

Illegal Drug and Marijuana Law

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To my mother, Sonia Spindt, for always being there for me.

Contents

Table of Cases	xix
Preface	xxv
Acknowledgments	xxix
Introduction	xxxv
Chapter 1 • Drugs and Drug Use	3
A. What Is a Drug?	3
Drug Abuse in America: Problem in Perspective, Second Report <i>National Commission on Marijuana and Drug Abuse</i>	4
B. Perspectives on Substance Use, Abuse and Addiction	7
John Barleycorn	
<i>Jack London</i>	8
The Ethics of Wine Drinking and Tobacco Smoking	
<i>Leo Tolstoy</i>	10
PiHKAL: A Chemical Love Story	
<i>Alexander Shulgin and Ann Shulgin</i>	14
Caring for Ms. L—Overcoming My Fear of Treating Opioid Use Disorder	
<i>Audrey M. Provenzano, M.D., M.P.H.</i>	15
Facing Addiction in America: The Surgeon General’s Report on Alcohol, Drugs, and Health	
<i>U.S. Department of Health and Human Services, Office of the Surgeon General</i>	18
Chapter 2 • Perspectives on Prohibition and Its Alternatives	21
A. Is Drug Criminalization Just?	22
<i>Wisconsin v. Hoseman</i>	22
On Liberty	
<i>John Stuart Mill</i>	27
The Collapse of the Harm Principle	
<i>Barnard E. Harcourt</i>	31
Illicit Drugs: A Test of Joel Feinberg’s <i>The Moral Limits of the Criminal Law</i>	
<i>Douglas Husak</i>	41

	<i>Ah Lim v. The Territory of Washington</i>	50
B.	Does Drug Criminalization Work?	55
1.	Debating the Costs and Benefits of Prohibition	55
	Drug Prohibition in the United States: Costs, Consequences, and Alternatives	
	<i>Ethan A. Nadelmann</i>	56
	Against the Legalization of Drugs	
	<i>James Q. Wilson</i>	67
	Drug Legalization: The Importance of Asking the Right Question	
	<i>Mark A.R. Kleiman and Aaron J. Saiger</i>	76
2.	Alternatives to Prohibition	83
a.	Decriminalization	84
	The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?	
	<i>Alex Kreit</i>	84
b.	Heroin-Assisted Treatment and Supervised Injection Facilities	94
	Can Heroin Maintenance Help Baltimore?	
	<i>Peter Reuter</i>	95
C.	The Opioid Crisis	99
	Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited	
	<i>Leo Beletsky and Corey S. Davis</i>	99
	The Opioid Epidemic: Fixing a Broken Pharmaceutical Market	
	<i>Ameet Sarpatwari, Michael S. Sinha, and Aaron S. Kesselheim</i>	104
D.	The War on Drugs	110
	Drug Truce	
	<i>Alex Kreit</i>	110
E.	Race, Class, and the Drug War	117
	Race, Drugs, and Law Enforcement in the United States	
	<i>Jamie Fellner</i>	118
	The Pathological Politics of Criminal Law	
	<i>William J. Stuntz</i>	124
	The New Jim Crow	
	<i>Michelle Alexander</i>	127
	Chapter 3 • Drug Crimes	133
A.	Drug Possession	133
1.	An Introduction to Drug Possession	134
	<i>Hawaii v. Hogue</i>	135
2.	Possession for Disposal	142

a. Overview	142
<i>Stanton v. Florida</i>	143
b. Length of Possession	144
<i>California v. Martin</i>	145
<i>Utah v. Miller</i>	152
c. What Qualifies as Disposal?	156
<i>Adams v. Alaska</i>	157
3. Constructive Possession	161
a. Introduction to Constructive Possession	161
b. Constructive Possession in Vehicles	162
<i>Regan v. Wyoming</i>	162
<i>Rivas v. United States</i>	167
c. Constructive Possession in Open-Air Drug Markets	181
<i>Bullock v. United States</i>	181
d. Constructive Possession by Go-Betweens	186
<i>United States v. Manzella</i>	186
4. When Does a Drug Buyer Acquire Possession?	189
<i>Epps v. Georgia</i>	189
<i>United States v. Kitchen</i>	191
B. Trafficking Offenses	198
1. Distribution and Possession with the Intent to Distribute	198
a. Proving an Intent to Distribute	198
<i>California v. Peck</i>	199
<i>Missouri v. McLeod</i>	200
<i>United States v. Hunt</i>	205
b. Is Sharing between Users Distribution?	211
<i>New Jersey v. Morrison</i>	211
<i>United States v. Wallace</i>	217
2. Manufacture	221
a. Manufacture of Naturally Occurring Substances	222
<i>North Carolina v. Childers</i>	222
<i>New Mexico v. Pratt</i>	224
b. Proof of Manufacture	227
<i>Saul v. Arkansas</i>	227
3. Accomplice Liability and Conspiracy	230
a. Drug Conspiracies and Minimally Involved Participants	231
<i>United States v. Brigham</i>	231
<i>United States v. Anaya</i>	237
Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines	
<i>Myrna S. Reader</i>	241

b. Recommending a Source from Which to Buy Drugs	243
<i>United States v. Tyler</i>	243
c. When Do Purchasers Become Co-Conspirators with Sellers?	247
<i>United States v. Colon</i>	247
<i>United States v. Caldwell</i>	252
4. Continuing Criminal Enterprise and “Drug Kingpin” Laws	259
<i>United States v. Witek</i>	260
<i>New Jersey v. Alexander</i>	264
C. <i>Mens Rea</i> : Knowledge in Drug Offenses	272
1. Knowledge of Drug Type and Quantity	272
<i>United States v. Jefferson</i>	273
2. Willful Blindness	279
<i>United States v. Heredia</i>	280
3. Knowledge in Khat and Analogue Cases	291
<i>United States v. Caseer</i>	292
<i>McFadden v. United States</i>	307
D. Proof of the Identity of a Substance	313
<i>Ohio v. McKee</i>	313
E. Additional Controlled Substances Offenses	318
1. Firearms and Controlled Substances	318
<i>United States v. Doody</i>	319
2. Drug-Induced Homicide	322
<i>Burrage v. United States</i>	323
Drug-Induced Homicide Laws: A Misguided Response to Overdose Deaths	329
3. Maintaining a Drug-Involved Premises	332
<i>United States v. Tebeau</i>	332
<i>United States v. Wilson</i>	338
4. Drug Free School Zones	340
A Moving Violation? Hypercriminalized Spaces and Fortuitous Presence in Drug Free School Zones	
<i>L. Buckner Inniss</i>	340
<i>United States v. Agilar</i>	341
5. Driving Under the Influence	344
<i>Burg v. Municipal Court</i>	344
<i>Arizona ex rel. Montgomery v. Harris</i>	353
6. Drug Paraphernalia	360
<i>South Dakota v. Holway</i>	360
<i>Village of Hoffman Estates v. The Flipside</i>	363
Lethal Injections: The Law, Science, and Politics of Syringe Access for Injection Drug Users	
<i>Scott Burris, Steffanie A. Strathdee, and Jon S. Vernick</i>	367
7. Pregnancy and Substance Use	372

Criminalizing Pregnancy <i>Cortney E. Lollar</i>	372
F. Constitutional Limitations on the Criminalization of Drug Use and Addiction	381
1. The Prohibition Against “Status” Crimes	381
<i>Robinson v. California</i>	381
<i>Powell v. Texas</i>	387
2. The Right to Privacy	398
<i>Ravin v. Alaska</i>	398
Chapter 4 • Sentencing and Civil Sanctions	409
A. An Introduction to Sentencing	409
Speech at the American Bar Association Annual Meeting	409
B. Drug Quantity	418
1. The Importance of Drug Type and Quantity in Sentencing	419
<i>United States v. Dossie</i>	419
<i>United States v. Rodriguez De Varon</i>	427
2. Measuring Drug Quantity	438
a. Carrier Mediums and Cutting Agents	438
<i>Chapman v. United States</i>	438
b. Counting Marijuana Plants	448
<i>Kansas v. Holsted</i>	449
c. Calculating Drug Quantity in Conspiracy Cases	453
Weighing the Evidence: Drug Quantity Issues in Mandatory Minimum Cases	
<i>Kyle O’Dowd</i>	453
<i>United States v. Hickman</i>	454
C. Issues in Federal Drug Sentencing	464
1. Mandatory Minimum Penalties	464
Competing Sentencing Policies in a “War on Drugs” Era	
<i>Hon. William W. Wilkins, Jr., Phyllis J. Newton</i> <i>and John R. Steer</i>	464
Rethinking Mandatory Minimums	
<i>Stephen J. Schulhofer</i>	466
2. The “Safety Valve”	470
a. The Requirement to Truthfully Provide Information	471
<i>United States v. Reynoso</i>	471
<i>United States v. Brownlee</i>	479
b. The Criminal History Limitation	481
<i>United States v. Boddie</i>	482
3. Providing Substantial Assistance	486
<i>United States v. Rounsavall</i>	487

4. The Crack and Powder Cocaine Sentencing Disparity	490
<i>United States v. Blewett</i>	492
5. The FIRST STEP Act	507
D. Drug Sentencing and the Eighth Amendment	512
<i>United States v. Angelos</i>	513
E. Prosecutorial Discretion	523
Unequal Justice: The Federalization of Criminal Law	
<i>Steven D. Clymer</i>	524
<i>United States v. Elliott</i>	526
<i>United States v. Dossie</i>	531
F. Drug Courts	536
Embracing Addiction: Drug Courts and the False Promise of Judicial Intervention	
<i>Eric J. Miller</i>	537
Drug Courts: A Review of the Evidence	
<i>Ryan S. King and Jill Pasquarella</i>	540
Contraindicated Drug Courts	
<i>Josh Bowers</i>	543
America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform	546
G. Civil Sanctions and Controls	549
1. Collateral Consequences of a Drug Conviction	549
a. An Overview of Collateral Consequences	549
"Collateral Damage": No Re-Entry for Drug Offenders	
<i>Nora V. Demleitner</i>	549
b. Immigration	553
<i>Moncrieffe v. Holder</i>	554
c. Public Housing	562
<i>Department of Housing and Urban Development v. Rucker</i>	562
2. Asset Forfeiture	567
Fines, Fees, and Forfeitures	
<i>Beth A. Colgan</i>	568
<i>United States v. \$124,700, in U.S. Currency</i>	570
Chapter 5 • Investigating Drug Crimes	575
A. Investigating Victimless Crimes	575
1. Police Participation in Drug Crimes	575
<i>Missouri v. Torphy</i>	576
a. Entrapment	577
<i>United States v. Russell</i>	577
<i>Utah v. J.D.W.</i>	588

b. Stash House Strings and the Outrageous Government	
Conduct Defense	591
<i>United States v. Black</i>	592
c. Police Corruption	606
The Harmful Side Effects of Drug Prohibition	
<i>Randy Barnett</i>	606
<i>United States v. Reese</i>	609
2. Informants	616
a. The Importance of Informants in Drug Investigations	616
Deregulating Guilt: The Information Culture of the Criminal System	
<i>Alexandra Natapoff</i>	616
b. Reliability of Informants	619
<i>United States v. Singleton</i>	620
Beyond Unreliable: How Snitches Contribute to Wrongful Convictions	
<i>Alexandra Natapoff</i>	628
<i>Schalk v. Indiana</i>	630
<i>Nebraska v. Johnson</i>	635
c. Informant Safety and Sanctioned Criminality	639
Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship	
<i>Michael L. Rich</i>	639
d. The Public Authority and Innocent Intent Defenses	642
<i>United States v. Fulcher</i>	642
3. Wiretaps	649
<i>United States v. Meléndez-Santiago</i>	650
B. Drug Investigations and the Fourth Amendment	653
1. Drug Dog Sniffs	654
<i>Illinois v. Caballes</i>	654
<i>Florida v. Harris</i>	658
2. Profiling and Pretextual Stops	663
Marijuana Legalization and Pretextual Stops	
<i>Alex Kreit</i>	664
<i>United States v. Lamour</i>	667
3. Drug Testing	673
<i>Lebron v. Secretary of the Florida Department of Children and Families</i>	676
Testing Drugs versus Testing for Drug Use: Private Risk Management in the Shadow of Criminal Law	
<i>Robert J. MacCoun</i>	686
4. “No-Knock” Drug Raids and Police Militarization	691

Overkill: The Rise of Paramilitary Police Raids in America <i>Radley Balko</i>	692
C. Other Constitutional Issues	703
1. Is There a “Drug Exception” to the Constitution? Drug Exceptionalism <i>Erik Luna</i>	703
2. Drug Policy and the First Amendment The Second Casualty of War: Civil Liberties and the War on Drugs <i>Paul Finkelman</i>	705
<i>Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal</i>	709
Chapter 6 • The Controlled Substances Act	713
A. The Controlled Substances Act: Overview	713
The Evolution of Federal Drug Control Legislation <i>Thomas M. Quinn and Gerald T. McLaughlin</i>	715
B. Classifying Substances under the Controlled Substances Act	723
<i>Grinspoon v. Drug Enforcement Administration</i>	724
<i>In the Matter of Marijuana Rescheduling Petition</i>	739
<i>Marijuana Scheduling Petition; Denial of Petition</i>	748
<i>Alliance for Cannabis Therapeutics v. Drug Enforcement Administration</i>	759
C. Constitutional Challenges to Scheduling Under the Controlled Substances Act	767
<i>The National Organization for the Reform of Marijuana Laws (NORML) v. Bell</i>	767
D. Research of Controlled Substances	776
Medical Marijuana: The Conflict between Scientific Evidence and Political Ideology <i>Peter J. Cohen</i>	777
E. The Classification of Hemp Under the Controlled Substances Act	780
<i>United States v. Mallory</i>	780
F. Listed Chemicals	788
<i>United States v. Kim</i>	789
Chapter 7 • The Regulation of Controlled Substances with Accepted Medical Uses	799
A. The Relationship Between the Controlled Substances Act and the Food, Drug, and Cosmetic Act	799
<i>American Pharmaceutical Association v. Weinberger</i>	800
B. The Controlled Substances Act and Prescription Drugs	807
1. Regulation and Prosecution of Physicians	807

<i>United States v. Moore</i>	808
<i>United States v. Hurwitz</i>	817
Did You Forget to Say You're Sorry? Litigating a Show Cause Hearing for a Physician's DEA Registration <i>Douglas J. Behr</i>	827
2. Controlled Substances and Medication-Assisted Treatment	830
The Law and Policy of Opioids for Pain Management, Addiction Treatment, and Overdose Reversal <i>Corey S. Davis and Derek H. Carr</i>	831
3. Regulation and Prosecution of Pharmacies	837
<i>Jones Total Health Care Pharmacy, LLC v. Drug Enforcement Administration</i>	838
4. Regulation and Prosecution of Manufacturers	845
"There's Danger Here, Cherie!": Liability for the Promotion and Marketing of Drugs and Medical Devices for Off-Label Uses <i>Richard C. Ausness</i>	845
<i>United States v. The Purdue Frederick Company, Inc.</i>	847
Chapter 8 • State Marijuana Reforms and the Federal Response	855
A. State Marijuana Legalization	855
Marijuana Legalization <i>Alex Kreit</i>	856
B. Comparing Regulatory Models	861
1. Overview	861
Considering Marijuana Legalization: Insights for Vermont and Other Jurisdictions <i>Jonathan P. Caulkins, Beau Kilmer, Mark A. R. Kleinman, Robert J. MacCoun, Gregory Midgette, Pat Oglesby, Rosalie Liccardo Pacula and Peter H. Reuter</i>	861
2. The Netherlands	874
The Dutch Coffee Shop System, Tensions and Benefits <i>Marianne M. J. van Ooyen-Houben</i>	874
3. Uruguay	882
Uruguay's Cannabis Law: Pioneering a New Paradigm <i>John Hudak, Geoff Ramsey, and John Walsh</i>	882
C. The Conflict Between State Legalization and Federal Prohibition	891
1. Federal Prosecution of State-Legal Marijuana Operations	892
a. Federal Enforcement Policies	892
Memorandum For All United States Attorneys: Guidance Regarding Marijuana Enforcement <i>James M. Cole, Deputy Attorney General</i>	894

Memorandum For All United States Attorneys: Marijuana Enforcement	
<i>Jefferson B. Sessions, III, Attorney General</i>	897
b. Appropriations Limits on Enforcement	898
<i>United States v. McIntosh</i>	899
c. Preemption	907
2. Access to Banking Services	908
Banks, Marijuana, and Federalism	
<i>Julie Anderson Hill</i>	908
Guidance: BSA Expectations Regarding Marijuana-Related Businesses	
<i>Department of the Treasury, Financial Crimes Enforcement Network</i>	912
3. Options for Resolving the Conflict between Federal and State Marijuana Laws	918
<i>The STATES Act</i>	918
<i>Strengthening the Tenth Amendment Through Entrusting States Act</i>	920
<i>Marijuana Justice Act of 2017</i>	922
Chapter 9 • International Drug Control	927
A. The International Market for Controlled Substances	927
Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics	
<i>Chantal Thomas</i>	927
World Drug Report, 2017	
<i>United Nations Office on Drugs and Crime</i>	931
A Report on Global Illicit Drugs Markets 1998–2007: Assessing the Operation of the Global Drug Market, Report 1	
<i>Peter H. Reuter</i>	937
<i>Note: Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico</i>	
<i>Seth Harp</i>	946
Drug Violence in Mexico: Data and Analysis through 2017	
<i>Laura Calderón, Octavio Rodríguez, and David A. Shirk</i>	953
War on Drugs	
<i>Report of The Global Commission on Drug Policy</i>	960
The Nexus between Drug Trafficking, Terrorism and Organized Crime	
<i>Michael Chertoff</i>	965
B. International Drug Treaties and Control Organizations	968
1. Overview	968

The International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights Violations? <i>Daniel Heilmann</i>	968
2. Marijuana Legalization and the Drug Treaties	978
Cannabis Regulation and the UN Drug Treaties: Strategies for Reform <i>David Bewley-Taylor, Martin Jelsma, Steve Rolles, and John Walsh</i>	979
3. Drug Control and the International Criminal Court	989
Just Say No: The Case against Expanding the International Criminal Court's Jurisdiction to Include Drug Trafficking <i>Heather L. Kiefer</i>	991
C. U.S. Influence on International Drug Control	995
1. Extraterritorial Application of U.S. Drug Laws	995
a. Prosecution of Foreign Drug Producers and Distributors	996
<i>United States v. Noriega</i>	996
<i>United States v. Manuel</i>	1005
<i>United States v. Lopez-Vanegas</i>	1011
b. Prosecution of Drug Possession on the High Seas	1017
<i>United States v. Saac</i>	1017
<i>United States v. Bellaizac-Hurtado</i>	1022
<i>United States v. Ballestas</i>	1033
2. Extradition of Drug Offenders	1040
Traffic Circles: The Legal Logic of Drug Extraditions <i>Edward M. Morgan</i>	1040
3. Extraterritorial Drug Investigation and Enforcement by U.S. Officials	1045
<i>United States v. Alvarez-Machain</i>	1046
<i>United States v. Verdugo-Urquidez</i>	1057
4. Crop Eradication Initiatives	1071
<i>Note: A New Approach to Extraterritorial Application of Environmental Statutes? Uncovering the Effects of Plan Colombia</i> <i>Joanne Sum-Ping</i>	1072
5. The U.S. Drug Certification Process	1075
Fighting Bad Guys with International Trade Law <i>Raj Bhala</i>	1075
Index	1083

Table of Cases

- \$124,700, in U.S. Currency, United States v., 570
- Adams v. Alaska, 157
- Agilar, United States v., 341, 530
- Alexander, New Jersey v., 264
- Allen v. United States, 183
- Alleyne v. United States, 273–275, 278, 279, 325, 417
- Alliance for Cannabis Therapeutics v. Drug Enforcement Administration, 740, 748, 759, 763, 764
- Alvarez-Machain, United States v., 1025, 1032, 1046, 1051, 1056, 1057
- American Federation of State, County, and Municipal Employees Council 79 v. Scott, 674
- American Pharmaceutical Association v. Weinberger, 800, 805, 807
- American Pharmaceutical Association v. Matthews, 805
- Anaya, United States v., 234–241, 247
- Angelos, United States v., 319, 511–513, 523
- Apprendi v. New Jersey, 274, 279, 415
- Arlington Heights v. Metropolitan Housing Development Corporation, 503, 505
- Armstrong, United States v., 605
- Bailey v. United States, 320
- Balint, United States v., 277, 278
- Becton, United States v., 259
- Behrman, United States v., 719, 720, 811
- Ballestas, United States v., 1033
- Bellaizac-Hurtado, United States v., 1022, 1037
- Black, United States v., 592
- Blewett, United States v., 490–492, 511
- Board of Education v. Earls, 675, 681, 685, 686
- Boddie, United States v., 482
- Booker, United States v., 415
- Bouie v. City of Columbia, 296
- Bowman, United States v., 1008, 1016
- Branch, United States v., 214
- Breese v. Smith, 398, 400
- Brigham, United States v., 231
- Brownlee, United States v., 479–481
- Bullcoming v. New Mexico, 318
- Bullock v. United States, 179, 181
- Burg v. Municipal Court, 344
- Burgess v. United States, 508
- Burrage v. United States, 274, 322, 323
- Burwell, United States v., 278
- Caballes, Illinois v., 574, 654, 657, 658
- Caldwell, United States v., 252
- Calvert, Kansas v., 144
- Cardales-Luna, United States v., 1033
- Carithers, Minnesota v., 221
- Carolene Products, United States v., 771, 773
- Carpenter v. United States, 178
- Carranza, United States v., 274, 276–279
- Carter, Minnesota v., 705
- Caseer, United States v., 291–294, 297–302, 306
- Casey v. United States, 584, 586

- Castillo, United States v., 320
Chapman v. United States, 438
 Chen, United States v., 334, 339
 Cheramie, Arizona v., 142
 Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 564, 566, 726, 727
Childers, North Carolina v., 222
 Coe, State v., 26
 Cole, People v., 144, 145, 150
Colon, United States v., 247
 Cook v. United States, 1050, 1055
 Covarrubias, California v., 290
 Crickon, United States v., 486
 Crouse, People v., 907
- Davis, United States v., 188, 454, 605
 De La Torre, United States v., 240
De Varon, United States v., 414, 427–429, 432–434, 436–438
Department of Housing and Urban Development v. Rucker, 562
 Direct Sales Co. v. United States, 249
 The Dollar Savings Bank v. United States, 622
Doody, United States v., 319
Dossie, United States v., 419, 531
- E.C., People v., 155
Elliott, United States v., 526
 Employment Division v. Smith, 709
Epps v. Georgia, 189
 Evans v. State, 135
 Eves, United States v., 451
- Ferguson v. City of Charleston, 673
 Ferguson, United States v., 668, 670, 671
 Flinchpaugh, Kansas v., 141
 Franks v. Delaware, 650
 Frisbie v. Collins, 1047, 1051
Fulcher, United States v., 642
 Fuller, United States v., 591
- Furlong, United States v., 1019, 1024, 1032
- Gaines, United States v., 649
 Garland v. State, 148
 Glenn, United States v., 203
Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 709, 710
 Gonzales v. Raich, 892, 903
 Griffin v. Wisconsin, 674
Grinspoon v. Drug Enforcement Administration, 714, 724, 756, 761–762, 765–766, 776, 800
 Griswold v. Connecticut, 399
- Haney, United States v., 207
 Harbison v. Arkansas, 142
 Harmelin v. Michigan, 495, 519
Harris, Arizona ex. Rel. Montgomery v., 353
Harris, Florida v., 658
 Harris, North Carolina v., 141
Hawaii v. Hogue, 135, 136, 141, 142
Heredia, United States v., 279, 280, 282–287, 290, 291
Hickman, United States v., 454
 Holland, United States v., 161, 170
Holsted, Kansas v., 449
Holway, South Dakota v., 360
 Hostetter v. Idlewild Bon Voyage Liquor Corp., 367
 Hudson v. Michigan, 691
Hunt, United States v., 203, 205
Hurwitz, United States v., 817–826, 845
 Hussein, United States v., 298
 Hutto v. Davis, 521
- Ibarguen-Mosquera, United States v., 1038
 INS v. Lopez-Mendoza, 1058, 1062
 Ivy, United States v., 257
- J.D.W., Utah v.**, 588
 Jackson v. Virginia, 171, 180

- Jacobson v. Massachusetts, 383
 Jardines, Florida v., 657, 658
Jefferson, United States v., 273
 Jewell, United States v., 280–285,
 287–290
 Jin Fuey Moy v. United States, 719, 811
 Johal, United States v., 795
Johnson, Nebraska v., 635
**Jones Total Health Care Pharmacy,
 LLC v. Drug Enforcement
 Administration**, 838
 Jones, State v., 138
- Kastigar v. United States, 624
 Katz v. United States, 704
 Kindle, United States v., 604, 605
Kitchen, United States v., 191
 Kim, United States v., 789
 Kleinman, United States v., 861, 906,
 907
 Kummer, State v., 589, 590
- Lagares, New Jersey v., 536
 Lamarr, United States v., 207, 209
 Lambert v. California, 295, 299
Lamour, United States v., 667
 Landry, Unites States v., 160
**Lebron v. Secretary of the Florida
 Department of Children and
 Families**, 676
 Lechuga, United States v., 249, 250
 Linder v. United States, 384, 719, 720
 Liparota v. United States, 312
 Lopez, United States v., 892, 1025
Lopez-Vanegas, United States v., 1011,
 1016, 1017
 Lowman v. United States, 186
- Maiden, United States v., 714, 772,
 773
Mallory, United States v., 780
Manzella, United States v., 186–189,
 197, 249
Manuel, United States v., 1005
- Marijuana Scheduling Petition, Denial
 of Petition**, 748, 763, 764, 766
**Marijuana Scheduling Petition, In the
 Matter of**, 739
Martin, California v., 145
 Mapp v. Ohio, 580, 581
 Maupin, State v., 314, 315
McFadden, United States v., 306, 307
McIntosh, United States v., 899
 McLean, United States v., 606
McLeod, Missouri v., 200
McKee, Ohio v., 313
 McKnight, People v., 663
 Melendez-Diaz v. Massachusetts, 318
Meléndez-Santiago, United States v.,
 650
 Mercer, United States v., 247
 Mijares, People v., 145, 147–151, 160
Miller, Utah v., 152
 Miranda v. Arizona, 212, 218, 581, 626,
 658, 703
Moncrieffe v. Holder, 554
Moore, United States v., 292, 807, 808,
 820
 Moreau v. State, 159
 Morgan, United States v., 448
 Morissette v. United States, 277–279
 Morrison, New Jersey v., 211, 322
 Morrison, United States v., 892
 Morse v. Frederick, 707, 708
 Murphy v. National Collegiate Athletic
 Association, 907, 908
 Murray v. Schooner Charming Betsy,
 1036, 1037
- National Organization for the Reform
 of Marijuana Laws v. Bell**, 767, 775
 National Organization for the Reform
 of Marijuana Laws v. DEA, 768
 National Organization for the Reform
 of Marijuana Laws v. Ingersoll, 760
 n.1, 768 n.1
 National Treasury Employees Union v.
 Von Raab, 674, 680, 685

- Noriega, United States v.**, 996
- Oliver v. United States, 704
- Olmstead v. United States, 1056
- Palmer, United States v., 525, 1019
- Palomo Farms, LLC v. DEA, 787
- Papachristou v. City of Jacksonville, 295
- Pardo, United States v., 169
- Pastor, United States v., 715
- Peck, California v.**, 199
- Peck, Minnesota v., 448
- Pinkerton v. United States, 252, 454, 463, 464
- Place, United States v., 218, 655, 656
- Plessy v. Ferguson, 497
- Pratt, New Mexico v.**, 224
- Pressler, United States v., 258
- Powell v. Texas**, 381, 387
- Printz v. United States, 907
- Purdue Federick Company, Inc., United States v.**, 847
- Ravin v. Alaska**, 398
- Reed, State v., 137, 140
- Reese, United States v.**, 609
- Regan, Wyoming v.**, 162, 230
- Reid v. Covert, 1058, 1061, 1064, 1065
- Reynoso, United States v.**, 471
- Richards v. Wisconsin, 691
- Richardson v. Colorado, 142
- Rivas v. United States**, 167
- Robinson v. California**, 381, 390, 391, 393, 395
- Robinson, United States v., 451, 485
- Robinson, Utah v., 141
- Roche, New York v., 246
- Roche, State v., 317
- Rodriguez, Louisiana v., 767
- Rosemond, United States v., 274, 275
- Rosenthal, United States v., 647
- Rounsavall, United States v.**, 487–490
- Russell, United States v.**, 577, 590, 591, 596
- Saac, United States v.**, 1017, 1022, 1029
- Saul v. Arkansas**, 227
- Schroeder, South Dakota v., 141
- Schalk v. Indiana**, 630
- Schneckloth v. Bustamonte, 685
- Shaulis-Powell, State v., 224, 225
- Sherman v. United States, 580, 582, 584
- Singleton, United States v.**, 620
- Skinner v. Railway Executives Association, 674, 676, 680, 681, 685
- Smith v. United States, 320, 441, 1031, 1037
- Solem v. Helm, 519
- Sorrells v. United States, 580, 582, 584
- Sosa v. Alvarez-Machain, 1025, 1032, 1057
- Speight v. United States, 174
- Stanley v. Georgia, 400, 403
- Stanton v. Florida**, 142, 143
- Staples v. United States, 277, 278, 311
- Sullivan, People v., 146, 149
- Swiderski, United States v., 213–217, 219, 220
- Tamez, United States v., 335, 339
- Taylor v. Maryland, 162
- Tebeau, United States v.**, 332
- Tran Trong Cuong, United States v., 820, 822
- Torphy, Missouri v.**, 576
- Touby v. United States, 775
- Twigg, United States v., 596, 600
- Tyler, United States v.**, 243
- Umeh, United States v., 1011
- United States Gypsum Co., United States v., 277, 278, 618
- Vaughn, United States v., 321
- Verdugo-Urquidez, United States v.**, 1057, 1058, 1061, 1066, 1068

- Vernonia School Dist. 473 v. Acton,
675, 676, 681, 685, 686
- Village of Hoffman Estates v. The
Flipside**, 363
- Wade v. United States, 486
- Wallace, United States v.**, 217, 219
- Watson v. United States, 320
- Webb v. United States, 719
- Weeks v. United States, 580
- Whipple v. Martinson, 382
- Whren, United States v., 665–667
- Williams, United States v., 218, 528
- Wilson v. Arkansas, 691
- Wilson, United States v.**, 335, 338
- Winship, In re:, 171
- Witek, United States v.**, 260, 261, 263,
264
- Wright, United States v., 221
- X-Citement Video, Inc., United States
v., 275, 278
- Yick Wo v. Hopkins, 496
- Young, State v., 816
- Yung Jon, Ex Parte, 117

Preface

Just two months before my casebook *Controlled Substances: Crime, Regulation, and Policy* was published in January 2013, voters in Colorado and Washington approved the first state marijuana legalization laws. Since then, U.S. drug policy has seen a number of significant changes. As of this writing, ten states have legalized the possession, commercial manufacture, and sale of marijuana; Vermont and Washington, D.C. have legalized marijuana possession and personal cultivation, though not commercial sales. Although marijuana remains a Schedule I controlled substance under federal law, the Department of Justice has for the most part permitted states to implement their legalization laws without interference. Interest in drug policy reform has not been limited to marijuana. Cities and states have started to explore ideas like safe injection sites in response to the opioid crisis, and lawmakers across the country have been reconsidering harsh drug sentencing laws. Finally, the past six years have yielded a number of noteworthy court decisions on drug laws, including U.S. Supreme Court decisions on the federal drug-induced homicide statute and the Controlled Substances Analogue Enforcement Act.

This book, which is in effect the second edition of *Controlled Substances*, covers all of these developments and more. The new title—*Illegal Drug and Marijuana Law*—reflects the shifting legal status of marijuana, which 1/5 of the states now regulate like alcohol rather than as a controlled substance.* *Illegal Drug and Marijuana Law* retains the structure of *Controlled Substances* along with the majority of its cases and articles, although a handful of cuts have been made to make room for new material. Among the most notable new additions are:

- A new chapter on state marijuana legalization laws and the federal response (Chapter 8).
- Expanded coverage of cases and materials related to the opioid crisis, including a new section on the crisis in Chapter 2.

* The term marijuana has a troubling history. “[I]t was popularized in the United States during the 1930s by advocates of prohibition, who sought to exploit prejudice against despised minority groups, especially Mexican immigrants.” Martin A. Lee, *Smoke Signals: A Social History of Marijuana—Medical, Recreational, and Scientific* 6 (2012). Some reject the term marijuana in favor of cannabis, in part because of this history. But the federal Controlled Substances Act and the vast majority of state laws continue to use marijuana (or marihuana), not cannabis. Because this is a law school textbook, and marijuana remains the standard term in most statutes and court decisions, I use the term marijuana in the book’s title and text.

- The legal status of hemp following passage of the 2018 Farm Bill.
- The 2018 FIRST STEP Act.
- Stash house stings and the outrageous government conduct defense.
- Drug testing of recipients of public benefits.
- U.S. Supreme Court decisions on the Controlled Substances Analogue Act (*McFadden v. United States*) and the federal drug-induced homicide statute (*Burrage v. United States*).

A course on illegal drug and marijuana law provides a uniquely rich mix of complex legal and policy problems. A close look at the law of drug crimes reveals unusually tough challenges in how to define them, how to prove them, and how to grade them. Is drug possession meant to punish drug ownership or physical contact with drugs? What sort of evidence is sufficient to conclude that a person who possesses drugs intends to distribute them? Should we sentence drug offenders based on the type and quantity of drugs involved in their offense or some other metric? The enforcement of drug laws, meanwhile, provides an ideal vehicle for studying a number of important and often overlooked issues like prosecutorial discretion, the use of informants in modern policing, and racial profiling. Drug prohibition also presents one of the most difficult tests for the theories of punishment. Though we may disagree about how much punishment a thief, a killer, or a drunk driver should receive, few question that theft, murder, and driving under the influence should be against the law. By contrast, many theorists and policy analysts believe that drug criminalization is unjust or unworkable. In the case of marijuana, the debate about prohibition is not just taking place in classrooms and academic conferences, but at ballot boxes across the country.

Yet, while modern drug laws are of central importance to our criminal justice system, they have been strangely absent from the curriculum at most law schools. Every criminal law casebook devotes significant coverage to homicide, property crimes, and rape. But only a handful include a chapter or section on drug offenses. Criminal procedure courses are filled with drug cases. But this is only because so many of the leading Fourth, Fifth, and Sixth Amendment cases happened to involve drug prosecutions. Courses like federal criminal law and international criminal law sometimes include coverage of drug offenses. And there are some schools that offer a seminar or course on drug policy. At most law schools today, however, a student could take every single criminal law-related offering without studying drug law and policy.

Illegal Drug and Marijuana Law aims to help fill this gap in the law school curriculum by giving teachers an accessible, flexible, and engaging textbook with which to design a course on drugs and the law. The book can be used as the primary or exclusive text in a range of law school courses. Whether for a seminar on the war on drugs, an advanced criminal law course on drug crimes, a survey course on controlled substances law, or a summer study abroad course on international drug control, *Illegal Drug and Marijuana Law* is meant for easy adoption.

Before I close, a few formatting notes. My chief objective has been to make this book as readable and user-friendly as possible. To that end, I have minimized the use of ellipses in cases and other source materials. Ellipses appear for omitted material within a sentence or paragraph. But I have opted not to use them where whole paragraphs or the beginning or end of a paragraph have been cut. In a few instances, I have re-ordered paragraphs from source material to enhance readability. I have deleted most in-text citations and the vast majority of footnotes from the cases and materials. Footnotes that have been retained are marked using the original numbering from the source material. A * indicates a footnote that I have written. Finally, in place of the traditional “notes and questions” sections, I use short narrative essays (usually one or two paragraphs) to link and supplement the materials. The book uses a centered straight line to demarcate the end of a case or article and the beginning of author-written text.

If you are a teacher who is thinking of teaching a course on illegal drug and marijuana law, whether using this book or another, I would be glad to discuss ideas with you. I have found learning about and teaching this subject to be incredibly enjoyable and rewarding. I hope that you will as well.

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Introduction

It is difficult to think of a development that has had a greater impact on our criminal justice system over the past five decades than the war on drugs. More Americans were arrested for a drug offense in 2017 than for any other category of crime tracked by the Federal Bureau of Investigation's Uniform Crime Report. Police made 1.6 million arrests for drug abuse violations, about 15% of all arrests. Of these, 85%—just under 1.4 million—were for simple drug possession. By comparison, in 2017, the police made approximately 1.25 million arrests for property crimes, 990,678 arrests for driving under the influence, and 505,681 arrests for violent crimes.

Drug convictions have contributed to the explosion in our prison population. The United States has the world's highest incarceration rate, with more than 2.3 million people behind bars in state and federal prisons and local jails. Drug offenders make up about one-fifth of this number. Approximately 460,000 people are locked up for drug offenses—97,000 in federal prisons, 208,000 in state prisons, and 157,000 in jails. See Peter Wagner and Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, Prison Policy Initiative (March 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

Meanwhile, drug investigations have had a dramatic influence on constitutional criminal procedure and policing, leading to (among other things) a rise in the use of informants, pre-textual traffic stops, and no-knock executions of warrants. Some commentators—and even some judges—have gone so far as to argue that courts have developed an implicit “drug exception” to the Constitution.

Although our drug laws are vigorously enforced, the wisdom and morality of drug prohibition remain hotly contested. Some argue that drug use and distribution are consensual, “victimless” activities that should not be criminalized at all. Others view drug prohibition as a moral imperative because of the harms to the community associated with substance abuse. In addition to the debate over whether it is just to criminalize drug transactions, there is widespread disagreement about how to calculate and balance the costs and benefits of prohibition. Does drug prohibition reduce drug use? If so, is the reduction in use substantial enough to be worth the price? This debate is not just playing out in classrooms and at academic conferences. As of June 2019, ten states have enacted laws legalizing the possession, commercial manufacture, and retail sale of marijuana.

Discussions about the role of race and class in our criminal justice system also tend to focus on drug policy. In her book *The New Jim Crow*, Michelle Alexander argues that “[n]othing has contributed more to the systemic mass incarceration of

people of color in the United States than the War on Drugs.” MICHELLE ALEXANDER, *THE NEW JIM CROW* 59 (2010).

In addition to the policy issues raised by modern drug prohibition, drug laws can pose challenging legal problems. Almost every attorney who works in criminal law will encounter drug cases throughout her practice—from handling misdemeanor possession cases as a new attorney to navigating a sprawling drug conspiracy case years into practice. As in every area of the law, many drug cases may be straightforward. But even a seemingly run-of-the-mill drug case can sometimes be quite complex. Imagine, for example, that the police find drugs in a hotel room with two occupants, neither of whom claims responsibility for the drugs. Are both occupants guilty of drug possession? Neither?

This book provides an overview of the law and policy of controlled substances. Chapter 1 focuses on drugs and drug use by briefly examining the question of what is a drug and offering perspectives on substance use, abuse and addiction. Chapter 2 introduces some of the key policy questions related to drug prohibition in the United States. Chapter 3 moves from policy to legal doctrine with an overview of drug crimes, including: possession, possession with intent to distribute, manufacture, and additional offenses like drug paraphernalia laws. Chapter 4 addresses drug sentencing and civil sanctions. Chapter 5 deals with the legal and policy issues raised by drug investigations, from the use of informants to racial profiling. Chapter 6 moves from criminal law to administrative law with an examination of the Controlled Substances Act, the federal law under which drugs of abuse are classified and controlled. Chapter 7 focuses on criminal and regulatory provisions related to the recreational use of medicines. Chapter 8 examines state marijuana legalization laws and the conflict between federal and state marijuana laws. Finally, Chapter 9 concludes with a look at international drug control law.