# IN THE AGE OF DECRIMINALIZATION, IS THE ODOR OF MARIJUANA ALONE ENOUGH TO JUSTIFY A WARRANTLESS SEARCH?

**By: Meghan Matt***

On March 24, 2017, at around 1:45 a.m., Jesse Hill and Nicholas Willis sat in a parked, but running, car in Bronx, New York.[1] Two plain clothes officers in an unmarked vehicle noticed them and pulled them over for what they asserted to be a traffic violation, claiming the defendants were parked in an area with diagonal white lines.[2] This is where the stories begin to wildly diverge. According to Officer Daniel Nunez—the State's only witness to testify—he noticed a strong odor of marijuana when he exited his vehicle to approach the defendant's car.[3] He also claimed that the windows were either partially or fully rolled down at the time; however, he never claimed to see either defendant smoking, and neither drug paraphernalia nor other contraband was found.[4] According to Nunez, three bags of marijuana were in plain view on the console of the vehicle.[5] The State entered into evidence a photo taken by Nunez of the three bags, arranged in a perfect line, on the center console.[6] Officer Nunez then asked Mr. Hill and Mr. Willis to step out of the car, at which time the officers frisked the defendants and searched the vehicle.[7] Officer Nunez testified that he "observed a box of ammunition and felt what he believed to be a firearm covered

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1 People v. Hill, No. 853-2017, slip op. at 2 (N.Y. Sup. Ct. July 29, 2019).
2 *Id.*
3 Joseph Goldstein, *Officers Said They Smelled Pot. The Judge Called Them Liars*, N.Y. TIMES (Sept. 13, 2019), https://www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html.
4 *Hill*, slip op. at 3.
5 Goldstein, *supra* note 3.
6 *Hill*, slip op. at 3.
7 *Id.* at 4.



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and wrapped in a shirt" in the trunk.[8] Upon this discovery, he called for an evidence collection team and arrested the defendants.[9]

However, according to Jesse Hill, there was never any marijuana on the center console.[10] Mr. Hill testified that the windows were rolled up when the officers approached and asked them to exit the vehicle.[11] At that time, Mr. Hill and Mr. Willis stood on opposite sides of the car, facing each other, while they were both searched.[12] Mr. Hill observed Officer Nunez first recover a Newport cigarettes box from the pocket of Mr. Willis and then search the interior of the car and the trunk.[13] According to Mr. Hill, the three bags of marijuana were inside the cigarettes box found in Mr. Willis's pocket, not arranged in a line on the center console of the vehicle.[14]

In her decision to dismiss the case, Judge April Newbauer stated, "[T]he time has come to reject the canard of marijuana emanating from nearly every vehicle subject to a traffic stop."[15] She further averred, "So ubiquitous has police testimony about odors from cars become that it should be subjected to a heightened level of scrutiny if it is to supply the grounds for the search."[16] Additionally, she noted that even though Mr. Hill and Mr. Willis "had a small sealed quantity of marijuana *somewhere* in their possession inside the car, there was no indicia of it being smoked, recently smoked, or burning . . . and no testimony that anything had been thrown out of the vehicle during its fifteen second turn around the corner."[17]

[8] *Id.*
[9] *Id.*
[10] *Id.* at 5.
[11] *Id.* at 4-5.
[12] *Id.* at 5.
[13] *Id.*
[14] *Id*.
[15] Goldstein, *supra* note 3.
[16] *Hill*, slip op. at 7.
[17] *Id.* (emphasis added).



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Judge Newbauer also noted the absurdity of the claim that three bags of loose marijuana stayed perfectly in place, lined up in a straight line on the center console while the defendants made a turn, shifting gears at least once.[18] Furthermore, she noted that, under the officer's version of events, the defendants made no effort to conceal the bags while being pulled over or while the officers approached, all the while knowing that there was a firearm in the trunk of the car.[19] While Officer Nunez contended that Hill "appeared very nervous and was breathing rapidly," the judge held those were "not exactly the hallmarks of marijuana ingestion."[20] The marijuana, gun, ammunition, and statements were all subsequently suppressed as fruits of an unlawful search and seizure.[21]

Part I of this Article discusses the Fourth Amendment warrant exception of the plain smell doctrine, providing a historical overview and presenting case illustrations, which demonstrate how the "rubber stamp" of the smell of marijuana has allowed governmental intrusion into fundamental rights to privacy. Part II explores current concepts of legalization, decriminalization, and medical marijuana, and how those issues have impacted jurisprudence nationwide regarding plain smell. Part III explains why the odor of marijuana alone as a reason to conduct a warrantless search is problematic and prejudicial, especially in the age of decriminalization and legalization, and provides the reader with an understanding of the legal and collective implications of things remaining as they are. Finally, parts IV and V offer the solution of an odor-plus standard via alternate routes. Under such a standard, police may not use the smell of marijuana alone as reason for probable cause to conduct a warrantless search, and, instead, must meet at least one other delineated criterion.

[18] *Id.* at 8.
[19] *Id.*
[20] *Id.* at 7.
[21] *Id.* at 8.



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## I. BACKGROUND AND HISTORY

*"Written originally in response to violations of privacy by an intrusive British government during colonial times," the colonists wanted to live as free men, away from the kingdom from which they fled, in a way that allowed them the autonomy to live and work apart from governmental intrusion.*[22]

### *A. The Legal History of Search and Seizure*

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures.[23] The ultimate measure of the constitutionality of a governmental search is "reasonableness."[24] A search supported by a valid warrant is considered reasonable.[25] This warrant requirement is based upon the premise that a neutral magistrate can better determine probable cause than an officer or prosecutor with a vested interest in the case.[26] Although warrantless searches are presumptively unreasonable, they may be deemed reasonable if they fall within a "few specifically established and well-delineated exceptions,"[27] including exigent circumstances, automobile searches, searches incident to arrest, consensual searches, and plain view searches.[28]

[22] Lee Arbetman & Michelle Perry, *Search and Seizure: The Meaning of the Fourth Amendment Today*, NAT'L COUNCIL FOR SOC. STUD., http://www.socialstudies.org/sites/default/files/publications/se/6105/610507.html (last visited Dec. 18, 2019).
[23] U.S. CONST. amend. IV.
[24] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995); *see also* Riley v. California, 573 U.S. 373, 381 (2014) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).
[25] *Riley*, 573 U.S. at 382 (quoting *Vernonia Sch. Dist.* 47J, 515 U.S. at 653).
[26] In *Johnson v. United States*, 333 U.S. 10, 14 n.3 (1948), the Court determined that close involvement in the competitive enterprise of law enforcement is incompatible with neutral determinations of probable cause because officers must act quickly under the "excitement that attends the capture of persons accused of a crime" without the opportunity to weigh and consider whether a given search or seizure is permissible under the Constitution. *See also* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Coolidge v. New Hampshire, 403 U.S. 443 (1971).
[27] Katz v. United States, 389 U.S. 347, 357 (1967).
[28] Texas v. Brown, 460 U.S. 730, 735-37 (1983); *Coolidge*, 403 U.S. at 465.



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Probable cause "exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[29] For a determination of probable cause, officers need more than a mere suspicion, but less than a determination of guilt beyond a reasonable doubt. "This knowledge must be sufficient that it would cause any reasonable person to believe that a crime exists, and that evidence is likely to be present at the location."[30]

Alternatively, "[r]easonable suspicion is the legal standard by which a police officer has the right to briefly detain a suspect for investigatory purposes and frisk the outside of their clothing for weapons, but not drugs."[31] Reasonable suspicion requires that an officer reasonably believe that the person stopped has, is, or is about to complete a crime.[32] While probable cause uses a reasonable person standard, reasonable suspicion uses a reasonable police officer standard.[33]

*B. The Automobile Search Exception*

The automobile exception permits the warrantless search of a motor vehicle when the officer has probable cause "to believe the vehicle contains contraband or other evidence of a crime."[34] The Court has reasoned that securing a warrant to search a vehicle for contraband goods is impractical "because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[35] Accordingly, where probable cause is present, an officer can search a vehicle for contraband without a warrant."[36]

[29] Ornelas v. United States, 517 U.S. 690, 696 (1996).
[30] *Reasonable Suspicion*, LEGAL DICTIONARY (Feb. 20, 2017), https://legaldictionary.net/reasonable-suspicion/.
[31] *What is Reasonable Suspicion?*, FLEX YOUR RIGHTS, https://www.flexyourrights.org/faqs/what-is-reasonable-suspicion/ (last visited Dec. 18, 2019).
[32] *Reasonable Suspicion*, *supra* note 30.
[33] *Definitions of Probable Cause vs. Reasonable Suspicion*, L. DICTIONARY, https://thelawdictionary.org/article/definitions-of-probable-cause-vs-reasonable-suspicion/ (last visited Dec. 22, 2019).
[34] United States v. Gaskin, 364 F.3d 438, 456 (2d Cir. 2004) (citing Pennsylvania v. Labron, 518 U.S. 938, 940 (1996)).
[35] Carroll v. United States, 267 U.S. 132, 153 (1925).
[36] *Id.*



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### *C. The Development of Plain View and Reliance on the Senses for Warrantless Searches*

#### *1. Plain Touch*

The landmark case, *Terry v. Ohio*, created the doctrine of plain touch, otherwise known as "stop and frisk," by permitting "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."[37] In *Minnesota v. Dickerson*, the Court overturned a lower court's admission of a bag of cocaine, refusing to accept the plain touch exception, and holding that an object may only be seized during a protective pat down if it reasonably resembles a weapon.[38] It further averred that officers must stop examining an object as soon as they are satisfied that the item is not a weapon.[39] At that point, it is impermissible for officers to further examine the item in order to determine if it is some other contraband.[40] Furthermore, "[e]vidence may not be introduced if discovered through a search that is not reasonably limited in scope to the original justification for the search, namely the protective search for weapons."[41]

#### *2. Plain Sight*

"The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."[42] The Court extended warrantless searches to the sense of sight; police may seize evidence discovered in plain view without a warrant under certain circumstances.[43] The

[37] Terry v. Ohio, 392 U.S. 1, 27 (1968).
[38] Minnesota v. Dickerson, 508 U.S. 366, 378 (1993).
[39] Susanne M. MacIntosh, *Fourth Amendment—The Plain Touch Exception to the Warrant Requirement*, 84. J. CRIM. L. & CRIMINOLOGY 743, 751 (1994).
[40] *Dickerson*, 508 U.S. at 379.
[41] MacIntosh, *supra* note 39, at 745.
[42] Payton v. New York, 445 U.S. 573, 587 (1980); Texas v. Brown, 460 U.S. 730, 738 (1983).
[43] Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).



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Court demarcated three requirements for a seizure to be valid under the plain view doctrine: (1) the initial intrusion must be justified by either a warrant or a valid exception to the warrant requirement, (2) the incriminating character of the object must be immediately apparent, and (3) the discovery of the object must be inadvertent.[44] Later, a new requirement was added that an officer must have lawful access to the object for seizure to be permissible under the plain view exception to the warrant requirement.[45]

*3. Plain Hearing*

Following the Supreme Court's precedent that the "[i]ncontrovertible testimony of the senses . . . may establish the fullest possible measure of probable cause,"[46] federal district and appellate courts have recognized the plain hearing exception as a legitimate analogue to the plain view doctrine.[47] These courts noted that the appellants assumed the risk of being overheard by an eavesdropper and therefore had no justifiable expectation of privacy as to their criminal conversations.[48] "Under the 'plain hearing' exception, if police officers overhear statements without the benefit of listening devices while they are stationed at a lawful vantage point, then those statements are admissible at trial."[49]

*D. The Development of The Plain Smell Doctrine*

The use of the sense of smell by officers justifying warrantless searches has a long and sordid history. During the Prohibition Era, the Court held that the presence of the odor of whiskey

[44] *Id.*
[45] Horton v. California, 496 U.S. 128, 137, 140 (1990).
[46] *Coolidge*, 403 U.S. at 468. *See also Horton*, 496 U.S. at 137; *Brown*, 460 U.S. at 740.
[47] United States v. Pace, 709 F. Supp. 948, 954 (C.D. Cal. 1989), *aff'd* 893 F.2d 1103 (9th Cir. 1990); United States v. Jackson, 588 F.2d 1046, 1051-52 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979); United States v. Fisch, 474 F.2d 1071, 1078-79 (9th Cir.), cert. denied, 412 U.S. 921 (1973).
[48] *Jackson*, 588 F.2d at 1054.
[49] *Pace*, 709 F. Supp. at 954.



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did not strip the petitioner of his constitutional guarantees against unreasonable searches.[50] The Court pointed out that despite the agents' ample opportunity to obtain a warrant once their suspicions were raised, they did not attempt to do so before entering, noting "there was no probability of material change in the situation during the time necessary to secure such warrant."[51] It further averred, "Officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search."[52]

Sixteen years later, the Court again invalidated a warrantless search based on the officers' detection of a distinctive odor, holding that the warrantless arrest and search violated the Fourth Amendment, even though officers may have had probable cause to obtain a search warrant.[53] The Court reasoned that the officers could not be "excused from the constitutional duty of presenting their evidence to a magistrate" because no suspect was fleeing, the search was of a permanent premises, no evidence or contraband was threatened with removal or destruction, and "[t]he evidence of their existence before the search was adequate" and "would not perish from the delay of getting a warrant."[54]

The Court also found that while odors alone do not authorize a search without a warrant, the presence of such an odor combined with an affiant qualified to identify the odor and its criminality may be sufficient for the issuance of a warrant. "Indeed[,] it might very well be found to be evidence of most persuasive character."[55] However, the Court further averred that a "magistrate's disinterested determination" is more neutral than that of a law enforcement officer

[50] Taylor v. United States, 286 U.S. 1, 6 (1932).
[51] *Id.*
[52] *Id.*
[53] Johnson v. United States, 333 U.S. 10, 13, 17 (1948).
[54] *Id.* at 15.
[55] *Id.* at 13.



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making a warrantless search and cautioned against reducing the Fourth Amendment "to a nullity," leaving "the people's homes secure only in the discretion of police officers."[56]

In 1974–decades prior to the age of decriminalization–the Fourth Circuit held that boxes inside a truck, combined with the smell of marijuana, was enough to place the contraband in plain view—that is, obvious to the senses.[57] In this case, the defendant, Sifuentes, was arrested at a motel for abduction and carrying a concealed weapon.[58] At the time of his arrest, keys to a truck were found on his person, but he denied knowledge or possession of such a truck.[59] The officers suspected that the vehicle was stolen and, upon moving it from the motel to the police impound garage, they smelled what they asserted to be "a strong odor of marijuana."[60] At that time, they inspected several boxes they observed inside the truck, all of which contained marijuana.[61] The Court reasoned that this plain view search and seizure did not violate the Fourth Amendment because the officers' "initial intrusion was reasonable and lawful."[62]

This case established plain smell, without the need for additional evidence, as an extension of the plain view doctrine. Many courts have used this jurisprudence in permitting searches to stand based on the odor of marijuana alone, even when no other factors were present and no corroborating evidence of any crime. However, in the years since this decision, other courts across the country have diverged on whether odor alone is enough to justify a warrantless search of a vehicle or a person.

[56] *Id.* at 14.
[57] United States v. Sifuentes, 504 F.2d 845, 848 (4th Cir. 1974).
[58] *Id.* at 847.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 849.



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## II. IS ODOR ALONE ENOUGH? THE COURTS ARE SPLIT

### *A. Odor Alone is Enough*

The Supreme Court has recognized that the odor of an illegal drug can be probative in establishing probable cause for a search.[63] Other courts have relied primarily upon the odor of marijuana in determining that probable cause existed for a warrantless automobile search.[64]

The Fifth Circuit Court of Appeals held the "detection of the odor of marijuana justifies 'a search of the entire vehicle.'"[65] During a routine traffic stop, an officer detected the odor of burnt marijuana, which he believed to originating from the ashtray. [66] However, upon finding nothing in the ashtray or passenger area, the officer opened the vehicle's hood to find a hole that revealed a brown plastic bag. He subsequently touched the bag and felt what he believed to be a small amount of marijuana.[67] The defendant was then placed under arrest and, when his car was impounded, a bag of marijuana and a shoulder sling of crack cocaine was discovered. [68] The court reasoned that "Price had smelled but not located marijuana and knew of [the defendant's] four prior arrests on narcotics charges. Together, these facts, viewed in light of Price's experience, justify a finding of probable cause to search the entire vehicle."[69]

[63] Johnson v. United States, 333 U.S. 10, 13, (1948).
[64] *See, e.g.*, United States v. Reed, 882 F.2d 147, 149 (5th Cir. 1989) (border patrol officer had probable cause after detecting burnt marijuana through a rolled-down window); United States v. Haley, 669 F.2d 201, 204 (4th Cir.) (patrolman had probable cause after he stopped a speeding automobile, smelled intense odor of marijuana emanating from driver's body while he sat in police cruiser, and also smelled strong marijuana odor when a passenger rolled down the window of the stopped vehicle), *cert. denied*, 457 U.S. 1117 (1982); People v. Kazmierczak, 605 N.W.2d 667, 674-75 (2000) ("[T]he smell of fresh marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle pursuant to the motor vehicle exception to the warrant requirement."). *See generally* Donald M. Zupanec, Annotation, *Odor of Narcotics as Providing Probable Cause for Warrantless Search*, 5 A.L.R.4th 681, 688-95 (1989) (cataloging a collection of cases holding that odor of marijuana, standing alone, provided probable cause for warrantless search of an automobile and its contents).
[65] United States v. McSween, 53 F.3d 684, 687 (5th Cir. 1995) (quoting *Reed*, 882 F.2d at 149).
[66] *Id.* at 685.
[67] *Id.* at 685-86.
[68] *Id*. at 686.
[69] *Id.*



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The Eighth Circuit Court of Appeals held that an officer, detaining a defendant in his patrol car, had probable cause to search the defendant's vehicle for marijuana upon smelling the odor of burnt marijuana on the defendant's person.[70] Because a traffic violation provided probable cause for a traffic stop, "the officer was entitled to conduct an investigation reasonably related in scope to the circumstances that initially prompted the stop."[71] Furthermore, because the investigation warranted the defendant sitting in the patrol car, and while in the patrol car, the officer smelled marijuana on the defendant, the court concluded that the officer had probable cause to search the vehicle.[72] Later, the same court held that during a routine traffic stop, a trooper had probable cause to search the vehicle and its containers after detecting the odor of raw marijuana while placing his head inside the vehicle to speak to the defendant.[73] Here, the smell of marijuana "created probable cause to search the car and its containers for drugs."[74]

Additionally, the Tenth Circuit Court of Appeals held that because the defendant was "reeking" of marijuana and the officer had extensive law enforcement experience with marijuana arrests, there was probable cause to search the entire car, including the trunk.[75]

*B. Odor Alone is Not Enough*

Some courts have found that the odor of drugs alone is not enough to justify a warrantless search. Others have found that a warrantless search is justified when the odor is coupled with another corroborating factor.

[70] United States v. McCoy, 200 F.3d 582, 584 (8th Cir. 2000) (citing United States v. Neumann, 183 F.3d 753, 756 (8th Cir. 1999)).
[71] *Id.*
[72] *Id.*
[73] United States v. Winters, 221 F.3d 1039, 1042 (8th Cir. 2000).
[74] *Id.* (citing *McCoy*, 200 F.3d at 584).
[75] *See generally* United States v. Loucks, 806 F.2d 208, 209, 211 (10th Cir. 1986).



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In the 1968 case *People v. Marshall*, the California Supreme Court ruled that the smell of marijuana creates probable cause to obtain a search warrant, but does not justify a warrantless search of a residence.[76] Though this case dealt with a residence rather than a vehicle, the language the court used is important. The court noted "[t]he difference between probable cause to believe contraband will be found, which justifies the issuance of a search warrant, and [the] observation of contraband in plain sight, which justifies seizure without a warrant."[77] It further added that an officer's strong belief that a search will reveal contraband—whether based on a sense of smell or another factor—does not validate a warrantless search.[78]

Later, the Fourth Circuit Court of Appeals found that "[t]he strong marijuana odor emanating from [a] vehicle *and* the small bag of marijuana found under the seat gave [an officer] probable cause to believe that still more marijuana was inside, thereby justifying a warrantless search either at the scene or at the police barracks."[79] During a routine traffic stop, Trooper Alford asked the defendant, Haley, to sit in his cruiser.[80] Upon smelling the odor of marijuana emanating from Haley's person, Alford walked back to the vehicle where he smelled the odor inside, as well as on the passenger, Riehl's person.[81] After Alford threatened the defendants that he would obtain a search warrant, Riehl told Alford that there was a small bag of marijuana and pills under the passenger seat.[82] Alford placed the defendants under arrest and called a tow truck to tow the vehicle to the station.[83] Upon its arrival, Alford opened the trunk of the vehicle and discovered the compartment to be wholly filled with large garbage bags made of an opaque plastic. According to

[76] People v. Marshall, 442 P.2d 665, 671 (Cal. 1968).
[77] *Id.* at 668.
[78] *Id.*
[79] United States v. Haley, 669 F.2d 201, 204 (4th Cir. 1982).
[80] *Id.* at 202.
[81] *Id.*
[82] *Id.*
[83] *Id.*



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Alford, one of the bags had a two-inch hole that revealed marijuana.[84] The court held that the odor of marijuana coming from the vehicle, partnered with the small bag of marijuana found under the seat, gave Alford probable cause to believe there was more marijuana inside of the vehicle and, thus, justified a warrantless search.[85] Additionally, the "distinctive configuration" of the garbage bags together with the "intense marijuana odor brought the contraband into plain view and justified its seizure."[86]

The Ninth Circuit Court of Appeals found that the plain smell of phenylacetic acid coupled with the plain view of a gun and police knowledge that the accused was a drug manufacturer, constituted probable cause to justify a warrantless search of the defendant's vehicle.[87]

Many state courts have also held that the odor of marijuana alone is not enough to justify a warrantless search. Notably, in 1977, the Supreme Court of Michigan found no probable cause when officers smelled burnt marijuana emanating from inside an automobile, and nothing in the officers' training or experience supported their claim that marijuana was recently smoked.[88] Additionally, appellate courts in both Maryland and North Carolina recently held that the odor of marijuana emanating from a vehicle provides probable cause sufficient to search the vehicle, but not the persons inside.[89]

[84] *Id.* at 203.
[85] *Id.* at 204.
[86] *Id.*
[87] United States v. Miller, 812 F.2d 1206, 1208-09 (9th Cir. 1987).
[88] People v. Hilber, 269 N.W.2d 159, 165 (Mich. 1978).
[89] Pacheco v. State, 214 A.3d 505, 518 (Md. 2019) ("[N]othing in the record suggest[ed] that possession of a joint and the odor of burnt marijuana gave the police probable cause to believe [the defendant] was in possession of a criminal amount of that substance."); State v. Pigford, 789 S.E.2d 857, 862 (N.C. Ct. App. 2016) ("[I]t is certainly not too onerous to require an officer to take some additional step to establish individualized suspicion before intruding upon a reasonable expectation of privacy.").



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## III. WHERE WE ARE NOW: LEGALIZATION AND DECRIMINALIZATION OF MARIJUANA

Since 2012, eleven states and Washington D.C have legalized small amounts of marijuana for recreational purposes.[90] Ten of those eleven states utilize a commercial model, meaning that for-profit, private businesses sell marijuana to the public.[91]

In most states where marijuana is legalized, an individual must be at least 21 years of age to purchase or possess marijuana,[92] and it may not be consumed openly or publicly.[93] However, it may be consumed in the privacy of one's home or in locally licensed consumption venues.[94]

While there are many similarities among state laws, there are also quite a few differences. For example, while universally illegal to consume marijuana in a vehicle, in Colorado, it is permissible for it to be carried in a sealed container in a car.[95] Massachusetts laws require that individuals store marijuana in a sealed container in the trunk of the vehicle or in a locked glove compartment.[96] Conversely, in Alaska, there are no state laws about how to travel in a vehicle

[90] German Lopez, *Marijuana Has Been Legalized in 11 States and Washington, DC*, VOX, June 25, 2019, https://www.vox.com/identities/2018/8/20/17938336/marijuana-legalization-states-map; *see also Marijuana Overview*, NAT'L CONF. ST. LEGISLATURES (Oct. 17, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx. In 2018, Vermont was the first state to have the issue pass solely through a legislative process, rather than a ballot initiative. *Id.* Michigan followed suit in 2019. *Id.*

[91] Lopez, *supra* note 90.

[92] Skye Gould & Jeremy Berke, *You Can Now Officially Purchase Legal Marijuana in Michigan*, BUS. INSIDER (Jan. 1, 2020, 7:41 AM), https://www.businessinsider.com/legal-marijuana-states-2018-1.

[93] Amber Taufen, *Colorado Marijuana Laws*, WESTWORD, https://www.westword.com/marijuana/laws (last visited Dec. 18, 2019); *Know the Law*, WASH. ST. LIQUOR & CANNABIS BOARD, https://lcb.wa.gov/mj-education/know-the-law (last visited Dec. 18, 2019); *Frequently Asked Questions: Can I Smoke or Consume Adult Use Marijuana Products in Public?*, CANNABIS CONTROL COMMISSION, https://mass-cannabis-control.com/cnb-faqs/#toggle-id-8 (last visited Dec. 18, 2019).

[94] Taufen, *supra* note 93; *Adult-Use Legalization Program Launches*, MARIJUANA POLICY PROJECT (JAN. 21, 2020), https://www.mpp.org/states/illinois/.

[95] Taufen, *supra* note 93.

[96] *Marijuana in Massachusetts--What's Legal?*, MASS.GOV, https://www.mass.gov/info-details/marijuana-in-massachusetts-whats-legal (last visited Dec. 18, 2019); *Frequently Asked Questions: Can I Drive with Marijuana in My Car?*, CANNABIS CONTROL COMMISSION, https://mass-cannabis-control.com/cnb-faqs/#toggle-id-10 (last visited Dec. 18, 2019).



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with marijuana.[97] However, taking marijuana over state lines is a federal offense and is, therefore, illegal in every state.[98]

Additionally, fifteen more states have decriminalized[99] marijuana.[100] "In these states, possession of small amounts of [marijuana] no longer carries jail or prison time but can continue to carry a fine, and possession of larger amounts, repeat offenses, and sales or trafficking can still result in harsher sentences."[101] These laws typically change a low-level marijuana possession offense from a criminal to a civil violation.[102] Consequently, individuals found to be in possession of a small amount of marijuana, within the states' statutory guidelines, are fined rather than imprisoned,[103] thus saving states millions of dollars in incarceration costs.[104]

Perhaps the most sweeping marijuana legislation came in the form of medical marijuana, with 33 states and Washington D.C. all permitting the use of medicinal marijuana within state-specific regulations.[105] Regulation standards between states vary widely. Louisiana falls on the

[97] Laurel Andrews, *A Tourist's Guide to Legal Marijuana in Alaska*, ALASKA OFFICIAL VISITOR'S GUIDE (May 2, 2018), https://www.adn.com/alaska-visitors-guide/2018/05/02/a-tourists-guide-to-legal-marijuana-in-alaska/.

[98] *Recreational Marijuana*, OREGON.GOV, https://www.oregon.gov/olcc/marijuana/pages/faqs-personal-use.aspx (last visited Apr. 3, 2020); *Marijuana in Massachusetts*, *supra* note 96; Andrews, *supra* note 97.

[99] Decriminalization is a loosening of criminal penalties imposed for personal marijuana use even though the manufacturing and sale of the substance remain illegal. . . . [B]oth the production and sale of marijuana remain unregulated by the state. . . . Legalization, on the other hand, is the lifting or abolishment of laws banning the possession and personal use of marijuana. More importantly, legalization allows the government to regulate and tax marijuana use and sales.

Tom Murse, *Decriminalization Versus Legalization of Marijuana*, THOUGHT CO. (Jan. 16, 2020), https://www.thoughtco.com/decriminalization-versus-legalization-of-marijuana-3368393.

[100] *Marijuana Overview*, *supra* note 90; *see also* Lopez, *supra* note 90.

[101] German Lopez, *Fifteen States Have Decriminalized--But Not Legalized--Marijuana*, VOX, July 10, 2019, https://www.vox.com/identities/2018/8/20/17938358/marijuana-legalization-decriminalization-states-map.

[102] *Marijuana Overview*, *supra* note 90; *see also* Glenn Greenwald, *Drug Decriminalization in Portugal*: *Lessons for Creating Fair and Successful Drug Policies*, CATO INSTITUTE (Apr. 2, 2009), https://www.cato.org/publications/white-paper/drug-decriminalization-portugal-lessons-creating-fair-successful-drug-policies. Proponents of decriminalization often point to a 2009 CATO Institute report, which found that in Portugal, where drugs have been decriminalized since 2001, drug usage rates are now among the lowest in the EU and sexually transmitted diseases and deaths linked to drug usage have drastically decreased. *Id.* Additionally, due to removing the fear of arrest, more people in Portugal are being treated for drug disorders and addictions. *Id.*

[103] *Marijuana Overview*, *supra* note 90.

[104] Jeffery A. Miron, *The Budgetary Implications of Drug Prohibition*, SCHOLARS HARVARD (Feb. 2010), https://scholar.harvard.edu/files/miron/files/budget_2010_final_0.pdf.

[105] *Legal Medical Marijuana States and DC*, PROCON.ORG (July 24, 2019), https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/.



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more conservative side by restricting the permissible forms of cannabis and prohibiting whole plant and smoking, while "requir[ing] marijuana-based medicine be in a liquid, such as an oil or spray; capsules or pills; edible dosages; topical applications; transdermal patches; or suppositories."[106] As of 2019, vaporization of marijuana through an inhaler is also persmissable.[107] Additionally, the qualifying lists of illnesses is very narrow, providing treatment for only ten serious medical conditions.[108]

Alternatively, other states provide patients with a more generous use of medicinal marijuana. For example, in Missouri, it is permissible for patients, and those caring for them, to possess up to one ounce of marijuana and grow up to six marijuana plants.[109] Moreover, the list of treatable conditions is expansive, including broad categories and provisions for "when a physician determines that medical marijuana could be an effective and safer treatment" and for "any terminal illness."[110] California was the first state to approve medical cannabis in 1996 under the Compassionate Use Act.[111] Since then, it has remained one of the safest and easiest places to receive medicinal marijuana treatments according to the Americans For Safe Access 2018 Annual Report.[112] California has allowed hundreds of illnesses to be treated by medicinal marijuana

106 Sam Karlin, *Question as Louisiana Marijuana Pharmacies Move Forward: Can They Make Enough Money to Survive?*, ADVOCATE (Mar. 25, 2018, 10:15 PM), https://www.theadvocate.com/baton_rouge/news/business/article_79dcc41a-2ec6-11e8-8290-6bc99773097f.html.

107 *Medical Cannabis Access Begins*, MARIJUANA POL'Y PROJECT (Oct. 3, 2019), https://www.mpp.org/states/louisiana/.

108 Karlin, *supra* note 106 (listing the following qualifying illnesses: "cancer, HIV, AIDS, Cachexia or wasting syndrome, seizure disorders, epilepsy, spasticity, Chron's disease, muscular dystrophy or multiple sclerosis").

109 *Summary of Missouri Medical Marijuana Law*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/states/missouri/summary-missouri-medical-marijuana-law/ (last visited Dec. 19, 2019).

110 *Id.*

111 AMERICANS FOR SAFE ACCESS, MEDICAL MARIJUANA ACCESS IN THE UNITED STATES 67 (2018), https://american-safe-access.s3.amazonaws.com/sos2018/2018_State_of_the_States_Report_web.pdf.

112 *Id.*



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through its progressive legislation, and patients are entitled to whatever amount of marijuana is necessary for their personal medical use.[113]

According to one source, it is estimated that 3,514,510 people legally use medical marijuana in the United States.[114]

The legalization of hemp is also vastly more popular following the 2018 Farm Bill, which made hemp a legal crop to be used in the production of textiles, fabrics, paper, food, and healthcare goods made with cannabidiol, a nonintoxicating extra known as CBD.[115] This bill allowed states to pass their own laws on the cultivation of hemp, which Congress defined as having less than .3% of tetrahydrocannabinol ("THC").[116] Forty-seven states have passed such laws, most of them adhering to the .3% standard.[117]

## IV. HOW LEGALIZATION AND CRIMINALIZATION HAVE AFFECTED THE JURISPRUDENCE

In jurisdictions where marijuana is legal or decriminalized, it appears that courts are mostly moving away from allowing search and seizure based on odor alone. In Colorado, the odor of marijuana is one of a number of factors courts consider until the totality of circumstances test.[118] While it is relevant to a probable cause determination, odor alone is dispositive.[119]

The Supreme Judicial Court of Massachusetts ruled that because state laws changed the status of possessing one ounce or less of marijuana from a criminal to a civil violation, "without

113 *Cannabis Cultivation Guidelines in California*, CAL. NORML, https://www.canorml.org/business-resources-for-cannabis-brands/local-medical-marijuana-cultivation-possession-guidelines-in-california/ (last visited Dec. 19, 2019).
114 *Number of Legal Medical Marijuana Patients*, PROCON.ORG (May 18, 2018), https://medicalmarijuana.procon.org/view.resource.php?resourceID=005889.
115 John Hudak, *The Farm Bill, Hemp Legalization, and the Status of CBD*, BROOKINGS (Dec. 14, 2018), https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/.
116 *Id.*
117 Lucy Diavolo, *Texas, Florida, and Ohio are Among States That May Have Accidentally Decriminalized Marijuana*, TEEN VOGUE, Aug. 21, 2019, https://www.teenvogue.com/story/texas-florida-ohio-states-accidentally-decriminalized-marijuana (citing National Conference of State Legislatures).
118 People v. Zuniga, 372 P.3d 1052, 1059 (Colo. 2016) (citing Florida v. Harris, 568 U.S. 237, 248 (2013)).
119 *Id.*



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at least some other additional fact to bolster a reasonable suspicion of actual criminal activity, the odor of burnt marijuana alone cannot reasonably provide suspicion of criminal activity to justify an exit order" from a vehicle.[120] Additionally, without articulable facts to support a probable cause belief that a criminal amount of contraband was present in a car, a magistrate would not, and could not, issue a search warrant.[121]

In New York, after officers approached a group of individuals standing on church grounds, they subsequently detained a homeless man whom they testified emanated a strong odor of marijuana from his person.[122] The court held "the mere odor of marijuana emanating from a pedestrian, without more, does not create reasonable suspicion that a crime has occurred, and consequently does not authorize law enforcement to forcibly stop, frisk, or search the individual."[123] It further explained that reasonable suspicion requires more evidence of criminal conduct and behavior in order to justify a forcible stop and detention.[124]

In the introductory case set forth in this Article, a New York judge recently threw out the search of a vehicle during a traffic stop based on the smell of odor alone, declaring, "So ubiquitous has police testimony about odors from cars become that it should be subjected to a heightened level of scrutiny if it is to supply the grounds for the search."[125]

In a landmark case, *Pecheco v. State*, the Maryland Court of Appeals held that although police lawfully searched the defendant's car for contraband or evidence based on the odor of

[120] Commonwealth v. Cruz, 945 N.E.2d 899, 910 (Mass. 2011) (citing Commonwealth v. Gaynor, 820 N.E.2d 223, 244 (2005)).
[121] *Id.* at 913; *see also* Commonwealth v. Overmyer, 11 N.E.3d 1054 (Mass. 2014).
[122] People v. Brukner, 25 N.Y.S.3d 559 (N.Y. City Ct. 2015), *aff'd, appeal dismissed*, 43 N.Y.S.3d 851 (N.Y. Co. Ct. 2016) "[The defendant] was subsequently charged with Obstructing Governmental Administration in the Second Degree based upon his physical resistance to a pat down for weapons and search for marijuana, Resisting Arrest based upon defendant's failure to comply with commands to stop resisting, and also Unlawful Possession of Marijuana." *Id.* at 564.
[123] *Id.* at 572.
[124] *Id.* at 571.
[125] *Hill*, No. 853-2017 at 7.



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marijuana, they did not have the same right to search his person.[126] The same court had earlier ruled in *Robinson* that it was allowable for police to search a vehicle based on the odor of marijuana, "as marijuana in any amount remains contraband, notwithstanding the decriminalization of possession of less than ten grams of marijuana; and the odor of marijuana gives rise to probable cause to believe that the vehicle contains contraband or evidence of a crime."[127] The *Robinson* court identified three crimes wherein the odor of marijuana may indicate commission: possession of ten grams or more of marijuana, possession of marijuana with the intent to distribute, or the operation of a vehicle under the influence of a controlled dangerous substance.[128]

The *Pacheco* decision upheld the court's earlier ruling and allowed the search of the vehicle based on odor alone.[129] However, because the defendant was only found to be in possession of one joint of marijuana—well under the permissible ten grams allowed by Maryland law—the court carved out a distinction wherein there was no probable cause to search the defendant's person, pointing out that the possession of one joint did not support "an inference that Mr. Pacheco also possessed roughly nine and a half more grams of that substance on his person."[130] The court further opined, "The same facts and circumstances that justify a search of an automobile do not necessarily justify an arrest and search incident thereto."[131] Therefore, in Pacheco's case, the smell and the marijuana cigarette did not supply probable cause for the arrest and search.[132]

Similarly, the Western District of New York recently held that "the generalized smell of marijuana alone gave the police *carte blanche*, pursuant to the automobile exception, in and of

[126] Pacheco v. State, 214 A.3d 505, 517-18 (Md. 2019).
[127] Robinson v. State, 152 A.3d 661, 665 (Md. 2017).
[128] *Id.* at 133.
[129] *Pacheco*, 214 A.3d at 516.
[130] *Id.* at 517.
[131] *Id.* at 518.
[132] *Id.*



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itself, the right to search the person of the defendant . . . or any other occupant."[133] It further averred, "the Court does not agree that the generalized smell of marijuana coming from a multi-occupant vehicle provides probable cause to arrest everyone in the vehicle for the offense of possessing marijuana."[134] Adding, the odor of marijuana alone "coming from a group of individuals without more, whatever their location, does not by itself provide the police probable cause to arrest and search incident to such arrest any particular individual in the group. . . . [A] finding of probable cause must be particularized to a specific individual."[135]

The state Supreme Court of Vermont held that the "'faint odor of burnt marijuana' didn't give state police the right to impound and search a man's car."[136] Similarly, the Colorado Supreme Court found that "because a drug-detection dog was trained to sniff for marijuana — which is legal in the state — along with several illegal drugs, police could not use the dog's alert to justify a vehicle search."[137]

Courts are split on whether a medicinal marijuana license bars a search based on odor alone. In Arizona, despite the institution of the Arizona Medical Marijuana Act (AMMA), its highest court held there is "probable cause based on the smell or sight of marijuana alone unless, under the totality of the circumstances, other facts would suggest to a reasonable person that the marijuana use or possession complies with AMMA."[138] Conversely, a Pennsylvania court ruled that state troopers did not have probable cause to search a man's vehicle after smelling marijuana

[133] United States v. Brock, No. 13-CR-6025, slip op. at 3-4 (W.D.N.Y. July 12, 2016).
[134] *Id.* slip op. at 6.
[135] *Id.*
[136] Michael Rubinkam, *In Era of Legal Pot, Can Police Search Cars Based on Odor?*, AP NEWS (Sept. 13, 2019), https://www.apnews.com/0ba2cf617a414174b566af68262ef937.
[137] *Id.*
[138] State v. Sisco, 373 P.3d 549, 555 (Ariz. 2016).



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during a traffic stop.[139] Though the officers subsequently discovered marijuana and a gun the defendant was not permitted to possess, the judge held that it was "'illogical, impractical and unreasonable' for the troopers to search Barr's car once he showed them his medical marijuana card."[140] The judge further averred that "the smell of marijuana is no longer *per se* indicative of a crime."[141]

## V. EXPLORATION OF THE PROBLEM: WHY USING THE ODOR OF MARIJUANA ALONE AS A BASIS TO SEARCH IS PROBLEMATIC AND PREJUDICIAL

There are several reasons why the plain smell doctrine is problematic. These include issues related to smell such as the amount of time the odor has been present, mobility of the odor, and the inability to immediately attribute an odor to an identifiable source.[142] Another concern is the reinforcement of racial bias within the criminal legal system. Additionally, states that have legalized hemp are running into issues maintaining marijuana charges as hemp and marijuana emit the same odor, which in turn can destroy probable cause determinations.[143] Finally, once the smell of marijuana was allowed as a sole, unbridled justification for a warrantless search, it also became a rubber stamp for police to search with no questions asked, thus infringing on the right to privacy we all expect as Americans.

### *A. Issues Related to Smell*

[139] Grace Griffaton, *PA Judge Rules It Was Wrong for Troopers to Search a Man's Car After Smelling Marijuana,* FOX 43 (Aug. 12, 2019, 5:52 PM), https://fox43.com/2019/08/12/pa-judge-rules-it-was-wrong-for-troopers-to-search-a-mans-car-after-smelling-marijuana/.
[140] *Id.*
[141] *Id.*
[142] Michael A. Sprow, *Wake up and Smell the Contraband: Why Courts that Do Not Find Probable Cause Based on Odor Alone Are Wrong*, 42 WM. & MARY L. REV. 289, 302 (2000).
[143] Debra Cassens Weiss, *New Hemp Laws Leave Police and Prosecutors Dazed and Confused,* ABA J., Aug. 9, 2019, http://www.abajournal.com/news/article/are-new-hemp-laws-accidentally-legalizing-pot-drug-sniffing-dogs-could-be-obsolete-along-with-pot-smell-probable-cause.



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1. *Amount of Time Present*

While the sense of sight allows a party to see something as it is happening, the sense of hearing allows one to hear a sound the moment it occurs, and the sense of touch allows an individual to immediately feel something and distinguish its shape and size, the sense of smell is more complicated, as courts have recognized smells often linger long past their original emittance.[144] As such, the sense of smell can be considered an unreliable tool to determine whether the object of the odor is physically present. "It is . . . beyond ordinary experience to be able to determine with reasonable accuracy the length of time a persistent odor has lingered. A persistent automobile odor may be strong and appear to be recent although it has lingered for hours, days or even longer."[145]

Moreover, if a warrantless search and seizure "are made upon probable cause, that is, upon a belief, *reasonably* arising out of circumstances known to the seizing officer, that an automobile . . . contains that which by law is subject to seizure and destruction, the search and seizure are valid."[146] However, what if that same belief is no longer reasonable? What if the source of the odor emanating from the automobile or the person is no longer physically present? Or, what if an officer is unable to determine from whom the odor originated?

During a routine traffic stop, an officer believed he smelled the odor of marijuana emanating from a vehicle, and after asking the defendant if he was in possession of marijuana, the defendant subsequently handed over a cigarette pack that contained four marijuana cigarettes.[147]

[144] *See* Brewer v. State, 199 S.E.2d 109, 112 (Ga. 1973); People v. Taylor, 564 N.W.2d 24, 30 (Mich. 1997); People v. Hilber, 269 N.W.2d 159, 164 (Mich. 1978); State v. Schoendaller, 578 P.2d 730, 734 (Mont. 1978) ("[T]he mere odor of marijuana might linger in an automobile for more than a day."); State v. Jones, No. 97-COA-01240, 1998 WL 515939, at *3 (Ohio App. 5th Dist. Aug. 3, 1998) ("Odors may well persist in locations after the object which generated them is long gone. . . .").
[145] *Hilber*, 269 N.W.2d at 164.
[146] Carroll v. United States, 267 U.S. 132, 149 (1925)(emphasis added).
[147] *Hilber*, 269 N.W.2d at 161.



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The search of the car revealed additional paraphernalia and a large quantity of marijuana,[148] but the court found it was not reasonable to infer that the defendant smoked marijuana solely from a residual odor of marijuana.[149]

In its opinion, the Supreme Court of Michigan held that "[e]vidence of a person's past use of marijuana would not alone furnish probable cause to stop him on the street and search him for marijuana. Nor would it alone justify issuance of a warrant to search him, his residence or automobile for marijuana."[150] It further opined:

> Similarly, it is not reasonable to infer present use of marijuana, or to conduct a search for it, on the basis of past use of marijuana evidenced solely by a residual odor of marijuana in an automobile occupied by the defendant, absent determination with reasonable accuracy of the time frame of use in relation to defendant's occupancy.[151]

Because the officer had no training in determining the length of time a residual marijuana odor lingered, and the inference that the marijuana odor was from the driver and not from another occupant no longer in the vehicle was unreasonable, the court found it was also unreasonable to infer that the defendant smoked marijuana solely from a residual odor of marijuana.[152] Therefore, because there is no determinable way to ascertain how long the odor of marijuana has been present, and smells often linger long past their original emittance, the plain smell doctrine is unreliable. Because of this unreliability, smell alone does not even reach the lower standard of reasonable suspicion because it offers no more than an unparticularized hunch.

2. *The Mobility of Odors*

148 *Id.*
149 *Id.* at 165.
150 *Id.* at 164.
151 *Id.*
152 *Id.* at 165.



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Another factor weighing against the reliability of the plain smell doctrine is the mobility of odors. "Odors may . . . be carried by the movement of air to locations where the object which originally created the odor was never present."[153] Therefore, officers may then conduct searches that interfere with one's inherent and sacred right to privacy. "Even a most acute sense of smell might mislead officers into fruitless invasions of privacy where no contraband is found."[154] Because odors are ambulatory, in most circumstances, they cannot provide an officer with more than a mere suspicion of criminal activity.

*3. The Inability to Immediately Attribute the Odor to an Identifiable Source*

A search or seizure supported by probable cause must be particularized as to the person or place to be searched or seized.[155] Furthermore, "[t]his requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."[156]

As explained above, courts have held that the indiscriminate odor of marijuana emanating from a multi-occupant vehicle[157] is not particularized enough to provide probable cause to arrest the occupants of the vehicle for possession of marijuana.[158] And the Supreme Court has previously opined, "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."[159] Therefore, because it is essentially impossible to make a factual determination of the origination of an odor without the use of another sense, and probable cause must be particularized to the individual and not just a vehicle or group, the use of the plain smell doctrine is unreliable.

[153] State v. Jones, No. 97-COA-01240, 1998 WL 515939, at *3 (Ohio App. 5th Dist. Aug. 3, 1998).
[154] People v. Marshall, 442 P.2d 665, 670 (Cal. 1968).
[155] Ybarra v. Illinois, 444 U.S. 85, 91 (1979).
[156] *Ybarra*, 444 U.S. at 91.
[157] United States v. Brock, No. 13-CR-6025, slip op. at 6 (W.D.N.Y July 12, 2016).
[158] *Id.*
[159] United States v. Di Re, 332 U.S. 581, 587 (1948).



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*4. Legalizing Hemp has Accidentally Legalized Marijuana in Some Jurisdictions*

Perhaps the strongest argument that the plain smell doctrine is problematic came from the legalization of hemp. As more and more states begin to legalize hemp, prosecutors have been left scrambling to determine what to do with marijuana charges, both outstanding and forthcoming. Prosecutors in Florida, Georgia, Ohio, Tennessee, and Texas have questioned or refused to pursue charges for low-level marijuana possession.[160] Though hemp and marijuana are similar in both appearance and smell, current lab tests are unable to distinguish between the low levels of THC in hemp and the higher amounts in marijuana.[161] "Without the technology to determine a plant's THC level, labs cannot provide scientific evidence for use in court. Without that help, prosecutors have to send evidence to expensive private labs."[162] And "[w]ithout this drug-testing capability," attorneys will "not [be] able to prove misdemeanor marijuana possession beyond a reasonable doubt."[163]

[160] Weiss, *supra* note 143. Furthermore, in late June, one court in Texas dismissed 234 misdemeanor marijuana possession charged on the grounds that crime labs were ill-equipped to test the amount of THC in confiscated cannabis. Kevin Curtin, *Possession of Small Amounts of Marijuana Effectively Decriminalized in Travis County*, AUSTIN CHRON. (July 12, 2019), https://www.austinchronicle.com/news/2019-07-12/possession-of-small-amounts-of-marijuana-effectively-decriminalized-in-travis-county/. This leads to the question whether, if current charges are being dismissed and future prosecutions are being hampered, should outstanding warrants also be tossed out? Would serving such warrants be "grossly unfair if down the road the cases will just be dismissed?" *Id.* Additionally, Texas Public Safety Officers have been instructed to cite and release for low-level offenses. Jolie McCullough, *Texas DPS Officers Told Not to Arrest in Low Level Marijuana Cases After New Hemp Law*, TEX. TRIB. (Aug. 1, 2019, 4:00 PM), https://www.texastribune.org/2019/08/01/texas-dps-marijuana-cite-and-release-hemp/.

[161] Ty Russell, *Florida Legalized Hemp, Now Miami-Dade Will Stop Prosecuting Minor Marijuana Cases*, CBS MIAMI (Aug. 9, 2019, 11:21 PM), https://miami.cbslocal.com/2019/08/09/florida-hemp-miami-dade-stops-prosecuting-minor-marijuana-cases/; Weiss, *supra* note 143; McCullough, *supra* note 160.
Previously, "laboratories had to identify hairs on marijuana flowers and test for the presence of cannabinoids, a process that required just a few minutes and a test strip that turned purple when it was positive." Nicholas Bogel-Burroughs, *Texas Legalized Hemp, Not Marijuana, Governor Insists as Prosecutors Drop Pot Charges*, NY TIMES (July 19, 2019), https://www.nytimes.com/2019/07/19/us/texas-hemp-marijuana-legalization.html.

[162] Jon Schuppe, *'I Feel Lucky, for Real': How Legalizing Hemp Accidentally Helped Marijuana Suspects*, NBS NEWS (Aug. 18, 2019, 3:47 AM), https://www.nbcnews.com/news/us-news/i-feel-lucky-real-how-legalizing-hemp-accidentally-helped-marijuana-n1043371. Alternatively, states could develop tests from within their own labs, which would be both costly to taxpayers and lengthy for the accused awaiting results. *Id.*

[163] Bill Bush, *Columbus Will Not Prosecute Misdemeanor Marijuana Possession Cases*, COLUMBUS DISPATCH (Aug. 7, 2019, 8:16 PM), https://www.dispatch.com/news/20190807/columbus-will-not-prosecute-misdemeanor-marijuana-possession-cases.



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Testing equipment, hiring new staff, training the staff on new testing methods, and court approval of such methods would be necessary of states that have legalized hemp and wish to continue to prosecute low-level marijuana offenses.[164] Though there are private labs developing the testing currently,[165] some prosecutors believe it to be "unfair and unethical to further prolong" such cases,[166] and backlogs of cases are likely inevitable from the influx of cases that would result in continued prosecution.[167] For example, the Columbus Police Crime Laboratory in Ohio would also be obligated to update its accreditation and purchase new equipment, which would require additional time and resources.[168] In that state, equipment alone needed for this new, specialized testing costs $250,000, while the fine for less than 3.5 ounces of marijuana is just $10.[169] In Texas, the estimated cost for equipment to test forensic quality costs between $300,000-500,000, with more than twenty labs needing such equipment to cover the state.[170] Furthermore, "[e]ven if labs get certified to do this kind of testing, most of the offices said they will have to consider the cost of the testing before deciding to move forward with a case."[171] In addition to the cost consideration

164 Schuppe, *supra* note 162. "Lab officials in Texas have estimated that the total cost there could run beyond $10 million. Private labs are charging $200 to $600 per test." *Id.*

165 As of August 2019, the Texas Forensics Science Commission was in process of developing a THC concentration test that could identify the difference between hemp and marijuana in most circumstances. Ryan Poppe, *If Approved, New Texas Test Will Determine Marijuana Is Illegal With 1% THC Levels*, KERA NEWS (Aug. 16, 2019, 11:36 AM), https://www.keranews.org/post/if-approved-new-texas-test-will-determine-marijuana-illegal-1-thc-levels.

166 Schuppe, *supra* note 162.

167 Curtin, *supra* note 160; Bogel-Burroughs, *supra* note 161.

168 Bush, *supra* note 163.

169 Bill Bush, *Police Dogs Can't Tell the Difference Between Hemp and Marijuana,* COLUMBUS DISPATCH (Aug. 12, 2019, 5:26 AM), https://www.dispatch.com/news/20190812/police-dogs-cant-tell-difference-between-hemp-and-marijuana [hereinafter Bush II].

170 Jolie McCullough & Alex Samuels, *This Year, Texas Passed a Law Legalizing Hemp. It Also Has Prosecutors Dropping Hundreds of Cases*, TEX. TRIB. (July 3, 2019, 6:00 PM), https://www.texastribune.org/2019/07/03/texas-marijuana-hemp-testing-prosecution/.

171 Andrew Pantazi, *Florida Legalized Hemp. Now Prosecutors are Dropping Marijuana Charges and Retiring Dogs*, JACKSONVILLE.COM (Aug. 7, 2019, 8:26 PM), https://www.jacksonville.com/news/20190807/florida-legalized-hemp-now-prosecutors-are-dropping-marijuana-charges-and-retiring-dogs.



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of the testing, officers and prosecutors must consider the cost of obtaining witnesses to testify to the results, many from out of state laboratories.[172]

Additionally, there is speculation that probable cause will no longer be determinable based on the smell of marijuana alone as its odor cannot be distinguished from that of hemp.[173] In Miami-Dade, one state's attorney said, "Since there is no visual or olfactory way to distinguish hemp from cannabis . . . odor alone will no longer be sufficient to establish probable cause to believe the substance is cannabis."[174] In Ohio, the smell of raw cannabis alone does not provide officers with probable cause to search.[175] However, there are still jurisdictions where hemp is legalized and the odor alone is sufficient for probable cause to search.[176]

Even drug sniffing dogs may be retired in many areas, as they cannot differentiate between the smell of hemp and that of marijuana.[177] "Once a dog has been trained to detect a certain narcotic, they can't be retrained to stop reacting to that odor."[178] Furthermore, if an officer discovers a felonious controlled substance in a vehicle based on unqualified odor detection, the case may be thrown out.[179] One jurisdiction in Ohio announced that "a vehicle may not be searched solely because a K-9 trained to alert to marijuana, altered a vehicle,"[180] while at least one jurisdiction in Florida will still utilize drug sniffing dogs since "odor can be one of several factors

[172] Pantazi, *supra* note 171; Bogel-Burroughs, *supra* note 161.
[173] Pantazi, *supra* note 171. In Florida, seven of twenty states attorneys polled explicitly said the new hemp laws would change the probable cause standard for police who previously used the sight and smell of marijuana to search potential suspects. *See also* Tyler Estep, *Citing Georgie Hemp Law, Gwinnett Solicitor Dismisses Marijuana Cases*, ATLANTA J. CONST. (Aug. 8, 2019), https://www.ajc.com/news/local/citing-georgia-hemp-law-gwinnett-solicitor-dismisses-marijuana-cases/v0UpTyEgO3jlkYOytXUumI/.
[174] Russell, *supra* note 161.
[175] Bush II, *supra* note 169.
[176] Kevin Curtin, *Don't Book 'em, Danno: DPS Backs off on Pot Busts*, AUSTIN CHRON. (Aug. 9, 2019), https://www.austinchronicle.com/news/2019-08-09/dont-book-em-danno-dps-backs-off-on-pot-busts/; McCullough, *supra* note 160.
[177]Pantazi, *supra* note 171; Bush II, *supra* note 169.
[178] Bush II, *supra* note 169.
[179] Curtin, *supra* note 160.
[180] Bush II, *supra* note 169.



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that lead to probable cause" under their new policy,[181] though "probable cause may not be developed solely on the smell."[182]

Some jurisdictions in Florida are applying an "odor-plus" standard "that relies on the apparent smell of marijuana in addition to the officers' observations before searching potential suspects."[183] Some of the factors that may help in establishing probable cause under this standard "include but are not limited to information regarding illicit activity prior to the stop, knowledge of the subject's prior recent criminal history for narcotics violations, observation of a hand-to-hand transaction prior to the stop, nervousness, signs of impairment and large amounts of cash."[184] There is concern, however, that this could lead to further issues if probable cause is determined by an officers' subjective opinions.[185] Conversely, probable cause has always been decided by an officers' subjective opinions, and this odor-plus standard could help to eliminate the rubber stamp policy of officers gaining the right to search based on their claim alone that they smelled an odor.

And hemp production has never been stronger. For example, in 2018, growers cultivated 78,000 acres of hemp, which is almost 10,000 more acres than in 2016.[186] Furthermore, "[t]otal sales for hemp-based products in the US were about $1.1 billion in 2018, and are expected to more than double by 2022."[187] In light of the identical smell of hemp and marijuana, the continued increase of hemp and CBD products, the abundant widespread issues that have arisen since

[181] Pantazi, *supra* note 171.
[182] *Id.*
[183] Russell, *supra* note 161; Pantazi, *supra* note 171.
[184] Russell, *supra* note 161.
[185] Pantazi, *supra* note 171.
[186] Parija Kavilanz, *These Hemp Farmers are Making a Killing on the CBD Industry,* CNN BUS. (April 10, 2019, 11:41 AM), https://www.cnn.com/2019/04/09/success/hemp-farmer/index.html.
[187] *Id.*



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marijuana's legalization, and the lack of uniformity among jurisdictions nationwide, the utilization of a standard based on odor alone is unreliable and cannot stand.[188]

*B. The Reinforcement Racial Bias within the Criminal Legal System*

Additionally, the plain smell doctrine only serves to reinforce and exacerbate the already troubling racial bias within our criminal legal system. Though black and white individuals use drugs at about the same rate,[189] black people are significantly more likely to be arrested for drugs than their white counterparts.[190] In fact, though black individuals account for roughly 13% of the population,[191] they make up over 30% of drug arrests[192] and are nearly four times more likely than whites to be arrested for marijuana.[193] And, even though the overall number of marijuana arrest rates has risen over the past decade, "the white arrest rate has remained constant at around 192 per 100,000, whereas the Black arrest rate has [risen] from 537 per 100,000 in 2001 (and 521 per 100,000 in 2002) to 716 per 100,000 in 2010."[194] Therefore, "it appears that the increase in

[188] Eric C. Leas et al., *Trends in Internet Searches for Cannabidiol (CBD) in the United States*, JAMA NETWORK OPEN, Oct. 23, 2019, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2753393.

[189] *See* Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 261-67 (2009) (reviewing drug use data by race and observing that "blacks account for 13% of the total who have ever used an illicit drug"). *See also*, AMERICAN CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 21 (2013), https://www.aclu.org/report/report-war-marijuana-black-and-white [hereinafter ACLU Report].

> In 2010, 34% of whites and 27% of Blacks reported having last used marijuana more than one year ago — a constant trend over the past decade. In the same year, 59% of Blacks and 54% of whites reported having never used marijuana. Each year over the past decade more Blacks than whites reported that they had never used marijuana.

*Id.*

[190] *Crime in the United States 2013*, FBI tbl.43, https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/persons-arrested (last visited Apr. 4, 2020); *see also* ACLU Report, *supra* note 189, at 17-20 (reporting on racial disparities in marijuana enforcement); Fellner, *supra* note 189, at 272-73 (reviewing drug arrest rates by race from 1980 to 2007).

[191] Karen R. Humes, Nicholas A. Jones, & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, U.S. CENSUS BUREAU 4 (March 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

[192] *Crime in the United States*, *supra* note 190.

[193] *Marijuana Arrests by the Numbers*, ACLU, https://www.aclu.org/gallery/marijuana-arrests-numbers (last visited Dec. 22, 2019); *see also Alabama's War on Marijuana*, SOUTHERN POVERTY L. CTR. (Oct. 18, 2018), https://www.splcenter.org/20181018/alabamas-war-marijuana?eType=EmailBlastContent&eId=fbfb3108-c152-47d8-8e23-28fac65ab617.

[194] ACLU Report, *supra* note 189, at 48.



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marijuana possession arrest rates overall is largely a result of the increase in the arrest rates of Blacks."[195]

Furthermore, in the seven states with the most comprehensive requirements for reporting data from traffic stops, police officers were more likely to pull over black drivers than white drivers.[196] More stops consequently lead to more searches, and accordingly, to more arrests. In a system that already overincarcerates people of color per capita,[197] the use of plain smell only serves to reinforce these racial disparities.

*C. Using "Odor" as a Rubber Stamp for Police to Conduct Warrantless Searches*

The "War on Drugs" began in 1971 when President Nixon "declared drug abuse to be 'public enemy number one' and increased federal funding for drug-control agencies and drug-treatment efforts."[198] As a result, the Drug Enforcement Agency ("DEA") was created in 1973.[199] The war on drugs "led to the proliferation of drug-sniffing dogs and the rise of 'pretextual stops,' in which the police stop someone ostensibly to issue a traffic ticket but with the ulterior motive of fishing for drugs."[200] A pretextual stop occurs when "police use traffic violation stops as a way to gain consent, plain view, or other justification for a search or seizure."[201] The *Sifuentes* case, which granted police the right to search vehicles based on odor alone, was then decided in 1974.[202]

[195] *Id.* Additionally, "[t]he disparities are much greater in some areas: A black person was six times as likely as a white person to be arrested by the Baton Rouge Police Department (BRPD) for marijuana possession in 2016." *Racial Profiling in Louisiana: Unconstitutional and Counterproductive,* SOUTHERN POVERTY L. CTR. 5 (2018), https://www.splcenter.org/sites/default/files/leg_special_report_racial_final.pdf.

[196] Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black,* N.Y. TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html (listing the following as the states with the most sweeping reporting requirements: Connecticut, Illinois, Maryland, Missouri, Nebraska, North Carolina, and Rhode Island).

[197] *Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet/ (last visited Dec. 22, 2019).

[198] *War on Drugs: United States History*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/war-on-drugs (last visited Dec. 22, 2019).

[199] *Id.*

[200] Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C.D. L. REV. 741, 743-44 (2016).

[201] *Id.* at 746-47.

[202] United States v. Sifuentes, 504 F.2d 845 (4th Cir. 1974).



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Police have been granted the authority to base a search on something that cannot be categorically proven: a claim based solely on their own sense of smell. The doctrine of plain smell created an avenue by which police officers may use the law in order to justify profiling[203] and fill quotas.[204] In fact, "[i]n the DEA's training program - Operation Pipeline - state and local '[o]fficers learn how to lengthen a routine traffic stop and leverage it into a search for drugs by extorting consent or manufacturing probable cause.'"[205] Furthermore, "[i]f a driver who has been stopped refuses to consent to a search, the police can develop the probable cause they need to look inside simply by claiming to smell marijuana."[206] Consequently, "[i]t is surprisingly common to see cases involving an officer who conducted a search after 'smelling marijuana' only to find a weapon or a drug other than marijuana, but no actual marijuana."[207]

There is also a "small scientific body of work and years of forensic research that has raised challenges to the ability to smell weed through containers, outside homes or . . . from a suspect's car."[208] James Woodford – a chemist specializing in odor molecules and how they can permeate

[203] *See Racial Profiling in Louisiana*, *supra* note 195, at 7. Furthermore, it is well-settled that police are more likely to pull over people of color than they are to stop white individuals. Kreit, *supra* note 200, at 756; *see also*, *Black Drivers in America Face Discrimination by Police*, ECONOMIST, https://www.economist.com/graphic-detail/2019/03/15/black-drivers-in-america-face-discrimination-by-the-police (last visited Dec. 22, 2019). Furthermore, one study found black people were twice as likely to be subjected to a pretextual traffic stop for investigative purposes than their white counterparts. CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 110 (2014). One philosophy is "troopers with an insufficient number of stops facing imminent evaluation are more likely to target for groundless or arbitrary stops individuals whom they perceive to be powerless to effectively complain, which disproportionately includes people of color." *Traffic Stop Quotes Create Racial Profiling Hazard*, ACLU MICH., https://www.aclumich.org/en/cases/traffic-stop-quotas-create-racial-profiling-hazard (last visited Dec. 22, 2019).

[204] Shaun Ossei-Owusu, *Race and the Tragedy of Quota-Based Policing*, THE AMERICAN PROSPECT, Nov. 3, 2016, https://prospect.org/justice/race-tragedy-quota-based-policing/; *see also* Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NPR (April 4, 2015, 4:47 AM), https://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers.

[205] Kreit, *supra* note 200, at 748 (quoting Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 761 (2007)).

[206] Kreit, *supra* note 200, at 752-53.

[207] Kreit, *supra* note 200, at 752.

[208] Annie Sweeney, *Police Say They Smelled Marijuana Before Search, but Judge Tosses out the Evidence*, CHI. TRIB. (Oct. 4, 2012), https://www.chicagotribune.com/news/ct-xpm-2012-10-04-ct-met-marijuana-stops-20121004-story.html.



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barriers and how smell dissipates in air – said, "[u]sually there is never anybody who challenges it, and when it is not challenged, the judges just take it at face value. . . . When the police say, 'I smell marijuana,' if the defense doesn't say anything or bring in an expert, it becomes a fact."[209]

While some people may find it difficult, or perhaps uncomfortable, to believe police would falsify information, a report by the New York Times published in 2019 found that "on more than 25 occasions since January 2015, judges or prosecutors determined that a key aspect of a New York City police officer's testimony was probably untrue"[210] and "at least five other judges have concluded in individual cases that officers likely lied about smelling marijuana to justify searches that turned up an unlicensed firearm."[211] Additionally, within the last few years, several officers in Chicago, Albany, and Virginia were all found to have lied under oath about having smelled marijuana before conducting a warrantless search.[212]

The police themselves refer to this practice as "testilying."[213] According to the aforementioned report, "[i]n many instances, the motive for lying was readily apparent: to skirt constitutional restrictions against unreasonable searches and stops. In other cases, the falsehoods appear aimed at convicting people — who may or may not have committed a crime — with trumped-up evidence."[214] In the report, one officer was quoted as saying, "[c]ertain car stops, certain cops will say there is odor of marijuana. And when I get to the scene, I immediately don't

[209] *Id.* ("[Woodford] has been called to testify on the issue numerous times over 20 years, often re-creating scenes to challenge officers' assertions that they could smell marijuana through packages, containers, or car trunks.").
[210] Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html [hereinafter Goldstein II].
[211] Goldstein, *supra* note 3.
[212] Jahla Seppanen, *NYC Cops Admit Fake 'Weed Smell' Is Used for Illegal Probable Cause Searches,* ROOSTER, Mar. 28, 2018, https://www.therooster.com/blog/cop-admits-fake-'weed-smell'-is-used-for-illegal-probable-cause-searches/.
[213] Goldstein II, *supra* note 210; *see also* Steve Schmadeke, *Four Cops Charged With Lying Under Oath After Video of Drug Bust Shown in Court*, CHI. TRIB. (June 8, 2015, 10:23 PM), https://www.chicagotribune.com/news/breaking/ct-chicago-glenview-cops-charged-20150608-story.html.
[214] Goldstein II, *supra* note 210.



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smell anything . . . . I can't tell you what you smelled, but it's obvious to me there is no smell of marijuana."[215] A Manhattan detective, who spoke to the New York Times on condition of anonymity, said that he had "come to believe that some officers, particularly in plainclothes units, lied about having smelled marijuana because of how frequently he heard it used as justification for a search."[216]

And often, the officers get away with it. Because of the prevalence of plea deals, it is very uncommon for a defendant to have the opportunity to question an officer's version of events.[217] Without a trial, there is no cross-examination, but "in the rare cases when an officer does testify in court — and a judge finds the testimony suspicious, leading to the dismissal of the case — the proceedings are often sealed afterward."[218] In one case highlighted by the New York Times report, a defendant appeared in court sixteen times over the course of 396 days before the officer's lies were revealed and the defendant's case was finally dismissed; however, the offending officer remains in good standing with the department, and "[s]hortly after the case was dismissed, he was promoted to detective and given his gold shield."[219]

We must remove this rubber stamp from the hands of police and restore the right to privacy. In the words of Judge Newbauer, "The time has come to reject the canard of marijuana emanating from nearly every vehicle subject to a traffic stop. So ubiquitous has police testimony about odors from cars become that it should be subjected to a heightened level of scrutiny . . . ."[220]

[215] Seppanen, *supra* note 212.
[216] Goldstein, *supra* note 3.
[217] Goldstein II, *supra* note 210.
[218] *Id.*
[219] *Id.*
[220] People v. Hill, No. 853-2017, slip op. at 7 (N.Y. Sup. Ct. July 29, 2019).



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## VI. THE SOLUTION: AN ODOR-PLUS STANDARD

In the age of decriminalization and legalization, plain smell is no longer enough. In a united nation standing on principles of equality and freedom, the lack of uniformity between the states – providing citizens in some states with lesser rights and protections than those in others – cannot stand. While the balance between federal power and states' rights is a delicate one, there are certain issues upon which the Constitution and the courts have found to be universal. One of these fundamental values is the right to privacy.

"*No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."*[221]

An effective solution first considers our country's founding and why the framers felt the Fourth Amendment was necessary. "Written originally in response to violations of privacy by an intrusive British government during colonial times,"[222] the colonists wanted to live as free men, away from the kingdom from which they fled, in a way that allowed them the autonomy to live and work apart from governmental intrusion. "The British government had issued general warrants, known as writs of assistance, to search colonists' homes for contraband, even when no information was presented to authorities to justify a search. No limits were placed on what items the authorities could search for and subsequently seize."[223] Within this framework, it is

[221] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (emphasis added).
[222] Arbetman & Perry, *supra* note 22.
[223] *Id.* (citing Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 9 (1993)); *see also Writ of Assistance: British-American Colonial History*, ENCYCLOPEDIA BRITANNICA (Feb. 28, 2020), https://www.britannica.com/topic/writ-of-assistance.



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unsurprising that Justice Felix Frankfurter summed up the primary concern of the Fourth Amendment as "the security of one's privacy against arbitrary intrusion by the police."[224]

The Court must begin to restore the Fourth Amendment rights promised in our Constitution to *all* Americans. While some privacy issues such as data security or drug testing of athletes would not have been foreseeable to the framers, boilerplate language like "I smelled the odor of _____" granting police access to search persons would have been very much in their purview. Regarding the aforementioned writs of assistance, "lawyer James Otis . . . made an eloquent attack on the legality of the writs based on the theory of political and social rights that he found in English common law."[225] Otis, "whom John Adams characterized as a 'master of the laws of nature and nations,'" argued that the writ appeared to be "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English lawbook."[226] The similarities between the police powers against which the framers fought and those facing Americans today cannot, and should not, be ignored.

Though there lies a constant tug-of-war between "the legitimate interests of law enforcement" and "the reasonable expectations of privacy of individual citizens,"[227] the plentiful exceptions carved out through jurisprudence have brought us too close to becoming the oppressive land from which our founders fled. Ultimately, even though laws differ nationwide as to the possession and use of marijuana, the foundation of a *search* lies in the protection of the Constitution, and therefore, under the discretion of the Supreme Court.[228] As such, the Court should adopt the "odor-plus" standard recently implemented by jurisdictions in Florida.[229]

[224] Arbetman & Perry, *supra* note 22 (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).
[225] *Writ of Assistance*, *supra* note 223.
[226] *Id.*
[227] Arbetman & Perry, *supra* note 22.
[228] Arbetman & Perry, *supra* note 22.
[229] Russell, *supra* note 161; Pantazi, *supra* note 171.



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As previously stated, some of the factors that may help to establish probable cause under this standard "include but are not limited to information regarding illicit activity prior to the stop, knowledge of the subject's prior recent criminal history for narcotics violations, observation of a hand-to-hand transaction prior to the stop, nervousness, signs of impairment and large amounts of cash."[230] However, this illustrative list is not fail-proof. Officers could still lie about what they observed prior to the search in question, and people often become nervous when being questioned by police, especially in communities where police presence and abuse are high. Therefore, only the more concrete devices by which the officer would need to back up his intuition or the alleged smell should be implemented. From the above list, these should include information regarding illicit activity prior to the stop, knowledge of the subject's prior recent criminal history for narcotics violations, and obvious signs of impairment. Because there is not currently an impairment test for marijuana similar to a breathalyzer,[231] additional factors should include dash and body cam videos, which could corroborate these obvious signs and possibly substantiate what the officer claims to have observed.

This "odor-plus" standard would provide more balanced anchors in the proverbial tug-of-war between state and individual interests. Furthermore, corroboration is a well-utilized legal tool, and one that could help legitimize the statements of a singular individual.[232]

Additionally, through a Supreme Court decision, uniformity would be provided between the states, thereby offering the same levels of protection and affording the same rights to all people, regardless of the state they choose to reside. The Court should act quickly as marijuana laws are

[230] Russell, *supra* note 161.
[231] Charles Scott Courrege, *Drugged Driving: How the Legalization of Marijuana has Impaired the Ability of the Louisiana DWI Law*, 44 S.U. L. Rev. 423, 439-440 (2017) (explaining a recent study's findings regarding Standard Field Sobriety Tests and their differing results in detection of cannabis impairment).
[232] For example, "Texas passed a law in 2001 requiring corroboration of all informant testimony in order to secure a drug conviction." *Unnecessary Evil- Issues: Require Corroboration*, ACLU, https://www.aclu.org/other/unnecessary-evil-issues-require-corroboration (last visited Dec. 22, 2019).



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changing and evolving every day, and unexpected issues – such as the legalization of hemp accidentality decriminalizing marijuana in some states – continue to arise.

## VII. CONCLUSION: AN ALTERNATIVE OPTION

While a Supreme Court decision adopting the odor-plus standard would provide the necessary jurisprudential requirement, the adoption of a universal standard by Congress would also alleviate the problem. Such a standard would need to include not only the amount of marijuana that would be legalized or decriminalized for personal use, but also how the marijuana would be cultivated, stored, sold, and transported, among other issues. Additionally, it should include a criterion by which police could search based on smell. Here, again, the odor-plus standard could be implemented to provide both uniformity to the states and protection for individuals.

Although 62% of Americans believe the use of marijuana should be legalized nationwide,[233] its use, sale or distribution has been illegal under federal law since the 1930s.[234] It remains illegal under federal law and is currently classified as a schedule 1 controlled substance under the Controlled Substances Act.[235] For reference, this classification "puts marijuana in the same category as heroin and a more restrictive category than schedule 2 drugs like cocaine and meth."[236]

Numerous issues have arisen between the states and the federal government since states have begun legalizing marijuana for medical and recreational use, though "[t]here is currently a ceasefire" in the war on marijuana "as long as individuals adhere to state law and don't engage in

[233] Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RES. CTR. (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/.
[234] *Federal Marijuana Laws*, FINDLAW (Jan. 23, 2019), https://criminal.findlaw.com/criminal-charges/federal-marijuana-laws.html.
[235] *The Controlled Substances Act*, FINDLAW (Mar. 1, 2019), https://criminal.findlaw.com/criminal-charges/controlled-substances-act-csa-overview.html.
[236] German Lopez, *Marijuana Is Illegal Under Federal Law Even in States that Legalize It*, VOX, Nov. 14, 2018, https://www.vox.com/identities/2018/8/20/17938372/marijuana-legalization-federal-prohibition-drug-scheduling-system.



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interstate commerce."[237] In a July 2019 Congressional hearing, Republican Representative Tom McClintock stated, "Marijuana decriminalization may be one of the very few issues upon which bipartisan agreement can still be reached."[238] He went on to say that "it ought to be crystal clear to everyone that our laws have not accomplished their goals."[239] Additionally, a comprehensive marijuana legalization bill recently passed through the House Judiciary Committee, making it the first time that a comprehensive cannabis reform bill has cleared a congressional committee.[240]

Legalization would also begin to address the disparities in racial bias that have exploded since the inception of the War on Drugs. As previously stated, though black and white individuals use drugs at about the same rate, black persons are significantly more likely to be arrested for drugs than their white counterparts.[241] Furthermore, "it appears that the increase in marijuana possession arrest rates overall is largely a result of the increase in the arrest rates of Blacks."[242]

Moreover, "[p]olice officers were more likely to stop black and Hispanic drivers than white drivers nationwide . . . and were over twice as likely to threaten or use physical force against blacks and Hispanics that they stopped compared to whites."[243] Additionally, "Blacks also experienced a

[237] *Federal Marijuana Laws*, *supra* note 234. Since 2014, Congress has approved a budget amendment that prohibits the Department of Justice from using funds to prevent states from implementing their medical marijuana laws. This is known as the Rohrabacher-Farr or CJS amendment. *See also* Tom Angell, *Congress Votes to Block Feds from Enforcing Marijuana Laws in Legal States*, FORBES, June 20, 2019, https://www.forbes.com/sites/tomangell/2019/06/20/congress-votes-to-block-feds-from-enforcing-marijuana-laws-in-legal-states/#1f83b7f84b62.

[238] Angelica LaVito, *U.S. Lawmakers Look to Legalize Pot in 'Historic' Marijuana Reform Hearing,* CNBC NEWS (July 11, 2019, 9:54 AM), https://www.cnbc.com/2019/07/10/us-lawmakers-look-to-legalize-pot-in-historic-marijuana-reform-hearing.html.

[239] *Id.*

[240] Claire Hansen, *Comprehensive Marijuana Legalization Bill Passes House Committee in Historic Vote*, U.S. NEWS & WORLD REP., Nov. 20, 2019, https://www.usnews.com/news/national-news/articles/2019-11-20/comprehensive-marijuana-legalization-bill-passes-house-committee-in-historic-vote.

[241] *Crime in the United States*, *supra* note 190; *see also* ACLU Report, *supra* note 189, at 17-20; Fellner, *supra* note 189, at 272-73.

[242] ACLU Report, *supra* note 189, at 48.

[243] *Race & Justice News: Blacks Disproportionately Arrested for Marijuana in Alabama*, SENTENCING PROJECT (Oct. 30, 2018), https://www.sentencingproject.org/news/race-justice-news-blacks-disproportionately-arrested-marijuana-alabama/ (citing ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC (2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf).



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higher rate of street stops compared to whites and Hispanics."[244] This is relevant, especially, when considered in light of search and seizure.[245] It goes to reason that if police stop more black individuals, then those individuals will be subject to more warrantless searches, which leads to disproportionately higher rates of incarceration.[246] Moreover, police are more than twice as likely to use force against people of color.[247] As such, a black individual may be more likely to consent to warrantless searches out of fear than a similarly situated white individual would.

Though legalization would begin to fix some racial disparities, it would not fully repair them. In many states and municipalities that have decriminalized and legalized marijuana, though arrest rates have dropped overall, there still exists a disparity between the arrest rates of black and white individuals despite roughly equal usage rates.[248] In Colorado, one of the first two states to legalize marijuana in 2012, the "marijuana arrest rate for African-Americans is almost three times that of [w]hites."[249] However, no solution will be comprehensive or perfect. Ultimately, lower arrest rates lead to lower rates of incarceration, which will allow more people to retain their jobs, homes, right to vote, and ability to be present for their families. Alternatively, perhaps in the statutes enacted by Congress, additional standards could be implemented such as a national standard on racial bias training and procedures for accountability among police forces nationwide through diminished qualified immunity.

[244] *Id.*
[245] For example, "[a]t the height of the stop-and-frisk era, nearly a decade ago, the police were arresting some 50,000 New Yorkers a year for low-level marijuana offenses, more than 85 percent of whom were black or Hispanic." Goldstein, *supra* note 3.
[246] "Police officers' disproportionate focus on people of color means that they are disproportionately ticketed, arrested, prosecuted, and ultimately imprisoned." *Racial Profiling in Louisiana*, *supra* note 195, at 5.
[247] Prison Policy Initiative, *Police are Twice as Likely to Use Force Against People of Color*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/graphs/use_of_force_2015.html (last visited Dec. 22, 2019) (citing DAVIS, WHYDE & LANGTON, *supra* note 254, at tbl.18. (Graph by Wendy Sawyer, 2018)).
[248] German Lopez, *After Legalization, Black People are Still Arrested at Higher Rates for Marijuana Than White People*, VOX, Jan. 29, 2018, https://www.vox.com/policy-and-politics/2018/1/29/16936908/marijuana-legalization-racial-disparities-arrests.
[249] *Id.*



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Whether it be a Supreme Court decision or Congressional legislation, one thing is certain: something must be done, and it must be done soon. The court system is on the brink of chaos with cases arising all across America offering differing jurisprudence on the same issue. Men and women are serving excessive sentences and mandatory minimums for possession of a drug that is fully legal in Washington D.C. and eleven other states. Black citizens are locked up at disproportionately higher rates in some states, while primarily white business owners sell and profit off of marijuana in others.[250] Police officers utilize boilerplate language to (sometimes) lie and (often) usurp individuals' fundamental right to privacy.

But most of all, there is a Constitutional crisis wherein some individuals are afforded higher degrees of protections and more rights than their fellow Americans. We have begun to regress into the oppressive system that the very founders of our nation fought against. It is time to remove the rubber stamp from the hands of police and restore the rights of individuals promised under the Fourth Amendment. If not now, when?

[250] Alana Yzola, *How Big Weed Became a Rich, White Business*, INSIDER, Dec. 23, 2019, https://insider.com/how-big-weed-became-rich-white-business-2019-12.



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