Hemp and marijuana are both the plant Cannabis sativa L; however, they differ in important ways. Hemp only contains very low amounts of tetrahydrocannabinol (THC), the psychoactive component of marijuana that gets you “high.” Hemp is one of the oldest cultivated crops, and humans have been using hemp for many industrial purposes for over 10,000 years. Hemp has been an extremely important crop in American history and was actively grown in the United States until the 1930s. In 1937, Congress passed the Marijuana Tax Act which began to sweep hemp into the realm of marijuana prohibition and made hemp cultivation difficult for farmers. However, during World War II, foreign supplies of hemp were no longer available, so the United States government encouraged American farmers to grow hemp once again and even began subsidizing the crop. After the war, the government shut down the hemp program and the industry died out again. When the Controlled Substances Act of 1970 was passed, it did not distinguish between hemp and marijuana, and hemp cultivation was officially outlawed in the United States.

More recently, hemp has been making a comeback in American agriculture. The Agricultural Act of 2014 (the 2014 Farm Bill), while not fully legalizing the crop, allowed states to develop research programs to study industrial hemp. Many of these state programs allowed for “market research,” giving farmers the ability to grow, process, and sell hemp products. The hemp industry further expanded with the passage of the Agricultural Improvement Act of 2018 (the 2018 Farm Bill). The 2018 Farm Bill defines hemp as “the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9

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1 Julia Naftulin, *A man was arrested on charges of transporting 6,701 pounds of marijuana that his company claims was hemp. Here’s the difference between them*, INSIDER (Feb. 7, 2019), https://www.insider.com/how-is-hemp-different-from-weed-marijuana-2019-1.
2 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis."\textsuperscript{12} The 2018 Farm Bill also removed hemp from the definition of marijuana within the Controlled Substances Act.\textsuperscript{13} This means that under federal law, Cannabis sativa L. that contains 0.3% THC or less is considered legal hemp, whereas Cannabis sativa L. that contains greater than 0.3% THC is considered illegal marijuana.\textsuperscript{14} The 2018 Farm Bill has also expanded the hemp industry by creating a federal regulatory program for hemp cultivation and authorizing states to implement regulatory programs within certain guidelines established in the bill.\textsuperscript{15} As of September 13, 2019, forty-seven states have enacted legislation that allows for some hemp production within their boundaries.\textsuperscript{16} This leaves South Dakota, Idaho, and Mississippi as the only states in the nation that do not have some sort of hemp program.\textsuperscript{17}

A. HEMP’S UNINTENDED IMPACT ON THE FAILED WAR ON DRUGS

The “War on Drugs” that began with the passing of the Controlled Substances Act of 1970 is increasingly viewed as a failure that has had devastating effects on already marginalized communities.\textsuperscript{18} In response to this realization, many states are beginning to relax harsh sentencing for drug offenses, and some have even legalized marijuana for adult use.\textsuperscript{19} Multiple pieces of legislation have been introduced that would legalize marijuana on a federal level; however, federal marijuana-legalization efforts have yet to be successful.\textsuperscript{20} While only ten states have legalized marijuana for adult use, most states have legalized marijuana for medical use.\textsuperscript{21} There are only four states in the nation that do not have some form of public cannabis access program for medical use.\textsuperscript{22} While this is a positive development, many people are still arrested for low-level marijuana convictions, and jails and prisons are still filled with people who have done nothing more than

\begin{footnotes}
\item[14] See id.
\item[17] Id.
\item[18] Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: or Why the ‘War on Drugs’ was a ‘War on Blacks’, 6 J. GENDER RACE & JUST. 381, 381 (2002).
\item[21] NAT’L CONF. OF STATE LEGISLATURES, supra note 19.
\item[22] Id.
\end{footnotes}
possess marijuana. Under today’s laws, a person can go to prison in one state for possessing what someone in another state can buy legally from a licensed dispensary.

Due to the newly revived interest in hemp production and the passage of the 2018 Farm Bill, many states have removed hemp from the definition of marijuana under their controlled substances acts and treat hemp as an agricultural commodity. While much of this legislation was a bipartisan attempt to stimulate the agriculture industries, it has had some unintended consequences that may have a positive impact on drug law reform movements.

i. Hemp Legalization’s Impact on Low-Level Marijuana Offense Arrests and Prosecutions

With the dividing line between legal hemp and illegal marijuana being so thin, states that have legalized hemp have had to reexamine how, and if, they will continue to maintain a prohibition on marijuana. The difference between hemp and marijuana comes down to a tenth of a percent of THC; Cannabis sativa L. is legal hemp at 0.3% THC but becomes illegal marijuana at 0.4% THC. The difference between legal hemp and illegal marijuana is impossible to see with the naked eye and determining the quantity of THC to such a degree requires sensitive testing equipment. This presents problems for law enforcement and prosecutors in states where hemp is legal, but marijuana remains an illegal drug.

Traditionally, many marijuana arrests went like this: a law enforcement officer initiates a traffic stop for a minor traffic offense, and when the driver side window is rolled down, the officer smells marijuana. The officer asks for consent to search the vehicle, and if the driver declines, the officer may call for a drug dog. If the drug dog alerts on the vehicle, the officer then has probable cause to search

24 NAT’L CONF. OF STATE LEGISLATURES, supra note 16.
26 Id.
30 Id.
the vehicle. In states that have adopted the “plain smell doctrine,” the officer has probable cause to search the vehicle if he smells what he believes to be marijuana, without the need for a drug dog to alert on the car. If the officer finds what he believes to be marijuana, he may initiate a roadside test to determine if THC is present in the substance. If THC is present, the individual is arrested and charged with the applicable criminal offense. The legalization of hemp causes various problems in this scenario.

When an officer or a drug-detection dog smells what is believed to be marijuana coming from the vehicle, the scent may in fact be that of legal hemp. Because hemp and marijuana are the same plant, they cannot be distinguished by smell. This creates an issue in establishing probable cause to search the vehicle. Colorado has already addressed this issue, though in circumstances related to legal marijuana. In People v. McKnight, a drug dog alerted to a vehicle which was then searched and found to contain a pipe with methamphetamine residue. The Colorado Supreme Court held that a drug dog trained to alert to the scent of various drugs, including marijuana, that alerts on a vehicle, does not give law enforcement probable cause to search that vehicle because the dog could be altering to the scent of marijuana, which is legal in the state of Colorado. It is likely that states with legal hemp programs but illegal marijuana may come to similar conclusions. A drug dog that is trained to alert to the scent of marijuana could very well alert to the scent of legal hemp in a vehicle because hemp and marijuana cannot be distinguished by scent.

When suspected marijuana is discovered by law enforcement and a field test is positive for THC, the tested substance may actually be legal hemp. Legal hemp may contain up to 0.3% THC and field tests commonly used by police only test for the presence of THC. This means that a positive field test no longer indicates that the substance in question is illegal marijuana. Field tests are not capable of distinguishing the amount of THC in a substance, making them useless for determining whether the substance in question is legal hemp or illegal marijuana. In addition, many state crime labs can only test for the presence of THC and do not

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31 Id.
32 Id.
34 446 P.3d 397, 398 (2019).
35 Id. at 441.
37 Leslie et al., supra note 33.
38 Id.
have the ability to test for a percentage of THC. While testing equipment capable of determining the quantity of THC within the substance is available, it was unnecessary until hemp became legal. In addition, state agricultural laboratories that have the ability to distinguish hemp from marijuana refuse to conduct testing for criminal prosecutions. This makes proving beyond a reasonable doubt that a substance is illegal marijuana, and not legal hemp, quite difficult. With the need for confirmatory test results to prove that a substance is illegal marijuana, the prosecution of minor marijuana offenses takes more time and resources, and many cities and counties have decided they will no longer prosecute these offenses.

B. CONCLUSION

While it may have been an unintended consequence, hemp legalization is forcing counties and cities across the country to evaluate whether it is worth it to prosecute people for low level marijuana offenses. Hemp legalization does not make marijuana possession legal, and states still have the ability to prosecute marijuana offenses if they choose, but in order to do so, states must make a significant investment in new testing equipment and also take more time and resources to secure convictions. Public policy may dictate that the ability to imprison more people for possession of small amounts of marijuana is not worth the cost of these investments. In time, this may cause more states to consider marijuana law reform.

42 Juan A. Lozano, DAs In Four Texas Counties Say They’ll No Longer Prosecute Misdemeanor Marijuana Cases, KUT 90.5 (July 3, 2019), https://www.kut.org/post/das-four-texas-counties-say-theyll-no-longer-prosecute-misdemeanor-marijuana-cases.
43 Eaton, supra note 40.