union Leader (Jan. 21, 2022) [https://www.unionleader.com/news/politics/state/new-plan-to-legalize-pot-for-adults-emerges/article_9d13c52e-cfa8-58be-9ebe-338e4ba22bdc.html?block_id=868819].

¹²⁹ No. 2020-0470, slip. op. at 2 (N.H. Jan. 14, 2022).

Citizens remain the primary victims of New Hampshire’s attachment to prohibition.¹³⁰ Of the 6,357 drug arrests in New Hampshire in 2018, 2,973 were related to marijuana and 2,741 were specifically related to marijuana possession; although arrest rates dropped after marijuana was decriminalized in 2017, 43% of all drug arrests in the state related to possession of marijuana a year later.¹³¹ This is similar to the national average: nationally, 43.2% of all drug-related arrests were for marijuana.¹³² In both New Hampshire and the U.S. as a whole, more people are arrested for offenses involving marijuana than any other drug.¹³³ Likewise, the New Hampshire marijuana arrest rate is similar to the national arrest rate: in New Hampshire, 202.10 people out of 100,000 were arrested for marijuana possession, compared to 203.88 nationally.¹³⁴ Even though New Hampshire’s arrest rates are comparable to the national average, they are, of course, significantly higher than in neighboring states that have legalized marijuana.¹³⁵

There is a significant racial disparity in arrests. Statewide, African-Americans are 4.11 times more likely to be arrested for marijuana possession than Caucasians, making the state seventeenth in the United States for largest racial disparity.¹³⁶ This is greater than the national average: nationally, African-Americans are 3.64 times more likely to be arrested for marijuana possession than Caucasians.¹³⁷ In all New Hampshire counties except for Hillsborough,

¹³⁰ See ACLU, *supra* note 42.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*; see also NEW HAMPSHIRE DEPARTMENT OF SAFETY BEYOND 20/20 PERSPECTIVE, <https://crimestats.dos.nh.gov/public/Browse/browsetables.aspx?PerspectiveLanguage=en> (click “Drug Reports by County”; deselect “Jurisdiction by Geography”) (last accessed July 11, 2021).

¹³⁴ ACLU, *supra* note 42.

¹³⁵ *Id.* In Maine, 54.99 out of 100,000 people were arrested for marijuana, which makes up 20% of drug arrests. Massachusetts has even fewer marijuana arrests; 4.52 people out of 100,000 are arrested for marijuana possession and marijuana possession was only 3% of all drug arrests. However, both Maine and Massachusetts have similar racial disparities in marijuana arrests. The ACLU report was created before Vermont legalized marijuana, so the statistics do not reflect the current status of the drug.

¹³⁶ ACLU, *supra* note 42.

¹³⁷ *Id.*

Belknap, and Carroll Counties, the racial disparities exceed the national average.¹³⁸ Cheshire County (13.2 times) has the highest racial disparity, followed by Merrimack County (6.70), Coos County (6.0), Strafford County (6.0), Sullivan County (5.3), Rockingham County (5.1), Grafton County (4.9), Hillsborough County (3.0), Belknap County (3.0), and Carroll County (2.1).¹³⁹

In terms of direct economic costs, New Hampshire, which otherwise claims to embrace a spirit of limited government spending, has spent about \$65.2 million enforcing its War on Marijuana in 2016.¹⁴⁰ These costs ignore the opportunity costs of flipping the script. Legalizing marijuana could have a significant effect on New Hampshire's tax revenue, as it has in other states that legalized the drug.¹⁴¹ Specifically, the 2018 Marijuana Commission found that legalizing marijuana could bring in millions of dollars in tax revenue annually in addition to license fees.¹⁴² Depending on the taxation model used and the size of the industry, legal marijuana could bring in between \$15 million and \$57 million in tax revenue annually.¹⁴³ With costs expected to range between \$9.9 and \$13 million, legal marijuana would bring in between \$2 and \$47 million annually, which will likely be spent on substance abuse treatment.¹⁴⁴ These numbers will likely be surpassed because the states that have taxed marijuana have seen the tax revenue exceed their initial estimates.¹⁴⁵ The most recent legislative analysis indicates that

¹³⁸ *Id.*

¹³⁹ ACLU, New Hampshire Marijuana Statistics, <https://graphics.aclu.org/marijuana-arrest-report/NH>.

¹⁴⁰ *Id.*

¹⁴¹ Angela Dillis et al., *The Effect of State Legalizations 2021 Update*, CATO INSTITUTE (Feb. 2, 2021), <https://www.cato.org/policy-analysis/effect-state-marijuana-legalizations-2021-update> [<https://perma.cc/H8FP-KMAS>].

¹⁴² COMM'N TO STUDY THE LEGALIZATION, REGUL., AND TAXATION OF MARIJUANA, *Final Report*.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Dillis et al., *supra* note 142.

marijuana could yield returns that outstrip the state's profits with respect to its monopolistic approach to liquor sales.¹⁴⁶

Thus, just focusing on the costs and benefits of criminalizing marijuana in the marijuana prohibition balance demonstrates that the costs of prohibition, as traditionally conceived, outweigh its dubious benefits, lopsidedly. In other words, marijuana prohibition imposes extreme costs upon society by labeling citizens criminals and incarcerating or otherwise diminishing citizens through official process. That there are economic opportunities that New Hampshire loses by pursuing marijuana prohibition, while neighboring states are eliminating prohibitionist policies and creating neighboring markets in which marijuana is sold, adds a serious, further challenge to the rationality of marijuana prohibition.

III. Dangerous Substances and Activities Legal Under New Hampshire Law

But that is all focusing on marijuana's costs and benefits in a silo, without thinking about where it sits with other sorts of activities that may cause harm to people. New Hampshire's Live Free or Die spirit has given it liberal laws regarding many different activities that cause harm, and even substantial harm, to people living here.¹⁴⁷ New Hampshire is one of three states that does not require any motorcycle rider to wear a helmet despite the potential danger of accidents.¹⁴⁸ Even though motor vehicle accidents are a leading cause of death, New Hampshire is the only state in the country that does not require seatbelts.¹⁴⁹ New Hampshire permits citizens to buy fireworks where purchases of this sort are illegal in many states and injuries

¹⁴⁶ See Landrigan, *infra*. n. 129 (“The difference is the markup on cannabis is a lot higher than liquor, so there is a lot more revenue to be made,” according to Representative Daryl Abbas, Salem).

¹⁴⁷ See Juston McKinney, *A New Hampshire State of Mind*, WBUR (Jan. 9, 2012), <https://www.wbur.org/hereandnow/2012/01/09/new-hampshire-comedy> [<https://perma.cc/YW2H-E3XA>].

¹⁴⁸ Tanya Mohn, *Thinking of Not Wearing a Motorcycle Helmet? Think Again*, FORBES (May 31, 2021, 10:16 PM) <https://www.forbes.com/sites/tanyamohn/2021/05/31/thinking-of-not-wearing-a-motorcycle-helmet-think-again/?sh=3f00356b301b> [<https://perma.cc/VRV4-NGPE>].

¹⁴⁹ CDC, “Buckle Up: Restraint Use in New Hampshire” (2014), *available at* https://www.cdc.gov/motorvehICLESafety/pdf/seatbelts/Restraint_Use_in_NH.pdf.

caused by these recreational goods are substantial.¹⁵⁰ New Hampshire funds education through the most regressive form of gambling, a lottery.¹⁵¹ Even more recently, it legalized online sports gaming, another revenue-driver for the state, which it advertises through public resources.¹⁵²

The ways in which New Hampshire citizens are allowed to harm their physical health on a day-to-day basis are manifold. New Hampshire allows people to consume alcohol, tobacco, and caffeine, three drugs that are as harmful or more harmful than marijuana.¹⁵³ Alcohol and tobacco are more addictive than marijuana; 15% of people who have tried alcohol and 32% of people who have tried tobacco are addicted, while 9% of all people who have tried marijuana are addicted to it.¹⁵⁴ Likewise, marijuana is less addictive than coffee, which is the most widely used and widely accepted drug in the world.¹⁵⁵

¹⁵⁰ Justin Sedgwick, *Here are the Fireworks Laws by Each State*, ABC7 (July 3, 2014), <https://abc7.com/news/what-are-your-states-fireworks-laws/153795/> [<https://perma.cc/E5J7-V5VK>]; Niall McCarthy, *Firework Injuries are Skyrocketing in The U.S.*, FORBES (July 1, 2021, 5:50 AM), <https://www.forbes.com/sites/niallmccarthy/2021/07/01/fireworks-injuries-are-skyrocketing-in-the-us-infographic/?sh=3fdb6b477e69> [<https://perma.cc/7R92-9H4D>]. Dare we mention football and the fact that we allow schools to permit students to play it in New Hampshire despite the demonstrable harms associated with the game?

¹⁵¹ New Hampshire Lottery History, <https://www.nhlottery.com/About-Us> [<https://perma.cc/G5A7-J3KP>].

¹⁵² New Hampshire Lottery Sports, <https://www.nhlottery.com/Sports> [<https://perma.cc/Z84F-T9MF>].

¹⁵³ See, e.g., Debra Rose Wilson & Zawn Villines, *Is Weed Addictive?*, MEDICAL NEWS TODAY (Jan. 30, 2020), <https://www.medicalnewstoday.com/articles/marijuana-addiction> [<https://perma.cc/ZS42-MWGP>]; Jennifer Peltz, *Smoking Pot vs. Tobacco: What Science Says About Lighting Up*, CHICAGO TRIBUNE (Apr. 8, 2019), <https://www.chicagotribune.com/lifestyles/health/ct-cb-smoking-pot-vs-tobacco-20190408-story.html> [<https://perma.cc/Y627-ZYUG>]; Honor Whiteman, *Alcohol 'More Damaging to Brain Health than Marijuana'*, MEDICAL NEWS TODAY (Feb. 12, 2018), <https://www.medicalnewstoday.com/articles/320895> [<https://perma.cc/JG83-G7QX>]; Kyle Jaeger, *Nine Totally Legal Substances Way More Addictive Than Marijuana*, ATTN (Oct. 30, 2015), <https://archive.attn.com/stories/3913/legal-substances-more-addictive-than-marijuana> [<https://perma.cc/4ZUE-3ZT2>]; Rob Waugh, *Smoking Weed is Less Addictive than Drinking Coffee, Drug Expert Claims*, METRO (APR. 17, 2015, 7:20 P.M.), <https://metro.co.uk/2015/04/17/smoking-weed-is-less-addictive-than-drinking-coffee-drug-expert-claims-5155336/>; Leland Kim, *Marijuana Shown to Be Less Damaging to Lungs Than Tobacco*, UNIVERSITY OF CALIFORNIA SAN FRANCISCO (Jan. 10, 2012), <https://www.ucsf.edu/news/2012/01/98519/marijuana-shown-be-less-damaging-lungs-tobacco> [<https://perma.cc/A6XQ-9HXV>].

¹⁵⁴ See *supra* note 154.

¹⁵⁵ Waugh, *supra* note 154; Elizabeth Hartney, *The Various Uses of Caffeine*, VERY WELL MIND (Jan. 19, 2021), <https://www.verywellmind.com/what-is-caffeine-21848> [<https://perma.cc/JR5B-G8VC>].

Anyone who has driven our roads knows that New Hampshire has a special relationship to alcohol.¹⁵⁶ As one public health commentator has noted, “The impact of alcohol on health is profound. Up to half of all people in beds in orthopedic wards are there because of an alcohol-related injury and on weekends the emergency departments of our hospitals are filled with people who are drunk.”¹⁵⁷ Yet New Hampshire goes above and beyond to market and sell this damaging substance to millions.¹⁵⁸ At every major ingress or egress into the state you will find a state-run liquor store selling intoxicants to residents and visitors alike. The absence of a sales tax makes these stores attractive to future emergency room ward patients. New Hampshire citizens imbibe at rates that substantially exceed the national average and have ranked New Hampshire at the very top of the list for states that drink the most in the Union.¹⁵⁹

Enter into any convenience store or gas station in New Hampshire and you also will see, stacked on the back walls, death sticks—cigarettes, cigars, and other tobacco and nicotine-laced products that the state permits private actors to sell, despite having settled cases with the industry for millions of dollars on behalf of millions of victims of these substances. Tobacco is linked to one in five deaths in the United States because it causes problems like lung cancer and heart disease.¹⁶⁰ Likewise, in addition to the 2,200 annual deaths from alcohol poisoning, alcohol is responsible for over 80,000 deaths in the U.S. every year due to violence, DUIs, and alcohol-

¹⁵⁶ https://www.nh.gov/liquor/about_commission.shtml (“New Hampshire is one of 18 control states in the nation where the government directly controls the distribution and regulation of alcoholic beverages.”); *see also* Bonnie and Whitebread, *supra* note 37 at 7 (“Alcohol, of course, had been around from the beginning. When the Puritans set sail for Massachusetts, they had brought with them 42 tons of beer and 10,000 gallons of wine.”).

¹⁵⁷ DAVID NUTT, *DRINK? The New Science of Alcohol and Your Health* vii (2020)

¹⁵⁸ Liquor Commission, https://www.nh.gov/liquor/about_commission.shtml [<https://perma.cc/H28B-NKHL>]. (“The New Hampshire Liquor Commission (NHLC) welcomes more than 12 million customers to its NH Liquor & Wine Outlet locations each year and works with thousands of on- and off-premise licensees, brokers, suppliers and business partners in its role to regulate the sale of alcohol in the State of New Hampshire.”).

¹⁵⁹ *See* Haughwout & Slater, *supra* note 26 at 40.

¹⁶⁰ *Id.*

induced health problems.¹⁶¹ Although it is rare, even caffeine can be fatal; there are ninety-two reported cases of people overdosing on caffeine.¹⁶² There are zero reported cases of marijuana overdoses, by contrast.¹⁶³ Although marijuana use still causes accidental deaths, such as car accidents, there is little evidence that marijuana is linked to major health problems such as cancer.¹⁶⁴

New Hampshire, like every other state in the country, also allows for cough syrup and prescription painkillers, which are more addictive, and more deadly, than marijuana.¹⁶⁵ Although they are controlled substances, cough syrup and prescription painkillers are categorized federally as Schedule III/V and II, respectively, making them more accessible than marijuana.¹⁶⁶

Speaking of manifestly “harder” drugs, as we forecasted in the introduction, the New Hampshire Supreme Court approved the use of the psychoactive drug, psilocybin, for religious purposes. In its 2020 decision, *State v. Mack*,¹⁶⁷ the court held that unless the State can overcome strict scrutiny, there is a constitutional right under the New Hampshire Constitution to use psilocybin, a Schedule I drug, for “sincere religious practice.”¹⁶⁸ On the other side of the spectrum, drugs we have traditionally viewed as not “hard” at all, are freely available. It is now

¹⁶¹ *Id.*; CDC, *Alcohol Poisoning Deaths* (Jan. 2015), <https://www.cdc.gov/vitalsigns/alcohol-poisoning-deaths/index.html> [<https://perma.cc/BC7C-ZHKL>].

¹⁶² Katherine Marengo & Claire Sissons, *Can You Overdose on Caffeine*, MEDICAL NEWS TODAY (Jan. 16, 2016), <https://www.medicalnewstoday.com/articles/322933#how-likely-is-an-overdose> [<https://perma.cc/B6XQ-GRT3>].

¹⁶³ German Lopez, *Marijuana is a Relatively Safe Drug—With Some Risks*, VOX (Nov. 14, 2018, 4:14 PM), <https://www.vox.com/identities/2018/8/20/17938380/marijuana-legalization-health-safety-risks-addiction> [<https://perma.cc/FK7U-3E4B>].

¹⁶⁴ *Id.*

¹⁶⁵ See American Addiction Centers, *Dextromethorphan/DXM Overdose: Dangers of Abusing Cough Medicine* (July 21, 2021), <https://americanaddictioncenters.org/dextromethorphan-dxm> [<https://perma.cc/K65Y-ZMEG>].

Jacqueline Muhammed, *Physician Claims Prescription Drugs Worse than Marijuana*, ILLINOIS TIMES (May 16, 2013), <https://www.illinoistimes.com/springfield/physician-claims-prescription-drugs-worse-than-marijuana/Content?oid=11450770> [<https://perma.cc/B4W3-Q3CH>].

¹⁶⁶ See DEA, “Drug Scheduling”, available at <https://www.dea.gov/drug-information/drug-scheduling> [<https://perma.cc/MNK9-87DC>].

¹⁶⁷ 249 A.3d 423 (2020).

¹⁶⁸ *Id.* at 440, 442–43.

widely accepted, for instance, that sugar and sugar-infused fast food are just as addictive and harmful as illegal drugs.¹⁶⁹ Not only is sugar addictive, but it is also responsible for about 180,000 deaths worldwide every year.¹⁷⁰ Likewise, fast food interacts with the brain faster than tobacco or other drugs.¹⁷¹ Worldwide, unhealthy eating is linked to 11 million deaths annually and is the leading risk factor for death in a majority of countries, causing more deaths annually than tobacco.¹⁷² Indeed, famed food journalist, Mark Bittman, claims that the market for food has become a matter of “national security”, writing:

[A]s agriculture and food processing became industries, they developed a third type of “food,” more akin to poison—“a substance that is capable of causing illness or death.” These engineered edible substances, barely recognizable as products of the earth, are commonly called “junk.”

Junk has hijacked our diets and created a public health crisis that diminishes the lives of perhaps half of all humans. . . . Yet it remains not only underregulated but subsidized by the governments of most countries.¹⁷³

Yet no one could contest the ways in which people, including those in New Hampshire, “junk” themselves to death (hence the concern of our fictional AOC). And this is also while citizens (including children) continue to scramble their minds staring into hand-held devices that use

¹⁶⁹ See Anahad O’Connor, *This is Your Brain on Junk Food*, NYT (Apr. 7, 2021), <https://www.nytimes.com/2021/03/25/well/eat/hooked-junk-food.html> [<https://perma.cc/4ERT-MU7Z>]; Brian Kraus, *Sugar is a “Drug” and Here’s How We’re Hooked*, HEALTHLINE (Sept. 18, 2013), <https://www.healthline.com/health-news/addiction-sugar-acts-like-drug-in-the-brain-and-could-lead-to-addiction> [<https://perma.cc/PR7N-9V85>].

¹⁷⁰ Kraus, *supra* note 170.

¹⁷¹ O’Connor, *supra* note 170.

¹⁷² Allison Aubrey, *Bad Diets Are Responsible for More Deaths Than Smoking, Global Study Finds*, NPR (Apr. 3, 2019), <https://www.npr.org/sections/thesalt/2019/04/03/709507504/bad-diets-are-responsible-for-more-deaths-than-smoking-global-study-finds> [<https://perma.cc/Z6F3-F3C2>].

¹⁷³ MARK BITTMAN, ANIMAL, VEGETABLE, JUNK: A HISTORY OF FOOD, FROM SUSTAINABLE TO SUICIDAL xiii (2021); see also Michelle Perro, MD and Vincanne Adams, Ph.D., WHAT’S MAKING OUR CHILDREN SICK? HOW INDUSTRIAL FOOD IS CAUSING AN EPIDEMIC OF CHRONIC ILLNESS, AND WHAT PARENTS (AND DOCTORS) CAN DO ABOUT IT ix (2017) (“In this book, we argue that a new generation of kids with chronic, hard-to-diagnose, hard-to-treat health problems is getting sick because of chronic exposure to poisons in the environment, and specifically from foods.”).

algorithms to suck away their attention and encourage them to buy goods and services, and give up, for free, rights to privacy around their thoughts and identities that they may never recover.¹⁷⁴

An even more salient form of self-harm has received explicit protection under newly enacted law. On the ground of bodily autonomy, New Hampshire's governor just signed a law that vests anti-vaxxers with additional protections against mandates that would require them to protect themselves and others from the spread of COVID-19 and its Delta variant.¹⁷⁵ In New Hampshire, citizens thus have a bolstered right to harm themselves by getting infected with a disease that has killed 840,000 Americans to date.¹⁷⁶ New Hampshire's chief law enforcement officer has even entered a lawsuit to ensure that its citizens are not required to become vaccinated against this disease in the interests of their bodily freedom and autonomy.¹⁷⁷

Perhaps it is also important to wonder about the state government's standing to enforce marijuana prohibition, more generally, given what it invests in protecting human life. After all, if New Hampshire is to be credited with caring deeply about the health and welfare of its citizens, deeply enough, that is, to justify the arrest, conviction, or imprisonment of people for conduct like ingesting marijuana on grounds that the drug is harmful to health (and so, life), New Hampshire would have to confront its failure to invest in life-saving legal mandates, including systems of mandatory response to child abuse and neglect.¹⁷⁸ New Hampshire's record in this

¹⁷⁴ See Sara Morrison, *Why You Should Care About Data Privacy Even if you "Have Nothing to Hide"*, VOX (Jan. 28, 2021, 1:10 PM), <https://www.vox.com/recode/22250897/facebook-data-privacy-collection-algorithms-extremism>, [<https://perma.cc/ATQ9-YRC7>]; Dionysios Demetis, *Algorithms Have Already Taken Over Human Decision Making*, THE CONVERSATION (Mar. 8, 2019, 7:51 AM), <https://theconversation.com/algorithms-have-already-taken-over-human-decision-making-111436> [<https://perma.cc/LPX9-FJU3>].

¹⁷⁵ Josh Rogers, N.H. Joins Lawsuit Against the Federal Government over Contractor Vaccine Mandate, NHPR (Oct. 29, 2021), <https://www.nhpr.org/nh-news/2021-10-29/n-h-joins-lawsuit-against-the-federal-government-over-contractor-vaccine-mandate> [<https://perma.cc/PK5E-PD94>].

¹⁷⁶ See CDC, Covid Data Tracker Weekly Review (Jan. 14, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> [<https://perma.cc/J9MS-FVR6>].

¹⁷⁷ *Id.*

¹⁷⁸ Holly Ramer, *Court Rejects Lawsuit Challenging Child Protection System*, ASSOCIATED PRESS (July 20, 2021), <https://apnews.com/article/courts-lawsuits-84a9004dcc68b0322c643cabebba83af> [<https://perma.cc/7XUU-EQYN>].

regard is atrocious.¹⁷⁹ Indeed, recent stories suggest that New Hampshire’s lack of commitment to funding law enforcement, illustrated by the crumbling human resource infrastructure of its county-based prosecution model, reveals substantial ambivalence about the value of justice in New Hampshire at the most basic levels, whether with regard to marijuana or other crimes.¹⁸⁰ It is with these observations in mind that we begin to explore the concept of reason and rationality as it relates to rational basis review, one prism through which the judicial branch performs the function of superintending the prosecution of marijuana prohibition in New Hampshire.

IV. If Reason and Rationality Is Truly the Standard. . . ?

A. How would we look to Spock?

¹⁷⁹ Michael S. Lewis, *Lewis: Why We Can’t Wait to Address NH’s Child Abuse and Neglect Crises*, NEW HAMPSHIRE BAR NEWS (May 7, 2019), <https://www.nhbr.com/lewis-why-we-cant-wait-to-address-nhs-child-abuse-and-neglect-crisis/>; <https://www.nhbr.com/the-greatest-civil-rights-crisis-in-nh-history/> [<https://perma.cc/XB72-CQ8L>]; Michael S. Lewis, *Answering Alternative Facts on Child Protection*, NEW HAMPSHIRE BAR NEWS (Oct. 13, 2018), <https://www.concordmonitor.com/Alternative-facts-on-child-protection-20888403> [<https://perma.cc/V4ZD-QQMF>]; see, e.g., Kerry Kavanaugh, *25 Investigates: NH DCYF Launches Internal Investigation into Harmony Montgomery Case*, BOSTON 25 NEWS (Jan. 3, 2022, 4:14 P.M.), <https://www.boston25news.com/news/local/25-investigates-nh-dcyf-launches-internal-investigation-into-harmony-montgomery-case/6XFKXI3GS5ENDO7X6I2IZBEHXU/> [<https://perma.cc/ATS5-SC37>] (discussing a 5-year old girl under the care of the New Hampshire Division for Children, Youth, and Families (DCYF) who was not reported missing for over two years)

¹⁸⁰ See Amy Covenor, *As Backlog Builds in New Hampshire Courts, Fewer Prosecutors, Defense Attorneys Available*, WMUR (Oct. 27, 2021), <https://www.wmur.com/article/court-backlog-new-hampshire-prosecutors-defense-attorneys/38084225> [<https://perma.cc/PW4W-5SFS>] (“Thousands of criminal cases are on hold across New Hampshire because there are no defense attorneys who can take them, while county prosecutors are sounding the alarm about crushing caseloads and significant staffing shortages.”); cf. Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 14 (1999) (“...Americans seem easily to forget that individual rights and freedoms depend fundamentally on vigorous state action.”) Yet top officials, oblivious to the conflict between their alleged public safety goals and their failure to fund a system to pursue these goals, continue to call upon the system to respond with criminal enforcement resources, adding demands to a failing law enforcement regime. See Kevin Landrigan, *State eyeing threat of pot laced with fentanyl*, UNION LEADER (Nov. 25, 2021), https://www.unionleader.com/news/politics/state-eyeing-threat-of-pot-laced-with-fentanyl/article_a84c5f3f-24b5-58e4-b19e-5fb57adf02c1.html?block_id=868819 [<https://perma.cc/NM3X-7MGP>] (“The state Executive Council will consider recommending the Legislature stiffen criminal penalties for drug dealers who are selling marijuana laced with fentanyl.”); see also Mark Hayward, *City Matters Will a Manchester rape trial start 4 years after arrest? The victim doesn’t expect it to*, UNION LEADER (Nov. 28, 2021), https://www.unionleader.com/voices/city_matters/city-matters-will-a-manchester-rape-trial-start-4-years-after-arrest-the-victim-doesnt/article_707cd66a-fc04-5069-b68b-b7b49284c511.html [<https://perma.cc/7XB8-74AU>] (describing how a sexual assault prosecution “landed in the mire and muck of the Hillsborough County justice system,” where it remains pending, unresolved, and weakened because of the lapse of time).

Imagine that we crest 2022 and New Hampshire still engages in the same policies of prohibition that it has as of the date of this symposium. Granite Staters wake up one morning to news that a UFO has entered the atmosphere above Lake Winnepesaukee and humanoids with pointy ears have dropped down upon our docks to make contact with our species.¹⁸¹ They are a supremely honorable species with an intergalactic, anthropological bent of the most ecumenical and pluralistic sort. As a result, they want to learn about us and to teach us about them. They have no other purpose than to understand the ways of other sentient beings in our universe, and humans in particular. They are able to bridge all language and communication divides, as an outcome of their accelerated and advanced capacities, technological and otherwise (after all . . . they reached earth from the Planet Vulcan).¹⁸²

As the months pass and they gain greater access to our societies, they come to understand that humans claim to order their societies around a virtue they call “justice.” They seek to understand all of the various ways in which humans seek to achieve justice in modern times. In studying the United States, they learn about our system of laws, about the concept of law itself, and the various ways in which human behavior is regulated by what we call law. Solicitous of the good opinion of this honorable species, the Chief Justice of New Hampshire, the top official in New Hampshire’s judiciary, invites one alien humanoid to observe a busy day of oral arguments, to watch one venue in which human disputes are resolved through justice systems governed by law.

¹⁸¹ Cf. Star Trek, *Vulcans*, https://www.startrek.com/database_article/vulcans [<https://perma.cc/RPD5-BK6N>] (“A humanoid race, with copper-based blood, slightly green-tinted complexion and notably pointed ears, they are responsible in a large part for the founding of the Federation. Over the centuries, Vulcans have developed a culture dedicated to the complete mastery of logic, learning to suppress their once-violent emotions in nearly every aspect of their existence.”).

¹⁸² Cf. Memory Alpha, *Vulcan*, <https://memory-alpha.fandom.com/wiki/Vulcan> [<https://perma.cc/L3MS-JWVS>] (They were widely renowned for their strict adherence to logic and reason as well as their remarkable stoicism.”).

The second case on the docket is a case formulated by an intrepid and courageous lawyer whose client has been convicted of possessing marijuana. The lawyer has challenged her client's conviction under New Hampshire law on the ground that the criminal prohibition of marijuana does not pass rational basis review. The Chief Justice has the privilege of asking the first series of questions of this attorney and he does: "Can we really strike this law down on rational basis review? Are we, as judges, empowered to do anything other than force you, the criminal defendant, to eliminate any and all conceivable justification for the law you claim is unconstitutional?"

The argument focuses on whether the law can be justified on any conceivable ground, including grounds that were not, in fact, the grounds supporting the passage of law. Whenever the attorney tries to raise new information about the wisdom or harm of the policy, or to engage in arguments that demonstrate that the overwhelming balance of benefits and harms demonstrates that it is not rational, she is rebuffed by justices who claim that it is not their job to assess the justice of the policy in the balance.¹⁸³

The day having concluded, the Chief Justice invites the humanoid into his chambers for a confidential discussion about the day. The humanoid, curious about the way in which the Chief Justice has conceptualized "rational basis review," asks for an explanation of the concept, which the Chief Justice provides in standard form.¹⁸⁴ Courts declare laws unconstitutional using different standards of judicial review in order to balance legislative authority and individual rights.¹⁸⁵ Rational basis review is the default standard of review.¹⁸⁶ Under rational basis review,

¹⁸³ Cf. RONALD DWORKIN, *JUSTICE IN ROBES 1* (2006) (including famous anecdote of a conversation between Justice Holmes and Judge Hand in which the Justice said that justice was not his job).

¹⁸⁴ See *infra*.

¹⁸⁵ *Heller v. Doe*, 509 U.S. 312, 319–20; *FCC v. Beach Commc'ns*, 508 U.S. 301, 314–16. 321, 333–34; see Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 *GEO. J. L. & PUB. POL'Y* 404 (2016).

¹⁸⁶ See Chemerinsky, *supra* note 186 at 401 403–04, 411.

the law will be upheld if there is a (or any) legitimate government interest and the law is rationally related to that interest.¹⁸⁷

The humanoid nods because the framework appears familiar in important ways. To a species that prizes logic and reason, a rationality test that assesses the rationality of a goal asks 1) whether the goal itself is justified or true and 2) whether the steps taken toward that goal are steps one would or should expect to produce that goal is a framework in line with the concept of rationality.¹⁸⁸ For the humanoid, his attachment to rationality and reason is at least as strong as the most forceful human advocates of rationality and reason would describe. Perhaps it is even true that, for him, as for others attached to rationality:

Reason is nonnegotiable. As soon as you show up to discuss the question of what we should live for (or any other question), as long as you insist that your answers, whatever they are, are reasonable or justified or true and therefore other people ought to believe them too, then you have committed yourself to reason, and to holding your beliefs to objective standards.¹⁸⁹

The humanoid thus wonders at the undifferentiated, perhaps casual, perhaps lazy, perhaps indifferent, application of judicial deference to legislative judgment implied by the Chief Justice's question to the defense attorney, given the august and solemn bearing of the judges, and the proceedings, and his own sense of the importance of reason to such office and functions. He

¹⁸⁷ *Id.* at 402.

¹⁸⁸ See, e.g., IMMANUEL KANT, *CRITIQUE OF PURE REASON* vii (2003 ed. Meikeljohn Trans.) (“Human reason . . . begins with principles, which cannot be dispensed with in the field of experience, and the truth and sufficiency of which are, at the same time, insured by experience.”); see also Gary Gensler, *Introduction to Logic* 3 (3d ed. 2017) (“When we try to prove a conclusion, we try to give a *sound* argument: valid and true premises. With these two things, we have a sound argument and our conclusion has to be true.”).

¹⁸⁹ STEVEN PINKER, *ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM AND PROGRESS* 8 (2018). *But see* STEPHEN ERIC BONNER, *CRITICAL THEORY: A VERY SHORT INTRODUCTION* 1 (2017 ed.) (Philosophy has evidenced a subversive element from its inception. Plato's *Apology* tells how Socrates was condemned by the Athenian citizenry for corrupting the morals of the young and doubting the gods. There was some truth to that complaint. He subjected long-standing beliefs to rational scrutiny and speculated about concerns that projected beyond the existing order.”).

asks if a standard identified with reason and logic could ever be so passive,¹⁹⁰ given all that humans tend to say about the virtues of justice, and given what the Chief Justice has told him about stakes for someone facing criminal sanctions. He asks the Chief Justice if he is willing to set up an appointment two weeks hence, permitting the humanoid to come up to speed on the subject of “rational basis review.” Upon leaving, the Chief Justice suggests that the humanoid might read the briefs of the parties to the case, which the Chief Justice believes would supply the humanoid with a good primer on the law.

The humanoid does this. Having read all of the decisions describing “rational basis review,” one stood out: *Massachusetts v. U.S. Department of Health and Human Services*.¹⁹¹ The case involved a constitutional challenge to Section Three of the Defense of Marriage Act.¹⁹² DOMA, the humanoid learned, was a much-reviled law that prevented otherwise blameless humans from benefits conferred on other humans by virtue of endearments the humanoid found otherwise entirely unexceptional. The opinion’s author, Judge Michael Boudin, we’ve mentioned before, was a particularly well-respected appellate judge, whose background was not in the area of civil rights, but in antitrust law, a field grounded so much more in the sort of quantitative reasoning familiar to the humanoid. The area of law at issue also had a history rooted in reason and logic. The litigants were seeking equal protection of law under the Fourteenth Amendment.¹⁹³ The standard articulation of equal protection bears a genealogic relationship to the philosopher Aristotle’s formulation of justice: that similarly situated humans be treated similarly. The humanoid learned that Aristotle is also largely credited with

¹⁹⁰ Cf. *Carrigan v. N.H. D.H.H.S.*, No. 2020-0518, slip. op. at 6–10 (N.H. July 2, 2021) (holding that the state judicial branch is not capable of assessing the legality of the state’s approach to spending on a mandated response system to reported instances of child abuse and neglect).

¹⁹¹ 682 F.3d 1 (1st Cir. 2012).

¹⁹² *Id.* at 5.

¹⁹³ *Id.* at 7.

discovering and institutionalizing logic as an academic subject for his human philosopher-descendants.¹⁹⁴

Yet Boudin's decision immediately reveals that equal protection principles, oddly, block the judge from any real active participation in bringing logic and reason to bear in determining the rationality of a given law. Any reason will do and even contradiction and inconsistency is tolerated by the rational basis review test Boudin identifies. As if to emphasize the point, Boudin tracks the history of this approach to a decision, *Buck v. Bell*,¹⁹⁵ in which the highest Court in the nation stood to the side and allowed a state to mutilate a person, forever preventing that person from reproducing, following a theory that the humanoid could only describe, in his own conceptualization, as a sort of barbaric and enthusiastic cruelty.¹⁹⁶ The author of that opinion, a famous judge in his own right, had even gained worldwide fame by rejecting the connection between logic and justice according to the law.¹⁹⁷

To the humanoid, it appeared as if Boudin reasoned his way out of the bind *Buck v. Bell* put him in, and did so in a manner reflecting a greater level of thought (to say nothing of virtue) than what traditional rational basis review would permit.¹⁹⁸ Switching to a different form of logic, inductive reasoning,¹⁹⁹ Boudin identified a subspecies of cases that he used to formulate a standard of judicial review that would not permit people subject to the law to suffer the gleeful

¹⁹⁴ Bertrand Russell, *The History of Philosophy 195–202* (1945) (describing Aristotle's contributions to logic).

¹⁹⁵ 274 U.S. 200 (1927).

¹⁹⁶ See Michael S. Lewis, *Pervasive Infancy: Reassessing the Contract Capacity of Adults in Modern America*, 19 U.N.H. L. Rev. 69, 95–96 (2020) (suggesting that the decision is psychopathic); see also Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart* 48 (2021) (“The law can become grotesque in the hands of such a person.”).

¹⁹⁷ See OLIVER WENDELL HOLMES, *THE COMMON LAW* (xxx) (“The life of the law has not been logic: it has been experience.”)

¹⁹⁸ Cf. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 247 (2007 3d ed.) (describing an alternative approach to judging in which courts approached judicial decision-making by pursuing a methodology rationally consistent with itself and with the contemporary demands of justice in a changing (if not evolving) society).

¹⁹⁹ Gensler, *supra* note 189 at 76 (“Much of our reasoning deals with probabilities. We observe patterns and conclude that, based on these, such and such a belief is *probably* true. This is inductive reasoning.”).

judicial indifference exhibited by the tradition of so-called rational basis review harkening to *Buck v. Bell*. These cases were ones in which Boudin determined that policies inflicting cruelty upon people could be “scrutinize[d] with care.”²⁰⁰

The humanoid found this much more appealing than the refusal to reason that seemed to characterize the alternative approach to rational basis review. And so, the humanoid could return to the Chief Justice with an alternative in hand and propose “scrutiny with care,” as at least one possibility for resolving the case he had seen argued on the first day he attended proceedings before New Hampshire’s courts of justice. With the eyes of a new, supremely rational, honorable species upon this state, should the Chief Justice adopt this standard with respect to marijuana?

B. Is Rational Basis Review Really Irrational Rational Basis Review Disguised when It Comes to Marijuana?

The Chief Justice would, of course, reveal to the humanoid that the caselaw deck has already been loaded in the other direction. In *United States v. Pickard*,²⁰¹ criminal defendants before a federal district court in California challenged the constitutionality of the Controlled Substances Act, to the extent it included marijuana as a Schedule 1 substance, prohibited by federal law under all circumstances.²⁰² The case involved sixteen individuals indicted for conspiracy to manufacture 1,000 marijuana plants.²⁰³ The defendants moved to dismiss the indictments, alleging that they were denied the defendants’ equal protection of the laws.²⁰⁴

The court’s resolution of this challenge in favor of the prosecutors begins almost apologetically. Indeed, the court felt the need to confirm that it approached the matter with an

²⁰⁰ 682 F.3d at 12.

²⁰¹ 100 F. Supp. 3d 981 (E.D. Cal. 2015).

²⁰² *Id.* at 988.

²⁰³ *Id.* at 988–89.

²⁰⁴ *Id.* at 989.

“open mind,” a first indication that, perhaps, the litigants were not so lucky with this particular judge.²⁰⁵ Nevertheless, having confirmed what all litigants are entitled as a right, the court observed, “At some point, in some court, the record may support granting [the defendants’] motion. But having carefully considered the facts and the law as relevant to this case, the court concludes that on the record in this case, this is not the court and this is not the time.”²⁰⁶

In the case, expert medical doctors testified, and were unrebutted, that cannabis had a positive medical impact, and is even an important palliative for patients suffering from diseases like ALS, HIV, and even PTSD.²⁰⁷ The government presented a psychologist who testified to impacts on state of mind, such as drops in IQ, that the defendants’ medical experts contested.²⁰⁸ Witnesses suffering from diseases testified to the palliative and therapeutic benefits of cannabis based on their own experiences.²⁰⁹ In applying rational basis review, the court looked for some “conceivable reason” to uphold the law, applying a “strong presumption of validity.” On the record, the court indicated that all of the facts were contested among and between the parties, including whether marijuana is harmful and whether it can be beneficial.²¹⁰ The court then concluded, because of the “serious, principled differences between and among prominent, well-informed, equivalently credible experts,” criminal prohibition must be sustained.²¹¹

Despite the stakes for defendants, the court refused to engage in a measurement of costs and benefits in degrees. The court also did not consider the effectuality of the government’s means, whether as a wholesale point, or as a matter of proportionality, given the harm. And the court did not look at harms and benefits in the context of other activities that are deemed legal

²⁰⁵ *Id.* at 988.

²⁰⁶ *Id.* at 988.

²⁰⁷ *Id.* at 999.

²⁰⁸ *Id.* at 1001.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1006–08.

²¹¹ *Id.*

that may cause more harm with fewer benefits and carry no criminal penalty. In New Hampshire, such conduct now includes the use of hallucinogens, which the New Hampshire Supreme Court protects as a matter of religious practice, where the irreligious or the watered-down spiritualists among us, face criminal sanctions for using marijuana and experiencing a mild high. Regardless, the absence of the sort of analysis that considers other substances and activities is a far cry from an examination under a standard of rationality that identifies and rebuts the strengths and weaknesses of claims offered to support policies that permit the state to criminalize and incarcerate people.²¹²

Perhaps the briefing parties are to blame. Perhaps they were dissuaded from making such a presentation by precedent suggesting that a more fulsome rational examination would be rejected. We do not see what the court conducted as “scrutiny with care.” It is better described as a sort of more expedient abnegation.²¹³ And that is a disappointment, given the potentiality of the judiciary to serve as a platform for rational refutation through an evidence-based process designed to produce rational outcomes, generally, and to weed out outcomes based on passion and prejudice, as a byproduct.²¹⁴ It does not reflect an attachment to a strengthening of faculties, both personal and public, that we associate with good health or strength.²¹⁵

²¹² See Pinker, *Rationality*, *supra* note 39 at 74 (describing rationality as a logical process of eliminating fallacies for the purpose of advancing goals).

²¹³ *Cf. Fulton v. Philadelphia*, 593 U.S. ___, slip. op. at 1–2 (2021) (Barrett, J. concurring) (expressing frustration with the standard, rote categories of constitutional review).

²¹⁴ See, e.g., Fed. R. Evid. 401, 402 and 403 (rules governing rational inquiry and the elimination of prejudicial evidence); see also Ward Farnsworth, *The Socratic Method* vii (2021) (“The Socratic method is a style of thought. It is a help toward intelligence and an antidote to stupidity...It is an approach about *asking* hard questions and chasing after them.”); *id.* (“Cross-examination ... allows witnesses to be probed, their weaknesses shown, their secrets found out. These properties make it a superb device for testing the truth and beliefs of a witness or of anyone else.”).

²¹⁵ *Cf. id.* at 42 (Rational inquiry is difficult. “[I]n fact it’s often good for you just to the extent it’s uncomfortable. That is why nothing more common than intellectual obesity.”).

Would we, in New Hampshire, feel satisfied with such an analysis from our judicial branch? We the authors would only be satisfied if the standard of review was renamed “extreme deference to the legislative branch as it permits harm to citizens who are engaging in activities that are no more harmful than much more harmful activities the legislature promotes and even encourages.” While people may drink to excess, carry and deploy guns, eat themselves to obesity, and wash it down with dangerous and addictive sugar water, our fellow New Hampshire friends, neighbors, and even family may still be punished and branded criminals for smoking a drug that neighboring states imbibe without manifesting a major threat to civilization. That, we believe, is not at all a review that assesses the rationality of a policy.²¹⁶ An actual rational basis review would not permit marijuana prohibition to survive a constitutional challenge in New Hampshire. It would not permit it to survive because the goals prohibition embraces — public health at the expense of liberty — are not truly embraced in light of what is otherwise allowed in New Hampshire, and because the ends used to achieve those goals are demonstrably ineffective and destructive.

What, then, can we say about rational basis review and the criminal prohibition against marijuana as a doctrinal matter? Perhaps, most potently, that rational basis review, to the extent it has ebbed and flowed as a matter of practical force, should become less patient with failed policies the longer they are proven to have failed, and the greater the impact they have on the lives and futures of citizens.²¹⁷ It is one thing to permit policy the possibility of getting off of the

²¹⁶ See, e.g., C.D.C. Reeve, *PHILOSOPHER KINGS: THE ARGUMENT OF PLATO’S REPUBLIC* 37 (2006 ed.) (“A philosopher is ruled by the desires in reason. He most wants the pleasure of learning the truth. Hence under optimal conditions he will come to understand the world as it really is. He identifies justice with justice itself, a property of psyches, and happiness with happiness itself, the stable acquisition of as much of the pleasure of learning and knowing the truth as possible throughout life.”).

²¹⁷ Cf. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1986) (adopting a due process standard that considers the life and liberty interests of the litigant from a due process standpoint and the government’s interest in the goals it seeks to achieve despite those interests); see also *State v. LaPlace*, 162 N.H. 174 (2011) (recognizing a liberty interest when

ground, but with a manifestly failed policy like marijuana prohibition, one even deployed as a political weapon according to its supporters, where citizens are branded criminals for having partaken, reason, at least, should be made of tougher stuff.

We argue that where what is at stake is a consciousness-altering experience, New Hampshire should be less solicitous of the use of criminal law to punish citizens, where those who practice religion are granted exemptions for their own mind-altering practices. To withhold experiences from the remainder of the population is to engage in irrational and unsupported preference-granting between citizens whose claims to freedom of conscience are equally strong. Perhaps rational basis review should also ask questions such as, “Are we being foolish here, or even racist, when it comes to the lives of our fellow citizens? Will we look absurd to future generations who will judge us as simply unjust, or even cruel or brutal?” As it stands, the test, if applied thoughtlessly, would never be something we’d imagine Spock would find acceptable. We should aspire to that viewpoint, not distance ourselves from it.

CONCLUSION

We agree with the statement that “[a] well-functioning republic makes decisions . . . by an open process of rational deliberation. It asks the obvious questions: What are we doing? Why are we doing it? What is the human and financial cost? What are the benefits? How and when does it end?”²¹⁸ Since we doubt that courts will show courage sufficient to apply “reason” and ask these questions with regard to their application of rational basis review, we doubt that

the state seeks incarceration as a remedy against a person and deploying a balancing test to invalidate the outcome of a sentencing proceeding); *see also* Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. Law Rev. 975, 1053–57 (2017) (tracking the history of rational basis review and arguing that rational basis review often paves the way, doctrinally, toward developments in the law that, after years of injustice and harmful, discriminatory policy, permit results that protect individuals from suffering further harm.)

²¹⁸ Fintan O’Toole, *The Lie of Nation Building*, NY REVIEW OF BOOKS at 17 (Oct. 7, 2021).

the test, itself, is actually rational basis review. It is, rather, some other sort of test, and one that cannot and should not lay claim to the honored place reserved for reason in the public venue.

We are believers in the notion that laws should be good and should, at least, do greater good than lesser harm. Where criminal law is so irrationally inflicted in this state, as it is with respect to marijuana, rational basis review, if it is to be a test with integrity, should demand a much more fulsome consideration of marijuana policy than standard applications might suggest. But if courts are to maintain an attachment to justice, then subjecting marijuana policy to a real rational assessment is better for the law, and better for the intelligibility of the concept of reason, than an alternative approach, which permits unreason to dress as reason and to harm citizens, profoundly, in the process.