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M. LOGAN BLAKE

Greened Out: Improving Virginia’s Recreational Marijuana Legislation

ABSTRACT

With the passage of the Cannabis Control Act in 2021, Virginia became the first southern state to legalize recreational marijuana. However, the operative language of the new possession statute, “a person 21 years of age or older may lawfully possess on his person or in any public place not more than one ounce of marijuana,” coupled with the lawful ability to grow four marijuana plants in residences, created interpretational issues. What would happen to a lawful home-grower whose marijuana plants produced more than one ounce? The General Assembly fixed this problem in a 2022 budget amendment that created a blanket home exception allowing one to possess unlimited quantities of marijuana in the home. Further, in a proposed update to the marijuana regime, penalties for marijuana distribution are neutered and the penalty for possession with the intent to distribute is eliminated. This Comment argues that if these two statutes come to co-exist, Virginia will be plagued by unregulated residential marijuana shops. This would not only produce negative consumer health outcomes but also a spike in crime. Therefore, this Comment—beyond exploring what marijuana is and what is in the new legislation—proposes two possible solutions to this problem.

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Editor in Chief, *Liberty University Law Review*, Volume 17; J.D. Candidate, Liberty University School of Law (2023); B.A., Leadership Studies, University of Richmond (2020). First, the Author thanks his darling Chloe for her unwavering love and support. The Author further thanks The Honorable Donald C. Blessing, Chief Judge, Virginia 10th Judicial Circuit, Judge Paul M. Spinden, and Casey R. Stevens, Esq. for their constant mentorship. Final thanks go to the Volume 17 Board and Staff for their diligent work and professionalism.

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COMMENT

GREENED OUT: IMPROVING VIRGINIA'S RECREATIONAL
MARIJUANA LEGISLATION*M. Logan Blake*[†]

ABSTRACT

With the passage of the Cannabis Control Act in 2021, Virginia became the first southern state to legalize recreational marijuana. However, the operative language of the new possession statute, “a person 21 years of age or older may lawfully possess on his person or in any public place not more than one ounce of marijuana,” coupled with the lawful ability to grow four marijuana plants in residences, created interpretational issues. What would happen to a lawful home-grower whose marijuana plants produced more than one ounce? The General Assembly fixed this problem in a 2022 budget amendment that created a blanket home exception allowing one to possess unlimited quantities of marijuana in the home. Further, in a proposed update to the marijuana regime, penalties for marijuana distribution are neutered and the penalty for possession with the intent to distribute is eliminated. This Comment argues that if these two statutes come to co-exist, Virginia will be plagued by unregulated residential marijuana shops. This would not only produce negative consumer health outcomes but also a spike in crime. Therefore, this Comment—beyond exploring what marijuana is and what is in the new legislation—proposes two possible solutions to this problem.

I. REEFER MADNESS

Reefer madness¹ took hold of Virginia on July 1, 2021, when the General Assembly passed the Cannabis Control Act (the Act), making the

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Commonwealth the first state south of the Mason-Dixon line to somewhat legalize the pungent plant² enjoyed by the citizens of eighteen other states and Washington D.C.³ The move was not surprising because 16% of Americans regularly consume marijuana,⁴ almost half have tried it,⁵ and 68% support full legalization.⁶ Americans, including Virginians, like their weed. Although the shift was predictable, Virginia did not plan to be a legal state until 2024.⁷ But concerns over the disproportionate impact of marijuana criminalization on minorities pushed a fractured General Assembly to rush the legalization of simple possession.⁸ Social equity concerns did not convince everyone. The Act left the Senate with a 20-20

¹ This is a pop culture reference to *Reefer Madness*, an exploitation film released in 1936 that demonized marijuana users, specifically Mexican immigrants. See Kristin Hunt, *Marijuana Panic Won't Die, But Reefer Madness Will Live Forever*, JSTOR DAILY (Apr. 23, 2020), <https://daily.jstor.org/marijuana-panic-wont-die-but-reefer-madness-will-live-forever/>.

² Taylor O'Bier, *A Timeline of How Virginia Became the First Southern State to Turn Green*, CBS 6 NEWS RICH., <https://www.wtvr.com/news/local-news/how-virginia-became-the-first-southern-state-to-turn-green> (July 2, 2021, 9:56 AM).

³ See ALASKA STAT. § 17.38.020 (2022); ARIZ. REV. STAT. § 36-2852 (2022); CAL. HEALTH & SAFETY CODE § 11357 (Deering 2022); COLO. CONST. art. XVIII, § 16(3); CONN. GEN. STAT. § 21a-279a (2022); D.C. CODE § 48-904.01 (2022); 410 ILL. COMP. STAT. 705/10-5 (2022); ME. STAT. tit. 28-B, § 1501 (2022); MASS. GEN. LAWS ch. 94G, § 7 (2022); MICH. COMP. LAWS SERV. § 333.27955 (2022); MONT. CODE ANN. § 16-12-106 (2022); NEV. REV. STAT. § 678D.200 (2021); N.J. REV. STAT. § 2C: 35-10a (2022); N.M. STAT. ANN. § 26-2C-25 (2022); N.Y. PENAL § 222.05 (2022); OR. REV. STAT. § 475C.445 (2022); 21 R.I. GEN. LAWS § 28.11-22 (2022); VT. STAT. ANN. tit. 18, § 4230 (2022); WASH. REV. CODE § 69.50.360 (2022).

⁴ Justin McCarthy, *What Percentage of Americans Smoke Marijuana?*, GALLUP, <https://news.gallup.com/poll/284135/percentage-americans-smoke-marijuana.aspx> (Aug. 15, 2022).

⁵ Jeffrey M. Jones, *Nearly Half of U.S. Adults Have Tried Marijuana*, GALLUP, (Aug. 17, 2021) <https://news.gallup.com/poll/353645/nearly-half-adults-tried-marijuana.aspx>.

⁶ Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP, (Nov. 9, 2020), <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx>.

⁷ Gregory S. Schneider & Antonio Olivo, *Virginia General Assembly Votes to Allow Adults to Possess Marijuana on July 1*, WASH. POST (Apr. 7, 2021, 7:07 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-general-assembly-headed-back-to-richmond-to-take-up-marijuana-legalization-other-unfinished-business/2021/04/07/c95c54f8-96e0-11eb-962b-78c1d8228819_story.html.

⁸ *Id.*

vote, which required the Lieutenant Governor to break the tie.⁹ The House passed the Act 53-44.¹⁰

The Act left the General Assembly with many of its provisions—including those integral to creating a recreational sales regime—subject to reenactment in 2022.¹¹ The 2022 legislative session came and went with the provisions subject to reenactment left on the backburner.¹² Now the Commonwealth must wait until the 2023 legislative session to see if, when, and how the General Assembly will implement some of the foundational requirements for effective recreational marijuana legalization.¹³ When the Act passed without a regulated sales framework in place, delegates, police chiefs, and lawyers from around the Commonwealth expressed concerns over a stimulated black market¹⁴ and otherwise law-abiding citizens inadvertently breaking the law.¹⁵ Now that a final determination on when the General Assembly will establish a regulated sales framework has been pushed further into the ether, some of those concerns have proven true.¹⁶ These problems will persist so long as personal marijuana possession is legal while regulated retail sales are not. The aim of this Comment, however, is not to throw stones at the General Assembly.

⁹ *Id.*

¹⁰ *Id.*

¹¹ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 279–80.

¹² Sarah Rankin & Denise Lavoie, *House Republicans Block Bill to Speed Retail Marijuana Sales*, AP NEWS (Feb. 28, 2022), <https://apnews.com/article/business-marijuana-recreational-marijuana-virginia-retail-sales-8815ded35e1390c2e5f70328e65987f1>.

¹³ 2022 SESSION: SB 391 CANNABIS CONTROL; RETAIL MARKET, VA. LEGIS. INFO. SERV., <https://lis.virginia.gov/cgi-bin/legp604.exe?221+vot+H11V0234+SB0391> (last visited Feb. 15, 2023) [hereinafter 2022 SESSION].

¹⁴ Laura French, *Read the Fine Print. Why Chesterfield's Chief Calls New Virginia Marijuana Law 'Very Faulty'*, CBS 6 NEWS RICH., <https://www.wtvr.com/news/local-news/chesterfield-chief-virginia-marijuana-law> (July 1, 2021, 8:14 AM).

¹⁵ Ned Oliver, *Virginia Lawmakers Already Discussing Speeding Up Retail Marijuana Sales*, VA. MERCURY (Aug. 17, 2021, 5:30 PM) <https://www.virginiamercury.com/2021/08/17/virginia-lawmakers-already-discussing-speeding-up-retail-marijuana-sales/>.

¹⁶ See Rankin & Lavoie, *supra* note 12; see also Karina Elwood, *Inside the 'Wild, Wild West' of Virginia's Marijuana Market*, WASH. POST (Aug. 26 2022, 7:54 PM), <https://www.washingtonpost.com/dc-md-va/2022/08/26/virginia-marijuana-gray-market/> (describing the rise of illegal marijuana pop-up shops).

This Comment has three goals. The first is to promote a general understanding of the marijuana plant. Examining the Act through one's current perspective of what "marijuana" is, which is likely influenced by how the government, media, and popular culture have historically portrayed it, is a poor position from which to start. One's perspective may be that marijuana is a miracle plant that heals the mind, body, and soul while causing none of the negative side-effects proclaimed by its detractors. Such a person could find the Act still too restrictive and that this Comment's slightly punitive proposal is simply a perpetuation of the old-school "war on drugs" mentality. Another reader may think that marijuana causes significant psychological issues, makes its users fiends for "hard drugs," or at best dulls its users' intellect, thus the Act represents society's moral decline. Such staunch viewpoints cloud one's objectivity. Therefore, this Comment presents modern literature on how marijuana effects the body to show that the truth lies somewhere between the two extremes. This gives the reader a chance to objectively examine the law and this proposal.

Second, this Comment presents a brief breakdown of the Act and some relevant portions of Senate Bill 391 (SB 391). SB 391—voting on which is postponed until 2023¹⁷—is the proposed vehicle to reenact the provisions of the Act—with slight changes—that were subject to reenactment.¹⁸ The synopsis presents some interesting new marijuana laws currently on the books and how SB 391 may change them. Finally, this Comment proposes changes to the criminal code. These changes are alternatives to each another, but both solve the same problem.

When the General Assembly first passed the Act in 2021, it blanketly prohibited the possession of more than one ounce of marijuana on one's person or in a public place.¹⁹ It did not consider that a citizen's newly-legal home-cultivated four marijuana plants could produce far more than the statutory limit.²⁰ Then, in 2022, the General Assembly passed a budget amendment that revised the possession statute and created a blanket home-exception that allows one to possess an unlimited amount of marijuana in

¹⁷ 2022 SESSION, *supra* note 13.

¹⁸ See S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

¹⁹ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 155–56.

²⁰ Liora Ipsum, *How Much Weed Can You Really Grow from Four Plants?*, LEAFLY, <https://www.leafly.com/news/canada/how-much-weed-can-you-grow-from-4-plants> (Nov. 16, 2020).

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the home.²¹ Further, SB 391 proposes to render all illegal marijuana sales a simple misdemeanor while repealing the current statute—Code § 18.2-248.1—criminalizing the possession of marijuana with the intent to distribute.²² If these two statutes come to coexist, it would be an egregious error by the General Assembly. It would allow citizens to turn their homes into marijuana stash houses from which they could sell unregulated cannabis with little-to-no consequences. Therefore, this Comment proposes an amendment to the possession statute that would clearly protect the possession of legally home-cultivated marijuana while not protecting illegal marijuana possessed in the home. Alternatively, this Comment proposes that the General Assembly refrain from repealing Code § 18.2-248.1. But before the law, this Comment presents the promised examination of the science.

II. CANNABIS SATIVA L.²³

A. *The Most Popular Psychoactive Drug in America*²⁴: *Its Effects and Common Usage*

Humans do not love marijuana simply because it produces ocular and olfactory pleasure. Cannabis enchants with the euphoric and dissociating sensations it imposes on the body and mind. This section begins with an account describing what consuming marijuana feels like. It then explains how marijuana causes those effects, which cannot be done without an examination of its most popular compounds. Finally, this section ends by describing the various ways marijuana users deliver the plant's intoxicating molecules.

²¹ 2022 SPEC. SESS. 1, Va. Acts 668.

²² S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

²³ The botanical name of the average psychoactive marijuana plant. See Christelle M. Andre et al., *Cannabis Sativa: The Plant of the Thousand and One Molecules*, 7 FRONTIERS PLANT SCI. 1, 1 (2016).

²⁴ *Marijuana Addiction: Rates and Usage Statistics*, NAT'L CTR. FOR DRUG ABUSE STATS., <https://drugabusestatistics.org/marijuana-addiction/> (last visited Feb. 16, 2023).

1. “Marijuana is a Useful Catalyst for Specific Optical and Aural Aesthetic Perceptions.”²⁵

Describing how cannabis is consumed and how it commandeers our neurological highways is meaningless if its induced sensation is mysterious to the reader. While researchers are still investigating the long-term psychiatric effects of regular marijuana use,²⁶ it is not the psychotic frenzy-inducing narcotic the 1930s U.S. government claimed it to be.²⁷ In *The Hasheesh Eater*, Fitz Hugh Ludlow described his hashish-induced altered state of consciousness.²⁸ First, he noted dissociated speech, “As I heard once more the alien and unreal tones of my own voice, I became convinced that it was someone else who spoke, and in another world.”²⁹ Next, his perception of time slowed and his short-term memory faltered:

Now for the first time I experienced that vast change which hasheesh [sic] makes in all measurements of time. The first word of the reply occupied a period sufficient for the action of a drama; the last left me in complete ignorance of any point far enough back in the past to date the commencement of the sentence. Its enunciation might have occupied years. I was not in the same life which had held me when I heard it begun.³⁰

Then, his vision twisted: “And now, with time, space expanded also. . . . The whole atmosphere seemed ductile and spun endlessly out into

²⁵ Allen Ginsberg, *The Great Marijuana Hoax*, ATLANTIC (1966), <https://www.theatlantic.com/magazine/archive/1966/11/the-great-marijuana-hoax/383250/>.

²⁶ Bryan W. Jenkins & Jibrán Y. Khokhar, *Cannabis Use and Mental Illness: Understanding Circuit Dysfunction Through Preclinical Models*, 12 FRONTIERS PSYCHIATRY 1, 1, 12–13 (2021).

²⁷ CLAYTON J. MOSHER & SCOTT AKINS, IN THE WEEDS: DEMONIZATION, LEGISLATION, AND THE EVOLUTION OF U.S. MARIJUANA POLICY, 33–34 (2019).

²⁸ See FITZ HUGH LUDLOW, *THE HASHEESH EATER: BEING PASSAGES FROM THE LIFE OF A PYTHAGOREAN*, 18–19 (Harper & Bros., 1857). Hashish is “the concentrated resin from the flowering tops of female hemp plants (*Cannabis sativa* or *C. indica*) that is smoked, chewed, or drunk for its intoxicating effect.” *Hashish*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/hashish> (last visited Jan. 17, 2023).

²⁹ LUDLOW, *supra* note 28, at 22.

³⁰ *Id.*

great spaces surrounding me on every side.”³¹ Finally, he had a mystical experience:

In the midst of my complicated hallucination, I could perceive that I had a dual existence. One portion of me was whirled unresistingly along the track of this tremendous experience, the other sat looking down from a height upon its double, observing, reasoning, and serenely weighing all the phenomena. This calmer being suffered with the other by sympathy but did not lose its self-possession.³²

This account is only a fraction of Ludlow’s work, but the excerpt shows his experience was at least personally compelling. However, cannabis does not affect everyone in the same way, and one’s experience depends on their strain’s interacting cannabinoids and their method of ingestion.³³ But no matter the strain or how its consumed, marijuana alters one’s perceptions of space and time. To understand how cannabis causes such profound effects on the human body, one must understand the part of us that it commandeers.

2. The Endocannabinoid System

The endocannabinoid system is the “bridge between [the] body and mind.”³⁴ It controls the communication network between the brain and the body.³⁵ The endocannabinoid system is aptly named after the cannabis plant.³⁶ Testing exogenous cannabinoids in marijuana plants led to the discovery of cannabinoid receptors in the brain, and the quest to learn the function of those receptors led to the discovery of endogenous

³¹ *Id.*

³² *Id.* at 23.

³³ Zerrin Atakan, *Cannabis, A Complex Plant: Different Compounds and Different Effects on Individuals*, 2 *THERAPEUTIC ADVANCES PSYCHOPHARMACOLOGY* 241, 241 (2012); Bradley E. Alger, *Getting High on the Endocannabinoid System*, DANA FOUND. (Nov. 5, 2013), <https://www.dana.org/article/getting-high-on-the-endocannabinoid-system/>.

³⁴ Alger, *supra* note 33.

³⁵ *Id.*

³⁶ *Id.*

cannabinoids (endocannabinoids).³⁷ Endogenous and exogenous cannabinoids are unique lipid-based, rather than water-soluble, neurotransmitters that bind to cannabinoid receptors and elicit a chemical response.³⁸ Understanding the interaction of exogenous cannabinoids and the human body requires a basic understanding of the endocannabinoid system, but understanding the endocannabinoid system requires a brief discussion of neurotransmission.

Like a general commanding his troops through the chain of command, the brain directs our appendages and organs through neurons and neurotransmitters in a process called “chemical synaptic transmission.”³⁹ Presynaptic neurons in the brain release chemical neurotransmitters like glutamate, dopamine, and serotonin that travel to postsynaptic receptors and control everything from memory, motor functions, and emotions, to excretory and cardiovascular functions.⁴⁰ To execute the brain’s commands, postsynaptic receptors must regulate the chemical cocktails transmitted by the presynaptic neurons.⁴¹ The endocannabinoid system is the means of communication between these presynaptic neurons and postsynaptic receptors.⁴²

The endocannabinoid system consists of cannabinoid receptors and endocannabinoids.⁴³ If the brain is the general and the pre and postsynaptic neurons are its inferior officers, then endocannabinoids are radio transmissions and cannabinoid receptors the operators. There are two types of cannabinoid receptors, CB1Rs and CB2Rs.⁴⁴ CB2Rs are found in immune cells, the spleen, the gastrointestinal system, the brain, and the peripheral

³⁷ See *Id.* “Exogenous” refers to cannabinoids produced outside the body (by the cannabis plant), while “endogenous” refers to cannabinoids produced by the body. *Id.*

³⁸ *Id.*

³⁹ Zachary M. Sheffler et al., *Physiology, Neurotransmitters*, NCBI BOOKSHELF, <https://www.ncbi.nlm.nih.gov/books/NBK539894/> (May 8, 2022).

⁴⁰ *Id.*

⁴¹ Alger, *supra* note 33.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

nervous system, but science knows little of their communicative role.⁴⁵ CB1Rs are mainly in the brain, living in the central and peripheral nerve terminals adjacent to postsynaptic receptors.⁴⁶ Postsynaptic receptors produce and release endocannabinoids that travel in retrograde (backwards) to the CBR1s, bind to the CB1Rs, and tell the CBR1s to inhibit or facilitate the release of certain neurotransmitters as a means for the postsynaptic cells to influence their incoming signals.⁴⁷ The cannabinoids—particularly d-9-THC—found in marijuana usurp these naturally produced endocannabinoids, influencing us in profound ways that we have yet to fully understand.⁴⁸

3. The Cannabinoid Coup d'état

Marijuana plants are complex organisms containing over 400 chemical compounds that have varying effects on the human body.⁴⁹ This section focuses on delta-9-tetrahydrocannabinol (d-9-THC) and cannabidiol (CBD). These chemicals, among sixty others, are collectively known as cannabinoids.⁵⁰ Cannabinoids naturally occur in the marijuana plant and, absent necessary processing, are clumped together as cannabinoid acids.⁵¹ When the marijuana plants are harvested and the plant material is dried, stored, and heated in a process called “decarboxylation,” these cannabinoid acids break down into cannabinoids.⁵² d-9-THC is the most famous—or infamous—cannabinoid.

d-9-THC is the main psychoactive ingredient in marijuana, meaning it causes the “high” that marijuana is famous for.⁵³ Once ingested, d-9-THC

⁴⁵ Atakan, *supra* note 33, at 242; Shenglong Zou & Ujendra Kumar, *Cannabinoid Receptors and the Endocannabinoid System: Signaling and Function in the Central Nervous System*, 19 INT’L J. MOLECULAR SCI. 833, 834, 839 (2018).

⁴⁶ Alger, *supra* note 33.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Atakan, *supra* note 33, at 241.

⁵⁰ *Id.*; Another popular emerging cannabinoid is d-8-THC, which affects the endocannabinoid system in a manner that is similar to d-9-THC, but its legality is hazy. See Pat Goggins, *What is Delta-8?*, LEAFLY, <https://www.leafly.com/news/science-tech/what-is-delta8-thc> (Aug. 5, 2022).

⁵¹ Atakan, *supra* note 33, at 245.

⁵² *Id.*

⁵³ *Id.*

binds to cannabinoid receptors and hijacks our neuro-communication highway.⁵⁴ d-9-THC acts as an endocannabinoid and inhibits the release of select neurotransmitters.⁵⁵ d-9-THC can also prevent the release of inhibitory transmitters, causing presynaptic cells to release more neurotransmitters like dopamine and glutamate.⁵⁶ Through these subversive tactics, d-9-THC causes the mind-bending experience that inspired Fitz Hugh Ludlow's psychedelic imagery. However, not all the effects of this craved compound are desirable. d-9-THC is known to cause anxiety and paranoia in some users, the risk of which increases as the concentration of d-9-THC in the plant increases, and many modern strains are of dubiously high potency.⁵⁷ However, cannabis plants produce another compound, cannabidiol (CBD), that blunts these psychotic effects and may have legitimate medicinal qualities.

CBD is the most widely studied cannabinoid because it seems to have untapped medical potential.⁵⁸ CBD is a nonpsychoactive cannabinoid that, unlike d-9-THC, does not activate cannabinoid receptors.⁵⁹ CBD is an allosteric modulator of cannabinoid receptors while d-9-THC and most endocannabinoids are orthosteric ligands.⁶⁰ Simply put, cannabinoid receptors have primary and secondary binding sites for cannabinoids; d-9-THC and endocannabinoids bind to primary sites and activate cannabinoid receptors while CBD binds to secondary sites and can either inhibit or facilitate the binding of d-9-THC and endocannabinoids to the primary sites.⁶¹ Therefore, CBD has a complicated relationship with d-9-THC. When CBD is consumed in high doses in combination with low doses of d-

⁵⁴ Alger, *supra* note 33.

⁵⁵ Atakan, *supra* note 33, at 242–43.

⁵⁶ *Id.* at 243.

⁵⁷ Alger, *supra* note 33; Atakan, *supra* note 33, at 247.

⁵⁸ See Christian Larsen & Jorida Shahinas, *Dosage, Efficacy and Safety of Cannabidiol Administration in Adults: A Systematic Review of Human Trials*, 12 J. CLINICAL MED. RSCH. 129, 129 (2020).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*; Cf. Ahmed F. Abdel-Magid, *Allosteric Modulators: An Emerging Concept in Drug Discovery*, 6 ACS MED. CHEMISTRY LETTERS 104, 104 (2015) (explaining the function of allosteric modulators).

9-THC, CBD increases d-9-THC's psychoactive "effectiveness."⁶² Conversely, because CBD influences the communication system that d-9-THC commandeers, CBD blunts d-9-THC's undesirable side effects.⁶³ Further, CBD allegedly promotes sleep, treats anxiety, depression, pain, and epilepsy through its interaction with cannabinoid receptors and other receptors throughout the body.⁶⁴ Therefore, those who consume marijuana should use d-9-THC and CBD in tandem to reduce the likelihood of experiencing the harsher psychotic symptoms of modern high-potency cannabis.⁶⁵ All this discussion of cannabinoids naturally raises the question: "how do users ingest them?"

4. Baked, Fried, or Smoked: The Cornucopia of Consumption Methods

The common perception of marijuana consumption is a product of pop culture. Most people probably picture a hazy-eyed stoner puffing on the end of a beige, twisted cigarillo or drawing from a large water-filled beaker that would look more at home in a laboratory than in a smoke shop. But just as society has diverse opinions on the plant, consumers use diverse cannabinoid ingestion methods. The common means of marijuana ingestion fall into three basic categories: combustion, vaporization, and oral consumption.⁶⁶ All means perform the same function on the plant: decarboxylation. Decarboxylation is the process of applying heat or light through smoking, baking, or refluxing to breakdown the cannabinoid acids in the raw cannabis plant into the desired cannabinoids like d-9-THC and CBD.⁶⁷ However, while these consumption methods may have essentially the same impact on the plant, they do differ in how they interact with the human body.

⁶² Atakan, *supra* note 33, at 245, 247.

⁶³ *Id.*

⁶⁴ Scott Shannon et al., *Cannabidiol in Anxiety and Sleep: A Large Case Series*, 23 PERMANENTE J. 18, 19 (2019); Larsen & Shahinas, *supra* note 58, at 129.

⁶⁵ Atakan, *supra* note 33, at 247.

⁶⁶ Kayla Williams, *The Different Ways to Smoke and Consume Cannabis*, LEAFLY, <https://www.leafly.com/news/cannabis-101/the-complete-list-of-cannabis-delivery-methods> (Sept. 27, 2021).

⁶⁷ Mei Wang et al., *Decarboxylation Study of Acidic Cannabinoids: A Novel Approach Using Ultra-High-Performance Supercritical Fluid Chromatography/Photodiode Array-Mass Spectrometry*, 1.1 CANNABIS & CANNABINOID RSCH. 262, 263 (2016).

The way users consume marijuana impacts the onset, intensity, and duration of their experiences.⁶⁸ Smoking cannabis—the combustion method—continues to be the most popular way to consume marijuana.⁶⁹ Marijuana users roll it into joints,⁷⁰ blunts,⁷¹ or put it into various types of pipes.⁷² When one ignites their cannabis, the psychoactive effects begin within moments and can last anywhere from one to four hours.⁷³ Smoking gives the user utmost control because it is easy to regulate intake and, therefore, intoxication level.⁷⁴ Yet with the benefit of control comes the burdens of inhaling potentially carcinogenic combusted material that can negatively affect respiratory health.⁷⁵ To alleviate these hefty burdens, one can choose to vape cannabis instead of igniting it.⁷⁶ Vaping is placing cannabis into an electronically heated chamber that bakes the cannabinoids out of the plant, which are then released as a vapor and inhaled.⁷⁷ This method of inhalation retains the benefits of control and quick onset seen in combustion methods while reducing inhaled carcinogens.⁷⁸ Both smoking and vaping, however, carry the risk of turning a casual user into a habitual one.⁷⁹

⁶⁸ Jacob T. Borodovsky et al., *Smoking, Vaping, Eating: Is Legalization Impacting the Way People Use Cannabis?* 36 INT'L J. DRUG POL'Y 141, 142 (2016).

⁶⁹ *Survey: Smoking Cannabis Remains Most Popular Method of Ingestion*, NORML (Mar. 5, 2020), <https://norml.org/news/2020/03/05/survey-smoking-cannabis-remains-most-popular-method-of-ingestion/>.

⁷⁰ A joint is ground marijuana wrapped in rolling paper made of hemp, wood pulp, or various other materials. *Joint*, LEAFLY, <https://www.leafly.com/learn/cannabis-glossary/joint> (last visited Jan. 17, 2023).

⁷¹ A blunt is ground marijuana wrapped in a cigar or other wrap made from tobacco. Kayla Williams & Pat Goggins, *What's the Difference Between Joints, Blunts, and Spliffs?*, LEAFLY, <https://www.leafly.com/news/cannabis-101/whats-the-difference-between-joints-blunts-and-spliffs/> (Sept. 28, 2022).

⁷² Williams, *supra* note 66.

⁷³ Borodovsky et al., *supra* note 68, at 142.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Borodovsky et al., *supra* note 68, at 142.

The horror stories we often hear of someone overconsuming cannabis and having an existential or mild psychotic crisis likely result from inexperienced users haphazardly eating marijuana-infused edibles of unforeseen potency. Marijuana is now infused with almost every culinary medium, from candies, desserts, and beverages, to beef jerky and pizza sauce.⁸⁰ Edibles are simple to make; they only require heating the raw plant material in an oil-based liquid.⁸¹ The heat causes decarboxylation and the released cannabinoids bind to their fatty surroundings.⁸² After a thorough strain, one can add the resulting mixture to any recipe.⁸³ The effects of edibles differ from their inhaled counterparts. While the lungs instantly absorb combusted or vaped cannabinoids, edibles are digested, meaning it could take over an hour before the full blast of ingested d-9-THC hits the user's brain.⁸⁴ Further, because the speed of absorption is dictated by the contents of the consumer's stomach, an edible may impact the mind for six hours or more, and the intensity can be wildly unpredictable.⁸⁵

Another consumption method worth mentioning is "dabbing," or the vaporization and inhalation of marijuana oils, concentrates, waxes, and resins.⁸⁶ Users scrape up highly potent marijuana concentrate and place it onto a heated quartz, titanium, or ceramic platform; this contact with the elevated temperature vaporizes the substance, which users then inhale through a beaker-like "rig."⁸⁷ Marijuana concentrates are made through numerous processes, such as dry processing, dry ice processing, water-based processing, and by using either flammable or nonflammable solvents.⁸⁸ The

⁸⁰ Hannah Meadows, *The 10 Best Infused Savory Edibles on the Market*, LEAFLY, <https://www.leafly.com/news/strains-products/best-savory-infused-edibles> (Sept. 14, 2022); Williams, *supra* note 66.

⁸¹ Daniel G. Barrus et al., *Tasty THC: Promises and Challenges of Cannabis Edibles*, METHODS REP RTI PRESS, 1, 2–3 (2016).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Alger, *supra* note 33.

⁸⁵ *Id.*; Barrus et al., *supra* note 81, at 5, 7.

⁸⁶ Mary Frances Mullins, *Cannabis Dabbing: An Emerging Trend*, 51 NURSING 46, 47–48 (2021).

⁸⁷ *Cannabis (Marijuana) Concentrates DrugFacts*, NAT'L INST. DRUG ABUSE (June 2020), <https://www.drugabuse.gov/publications/drugfacts/marijuana-concentrates> [hereinafter *Cannabis Concentrates*].

⁸⁸ *Id.*

flammable solvent method is the most commonly practiced because it is cheap, efficient, and produces highly potent concentrates, but the production process carries with it the inherent risk of fires and explosions.⁸⁹ The flammable solvent method involves passing butane oil through a tube filled with cannabis; as the fluids pass, the cannabinoids dissolve into the butane, and the cannabis and butane concoction then exits the tube through a filter.⁹⁰ Vaporizing cannabis concentrates is the most dangerous and psychoactively intense method of ingesting marijuana because the d-9-THC levels normally found in concentrates transcend the levels found in dried marijuana.⁹¹ Further, even under the new Act, the legality of cannabis concentrates is still hazy in Virginia because the new cannabis regulatory board, not the criminal code, will promulgate concentrate possession limits.⁹²

Humans love altering their consciousnesses with extraneous chemicals. Marijuana, as the reader may see, is relatively innocuous compared to some of the other chemicals in which humans indulge. But it is not without its problems. To prevent some of these problems, recreational marijuana will not be anarchy. The Commonwealth will impose laws and regulations. Some of the laws and regulations will focus on public health. Others will focus on remedying past societal wrongs. It is thus worth exploring the Commonwealth's emerging cannabis law and policy.

III. THE CANNABIS CONTROL ACT

Referring to recreational marijuana as “legal” in Virginia is a bit of a misnomer. On July 1, 2021, the General Assembly only legalized simple possession and minimal home cultivation. Possessing up to one ounce of dried cannabis on one's person or in a public place now carries no criminal or civil penalties, and neither does cultivating up to four plants in one's

⁸⁹ *Id.*; Mullins, *supra* note 86, at 48.

⁹⁰ *Cannabis Concentrates*, *supra* note 87; Mullins, *supra* note 86, at 48.

⁹¹ *Cannabis Concentrates*, *supra* note 87; Mullins, *supra* note 86, at 48. The average level of d-9-THC found in dry marijuana is about 15%, while the levels found in cannabis concentrates can range from 54% to 80%. *Cannabis Concentrates*, *supra* note 87; Mullins, *supra* note 86, at 48.

⁹² VA. CODE ANN. § 4.1-1100 (2022) (stating the Board shall promulgate an amount of “marijuana product” that is equivalent to one ounce of marijuana).

residence.⁹³ However, while simple possession is legal, many of the other laws promulgated by the Act regarding the recreational sales regime may simply be apparitions. Many of the Act's provisions were subject to reenactment by the General Assembly in 2022.⁹⁴ The Act's reenactment came before the General Assembly with minor changes as Senate Bill 391 (SB 391).⁹⁵ SB 391 passed in the Senate, but a Republican House Subcommittee pushed a final vote on SB 391 until 2023.⁹⁶ Therefore, marijuana's true legal status is tentative.

Because of the ridiculousness that ensued from legal marijuana possession coupled with illegal—and thus unregulated—recreational sales,⁹⁷ marijuana will likely be a regulated, salable commodity sometime soon. But just what that system will look like is uncertain. However, SB 391 did not die on the vine. It is still up for a vote in 2023. It also did not substantively change much of the Act. Therefore, examining SB 391—where necessary—and the Act's provisions could paint a fairly accurate picture of future Virginia marijuana legislation.

Legitimizing the cultivation, processing, and sale of a psychoactive drug is not a step lightly taken by the General Assembly. The Act's provisions reflect that this decision was the product of political, social, and philosophical concerns. This Comment briefly examines the non-criminal provisions of the Act by breaking them down into three sections: those relating to the regulatory body called the “Cannabis Control Authority,” the licensing structure, and the collection and distribution of marijuana-related revenue. Interspersed throughout these provisions are statutes designed to address the prominent social equity concerns expressed by the Democratic delegates. This Comment does not address the entire Act or all of SB 391.

⁹³ *Id.* § 4.1-1100(A); VA. CODE ANN. § 4.1-1101(A) (2022).

⁹⁴ See S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 279.

⁹⁵ See S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

⁹⁶ 2022 SESSION, *supra* note 13.

⁹⁷ See 3 *Charged with Illegal Sale, Distribution of Marijuana at 2 Virginia Beach Pop-Up Shops*, 3 WTKR (May 13, 2022, 6:27 PM), <https://www.wtkr.com/news/3-charged-with-illegal-sale-distribution-of-marijuana-at-2-virginia-beach-pop-up-shops> (detailing more instances of random illegal marijuana pop-up shops). Through investigation, the author of this Comment discovered an online resource that pairs Virginia cannabis consumers with illegal cannabis dealers. The website included communication methods, pop-up shop announcements, menus, and delivery options. To not promote the website's use, a citation is omitted.

Nor does it point out every difference. This Comment examines the Act and addresses only those changes likely to be made by SB 391 that are necessary to understand the basic workings of the legislation.

A. *The Cannabis Control Authority: Structure, Powers, and Mandatory Regulations.*

The Act begins by establishing a new independent agency, dubbed the Cannabis Control Authority (the Authority), to oversee and regulate Virginia's retail marijuana sales.⁹⁸ The Authority's power flows from its Board of Directors (the Board), which is tasked with implementing marijuana regulations that are "for the benefit of the citizens of the Commonwealth and for the promotion of their safety, health, welfare, and convenience."⁹⁹ Further, the Authority has a Cannabis Public Health Advisory Council that will monitor public health trends relating to marijuana and make regulation recommendations to the Board.¹⁰⁰ The provisions that establish the Authority, its powers, and the regulations it is required to promulgate became effective on July 1, 2021, and are mostly not subject to reenactment.¹⁰¹

The Board has a range of powers under the Act. Almost all these powers relate to the potential cannabis industry. The Board will issue licenses, control the possession and distribution of marijuana products, implement training programs for dispensary employees, create public health propaganda for dispensaries to hand out to their customers, and perform other actions reasonably necessary for it to carry out its duties as the preeminent cannabis regulator.¹⁰² Further, the Board will establish a Cannabis Equity and Diversity Support Team, whose primary mission will be to analyze potential barriers to entry for minority cannabis business owners and help those owners navigate the administrative mire that will be the new cannabis industry.¹⁰³ The Board must also devise a plan to elicit the industry participation of those living in areas scourged by the old

⁹⁸ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 125 (codified as amended at VA. CODE ANN. § 4.1-601 (2022)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 125–26 (codified as amended at VA. CODE ANN. § 4.1-603 (2022)).

¹⁰¹ *Id.* at 279.

¹⁰² *Id.* at 127–32 (codified as amended at VA. CODE ANN. §§ 4.1-604, 4.1-606 (2022)).

¹⁰³ *Id.* at 127 (codified as amended at VA. CODE ANN. § 4.1-604 (2022)).

prohibitive marijuana regime.¹⁰⁴ The regulations the Board must promulgate show the General Assembly's desire to ensure that the products consumers receive are safe and that illicit use of those products is limited.

The General Assembly's commitment to eliminating unlawful marijuana distribution is exemplified by the seed-to-sale tracking system. This system will track marijuana "from either the seed or immature plant stage until the retail marijuana or retail marijuana product is sold to a customer at a retail marijuana store."¹⁰⁵ The logistics of such a scheme are for the Board to determine.¹⁰⁶ The seed-to-sale tracking system is but one labor ahead of the Board. The Board will also mandate security standards for commercial grows such as lighting, physical security, and alarm systems.¹⁰⁷ The Board will have to ensure that the transportation of marijuana is secure and that all facilities preparing marijuana are sanitary.¹⁰⁸

The requirement that all retailers sell marijuana products in Board-required packaging with statutorily required warning labels further exemplifies the commitment to consumer safety.¹⁰⁹ Additionally, edible marijuana products will have a d-9-THC potency cap at five milligrams per dose.¹¹⁰ SB 391 proposes to reduce the d-9-THC dose limit per package from sixty milligrams to fifty.¹¹¹ Beyond what is set out in the home cultivation statute,¹¹² the Board will implement regulations that curb child

¹⁰⁴ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 127 (codified as amended at VA. CODE ANN. § 4.1-604 (2022)).

¹⁰⁵ *Id.* at 134 (codified as amended at VA. CODE ANN. § 4.1-604 (2022)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 130 (codified as amended at VA. CODE ANN. § 4.1-606 (2022))

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 169 (subject to reenactment but repeated in SB 391).

¹¹⁰ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 130 (codified as amended at VA. CODE ANN. § 4.1-606 (2022)).

¹¹¹ *Id.*; S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

¹¹² The relevant portion of the statute is as follows:

B. A person who cultivates marijuana for personal use pursuant to this section shall:

1. Ensure that no marijuana plant is visible from a public way without the use of aircraft, binoculars, or other optical aids;
2. Take precautions to prevent unauthorized access by persons younger than 21 years of age; and

safety issues and nuisances that naturally coincide with growing marijuana in a home.¹¹³ Finally, the Board will have to establish a testing program that requires samples of all batches of retail marijuana, prior to sale, be sent to a laboratory to test for contaminants and to determine that batch's percentage of d-9-THC.¹¹⁴ Neither the Act nor SB 391 heavily detail the range of safety and industry regulations, as they will mostly be within the Board's discretion.

B. Licensing: Categories and Preferences

Breaking into Virginia's possibly emergent cannabis industry may prove to be a dog fight because the General Assembly originally intended to limit the number of licenses available at almost every step of the production chain and to give preference to applicants who qualify under the much-contested social equity provisions—and those laws are still on the books.¹¹⁵ Those limitations may change. Either way, should Virginia's recreational scheme get up and running, there will be licenses to go around, and the Act details what kind of licenses will be issued and who they will be issued to.

Five types of licenses will be available to would-be cannabis entrepreneurs: retail sale licenses, wholesale licenses, manufacturing licenses, cultivation licenses, and testing facility licenses.¹¹⁶ Other than testing facility licenses, the Act caps the number of licenses granted in each category.¹¹⁷ It provides that no more than 400 retail licenses, twenty-five wholesale licenses, sixty manufacturing licenses, and 450 cultivation licenses will be issued.¹¹⁸ However, SB 391 proposes to eliminate all of those

3. Attach to each marijuana plant a legible tag that includes the person's name, driver's license or identification number, and a notation that the marijuana plant is being grown for personal use as authorized under this section.

VA. CODE ANN. § 4.1-1101(B) (2022).

¹¹³ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 131 (codified as amended at VA. CODE ANN. § 4.1-606 (2022)).

¹¹⁴ *Id.* at 167–68.

¹¹⁵ *Id.* at 130–31 (codified as amended at VA. CODE ANN. § 4.1-606 (2022)).

¹¹⁶ *Id.* at 131 (codified as amended at VA. CODE ANN. § 4.1-606 (2022)).

¹¹⁷ *See id.*

¹¹⁸ *Id.*

caps except for retail licenses.¹¹⁹ Further, whether licensees can receive licenses in more than one category will be up to the Board.¹²⁰ This deference to the Board is set to limit vertical integration and “ensure that all licensees have an equal and meaningful opportunity to participate in the market.”¹²¹ In that vein, SB 391 proposes an 8,000 square-foot canopy¹²² limit on those who do obtain multiple licenses.¹²³ Beyond vertical integration, licensees may have difficulty proliferating business locations. Licenses will only be granted for one place of business, meaning if a retail licensee wants to open more than one dispensary, they must apply for another retail license for the new location,¹²⁴ a move that may be thwarted by the licensing caps. The Board may also cap the number of licenses granted in one community if too many licenses are issued to that location or if marijuana seems to have a particularly harsh impact on that community’s health.¹²⁵ Licensing restrictions are not the only ways the licensing structure will control entry into the new industry: social equity provisions that give licensing preferences to disadvantaged groups may present a barrier for some interested citizens, and this barrier has been a source of concern.

A great racket ensued among lawmakers over the social equity provisions in the licensing framework.¹²⁶ Some delegates claim the provisions merely reward criminals for prior criminality, while others herald the structure as a step to rectify the overcriminalization of marginalized communities under

¹¹⁹ S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

¹²⁰ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 131 (codified as amended at VA. CODE ANN. § 4.1-606 (2022)).

¹²¹ *Id.*

¹²² “Canopy” is defined by SB 391 as “any area dedicated to live marijuana plant cultivation, including areas in which plants are grown, propagated, cloned, or maintained. If any such areas are stacked vertically, each level of space shall be measured and included in the total canopy square footage.” S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

¹²³ *Id.*

¹²⁴ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 140.

¹²⁵ *Id.* at 130 (codified as amended at VA. CODE ANN. § 4.1-606 (2022)).

¹²⁶ See Andy Fox, *Social Equity Licenses for Selling Marijuana Causing Stir with Some Republican State Leaders*, WAVY (July 10, 2021, 7:04 PM), <https://www.wavy.com/marijuana-in-virginia/social-equity-licenses-for-selling-marijuana-causing-stir-with-some-republican-state-leaders/>.

the old marijuana regime.¹²⁷ For better or worse, the Board must implement the following social equity objectives. First, the Board must ensure the license application process is configured in a way that prevents disparate impacts on historically disadvantaged communities.¹²⁸ Neither the Act nor any other Virginia statute defines “historically disadvantaged community.” However, the basic definition of “disadvantaged” means “lacking in the basic resources or conditions (such as standard housing, medical and educational facilities, and civil rights) believed to be necessary for an equal position in society.”¹²⁹ Therefore, it seems the Board must strive to stem any marijuana-related adverse health outcomes on communities that suffer from terrible healthcare while still working to include impoverished communities in the potential marijuana economic boom.

Next, the Board will establish criteria to evaluate “social equity license applicants.”¹³⁰ Social equity license applicants are those who have lived in Virginia for at least a year and who are either persons or entities with at least 66% ownership by someone who falls into one of the enumerated categories.¹³¹ The first of such categories are those, or a parent, child, sibling, or spouse of those, who have been convicted of a misdemeanor marijuana offense under the old marijuana regime.¹³² Second are those who have resided for at least three of the last five years in an area the Board determines “to have been disproportionately policed for marijuana crimes” or that is “economically distressed.”¹³³ The last category encompasses those

¹²⁷ See Monique Calello, *Virginia Marijuana Legalization: What Worked, What Hasn't Worked, and What's Ahead in 2022*, NEWS LEADER (Dec. 9, 2021, 6:55 AM), <https://www.newsleader.com/story/news/2021/12/08/marijuana-legalization-virginia-2022-general-assembly-plans-weed-cannabis-recreation/882659002/>; see also Fox, *supra* note 126.

¹²⁸ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 130–31 (codified as amended at VA. CODE ANN. § 4.1-606 (2022)).

¹²⁹ *Disadvantaged*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/disadvantaged> (last visited Jan. 14, 2023).

¹³⁰ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 130–31 (codified as amended at VA. CODE ANN. § 4.1-606 (2022)).

¹³¹ *Id.* While the Statute provides five categories of social equity license applicants, this Comment distills them down into three.

¹³² *Id.* at 130.

¹³³ *Id.* at 130–31. The Board is to use data collected by the United States Census Bureau to make this determination. *Id.*

who graduated from a Virginian historically black college or university (HBCU).¹³⁴ SB 391 proposes to tweak these categories in a few ways. First, SB 391 would extend “convictions” to include dismissed or deferred violations of the old marijuana laws.¹³⁵ Second, it would replace “parent, child, sibling, or spouse of a person” to the blanket term “family member” and would require that the family member was a dependent of the person when the person was convicted under the old marijuana statute or that the family member was significantly impacted by the conviction.¹³⁶ Third, rather than graduating from an HBCU, living in an economically distressed area, or living in a place formerly heavily policed for marijuana crimes being separate statuses, any of which would qualify an applicant as a social equity applicant, SB 391 would require the applicant to meet two of the three.¹³⁷ Whether the social equity applicant criteria changes or not, such an applicant could enjoy “preference in the licensing process,” waivers of some portion of the licensing fees, and a state “low-interest business loan.”¹³⁸ The Act does not detail how many licenses will be set aside for social equity applicants; however, among those applicants that do not qualify, such a preference system would make the battle to take advantage of the emerging industry all the more competitive.

C. *Taxation and Distribution of Revenue*

It is no secret that marijuana can be a magnificent driver of revenue for states that choose to regulate and tax a green commercial market. The Joint Legislative Audit and Review Commission estimated that, depending on the tax rate, Virginia’s cannabis market could generate between \$37–\$62 million in tax revenue in the first year of retail sales alone, and by year five, between \$184–\$308 million.¹³⁹ The General Assembly’s decision to place a

¹³⁴ *Id.*

¹³⁵ S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 131.

¹³⁹ JOINT LEGIS. AUDIT & REV. COMM’N, REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA: KEY CONSIDERATIONS FOR MARIJUANA LEGALIZATION, JLARC Rep. 542, at 124–25 (2020) [hereinafter JLARC].

21% excise tax on retail marijuana sales¹⁴⁰ coupled with the standard 5.3% retail sales tax (or higher in some localities)¹⁴¹ indicates that Virginia's tax revenues will be on the lower end of that spectrum.¹⁴² Further, the Commonwealth will generate some revenue from the Board-determined license application fees, annual license maintenance fees,¹⁴³ and civil penalties assessed against those who violate some provisions of the Act.¹⁴⁴ Unsurprisingly, nowhere else in the Act are the General Assembly's social equity objectives more apparent than in the provisions that deal with spending that potential revenue because several of the Act's provisions detail government social programs funded by the collected taxes.

First, the Act establishes the Cannabis Equity Reinvestment Board (Equity Board), which is to provide communities with the tools to "address the impact of economic disinvestment, violence, and historical overuse of criminal justice responses to community and individual needs"¹⁴⁵ The Equity Board is to support those who were disproportionately targeted by former drug enforcement by developing a workforce program to provide reentry services, apprenticeships, and job training services.¹⁴⁶ Further, the Act creates the Virginia Cannabis Equity Business Loan Fund, which will provide low and zero-interest loans to social equity licensees "to foster business ownership and economic growth within communities that have been the most disproportionately impacted by the former prohibition of cannabis."¹⁴⁷ Finally, to fund the duties of the Equity Board, the Virginia Indigent Defense Commission, and the Virginia Cannabis Equity Business Loan Fund, the Act establishes the Cannabis Equity Reinvestment Fund.¹⁴⁸

¹⁴⁰ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 152; S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

¹⁴¹ *Retail Sales and Use Tax*, VA. TAX, <https://www.tax.virginia.gov/sales-and-use-tax> (last visited Jan. 14, 2023).

¹⁴² See JLARC, *supra* note 139, at 124–25.

¹⁴³ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 151–52.

¹⁴⁴ *Id.* at 129 (codified as amended at VA. CODE ANN. § 4.1-604 (2022)).

¹⁴⁵ *Id.* at 6. (codified as amended at VA. CODE ANN. § 2.2-2499.5 (2022)).

¹⁴⁶ *Id.* at 7 (codified as amended at VA. CODE ANN. § 2.2-2499.7 (2022)).

¹⁴⁷ *Id.* at 172–73 (codified as amended at VA. CODE ANN. § 4.1-1501 (2022)).

¹⁴⁸ *Id.* at 7–8 (codified as amended at VA. CODE ANN. § 2.2-2499.8 (2022)).

However, the percentage of cannabis revenue diverted to the Cannabis Equity Reinvestment Fund will only be a portion of the total received.¹⁴⁹

The Act formulaically breaks down the distribution of collected cannabis tax revenue. After the Authority's needs are met and local taxes are withdrawn, only 30% is allocated to the Virginia Cannabis Equity Reinvestment Fund.¹⁵⁰ The remaining cannabis revenue will be distributed as follows: (1) 40% will go to "pre-kindergarten programs for at-risk three-year-olds and four-year-olds,"¹⁵¹ (2) 25% will go to the Department of Behavioral Health and Developmental Services, which will then distribute those funds to local community service boards to administer drug abuse prevention and treatment programs,¹⁵² (3) 5% will go to public health programs that ward off drugged driving and that warn of the health risks of marijuana.¹⁵³ The social equity provisions are not limited to the spending and licensing provisions of the Act. The changes to the criminal code share the progressive theme through reducing the criminalization of marijuana-related activities. However, the General Assembly should be cautious not to enact the progressive changes to the criminal code haphazardly. Therefore, this Comment proceeds to point out a serious flaw in the regime and offers two alternate solutions.

IV. FIXING THE CRIMINAL CODE

Past marijuana criminalization scourged Virginia's (mostly minority) citizenry. In 2019 alone, police arrested 26,470 Virginians for marijuana-related offenses and have made an average of 20,000 to 30,000 marijuana-related arrests per year for the last decade.¹⁵⁴ Marijuana prohibition was particularly hard on black Virginians, whose average arrest rate for marijuana possession between 2010 and 2019 was 3.5 times higher than the

¹⁴⁹ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 134–35 (codified as amended at VA. CODE ANN. § 4.1-614 (2022)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Diego Mendoza, *Virginia Cannabis Arrests Drop Nearly 50% Following Decriminalization*, WUSA9 (June 11, 2021, 3:08 PM), <https://www.wusa9.com/article/news/crime/virginia-marijuana-arrests-drop-following-decriminalization/65-46a8f822-c4cd-4aa5-90e8-88ba929a396c>; JLARC, *supra* note 139, at 7.

arrest rate for white Virginians.¹⁵⁵ The racial disparity existed in all of the Commonwealth's localities that had enough quantifiable data.¹⁵⁶ The General Assembly attempted to rectify this by passing provisions recommended by the Joint Legislative Audit and Review Commission to reduce arrest rates and relieve those convicted under the old system.¹⁵⁷ For example, one's arrest or conviction record for a misdemeanor marijuana possession or distribution charge will no longer be open for public inspection.¹⁵⁸ Further, the smell of marijuana alone is no longer probable cause for a search.¹⁵⁹ The most profound change, however, was the reduction of marijuana-related criminal offenses and penalties.¹⁶⁰

Not all the General Assembly's attempts to rectify past and ongoing injustices through reducing the number of criminal marijuana offenses have been optimal. First, the Act originally legalized simple possession of up to one ounce of marijuana on one's "person or in any public place . . ."¹⁶¹ Such failed to explicitly consider the marijuana otherwise legally grown from home-cultivated plants, so courts could have interpreted it in multiple ways. Then, the General Assembly passed a 2022 Budget Amendment (Budget Amendment) changing the possession statute to create a blanket home exception.¹⁶² While this solved the interpretational problems of the first iteration, it opened the door for any Virginia residence to become an unregulated marijuana stash-house. Further, should SB 391 pass in 2023, it would repeal the current marijuana distribution criminal statute and replace it with a light criminal penalty on all illegal marijuana sales.¹⁶³ Should these two statutes co-exist, illegal marijuana sales formerly made in

¹⁵⁵ JLARC, *supra* note 139, at 10.

¹⁵⁶ *Id.* at 11.

¹⁵⁷ *See generally id.* (discussing the arrest rate for marijuana offenses by race and other ethnic groups).

¹⁵⁸ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 235–37 (codified as amended at VA. CODE ANN. § 19.2-389.3 (2022)).

¹⁵⁹ *Id.* at 165 (codified as amended at VA. CODE ANN. § 4.1-1302 (2022)).

¹⁶⁰ *Id.* at 155–56 (legalizing possession of up to one ounce of marijuana and the cultivation of up to four plants in one's residence).

¹⁶¹ *Id.* at 155.

¹⁶² H.B. 30, Gen. Assemb., Spec. Sess. I, ch. 2, 2022 Va. Acts 668 (codified as amended at VA. CODE ANN. § 4.1-1100 (2022)).

¹⁶³ S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

shady underground deals or through vagrant pop-up shops could happen in unsanctioned brick-and-mortar establishments in residential neighborhoods. The remainder of this Comment dives deeper into these problems and proposes solutions that balance the issues in the Act, the Budget Amendment, and SB 391, while maintaining the forgiving theme of marijuana legalization generally.

A. *Problems with the Possession Statute*

Virginia Code § 4.1-1100, as originally passed in the Act, legalized simple possession of up to one ounce of marijuana and criminalized possession of any amount over a pound as a felony.¹⁶⁴ However, the Act contained ambiguity through the phrase “may lawfully possess on his person or in any public place”¹⁶⁵ For example, what happens when one legally cultivates four plants and their home-grow yields felony-level quantities? Different courts could have concluded differently. The General Assembly remedied that ambiguity by adding a blanket home exception to Code § 4.1-1100,¹⁶⁶ which may cause different—but no less severe—problems. Analyzing both iterations of Code § 4.1-1100 requires understanding “possession” as a term of art, so this section first defines “possession” as it is generally used in Virginia criminal law. Then, this section examines the interpretation problems with the Act’s version of Code § 4.1-1100. This section then addresses the recent amendment to Code § 4.1-1100 in the Budget Amendment and some problems therewith.

1. “Possession” in Virginia Criminal Law

“Possession” is defined by Virginia’s historic and current narcotic possession statutes and cases. Virginia Code § 18.2-250.1, which the Act repealed and replaced with Code § 4.1-1100,¹⁶⁷ formerly covered marijuana possession.¹⁶⁸ While the punishment for simple possession under the Statute

¹⁶⁴ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 155–56.

¹⁶⁵ *Id.* at 155.

¹⁶⁶ H.B. 30, Gen. Assemb., Spec. Sess. I, ch. 2, 2022 Va. Acts 668 (codified as amended at VA. CODE ANN. § 4.1-1100 (2022)).

¹⁶⁷ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 279.

¹⁶⁸ VA. CODE ANN. § 18.2-250.1(A) (2020), *repealed by* S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 279.

evolved from criminal to civil penalties over the years, how the Statute used “possession” remained consistent.¹⁶⁹

Under § 18.2-250.1, it was “unlawful for any person knowingly or intentionally to possess marijuana”¹⁷⁰ “[K]nowingly or intentionally to possess”¹⁷¹ is consistent with Virginia’s current narcotics possession statute.¹⁷² To convict a defendant for narcotics—and formerly marijuana—possession in Virginia, the Commonwealth must show a defendant either actually or constructively possessed the drug.¹⁷³ Actual possession is simply physical control over the narcotic in question.¹⁷⁴ To prove constructive possession, the Commonwealth must show “evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the defendant was *aware* of both the *presence* and the *character* of the substance *and* that it was subject to his dominion and control.”¹⁷⁵

Therefore, proximity to marijuana such that one can exercise dominion and control over it, while a factor, is not enough.¹⁷⁶ The Commonwealth must further prove both that the defendant knew it was marijuana and that it was under his dominion and control.¹⁷⁷ So if a defendant has marijuana stowed in their glove compartment, while they may have dominion and control over it, as it is readily accessible, the Commonwealth still must prove through factors like a reeking cabin, the defendant’s possession of a key to the glove box, and the defendant’s further reluctance to open it, that they knew it contained marijuana.¹⁷⁸ Therefore, when this section refers to

¹⁶⁹ Compare VA. CODE ANN. § 18.2-250.1(A) (1991) (repealed 2021) (penalizing “knowingly or intentionally” possessing marijuana as a misdemeanor), with VA. CODE ANN. § 18.2-250.1(A) (2020) (repealed 2021) (penalizing “knowingly or intentionally” possessing marijuana with a \$25 civil penalty).

¹⁷⁰ VA. CODE ANN. § 18.2-250.1 (repealed 2021).

¹⁷¹ *Id.*

¹⁷² Compare VA. CODE ANN. § 18.2-250.1 (repealed 2021), with VA. CODE ANN. § 18.2-250 (2022).

¹⁷³ *Ervin v. Commonwealth*, 704 S.E.2d 135, 139 (Va. Ct. App. 2011) (quoting *Young v. Commonwealth*, 659 S.E.2d 308, 310 (Va. 2008)).

¹⁷⁴ See *Possession*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁷⁵ *Ervin*, 704 S.E.2d at 139 (emphasis added) (quoting *Powers v. Commonwealth*, 316 S.E.2d 739, 740 (Va. 1984)).

¹⁷⁶ *Id.* at 139–40.

¹⁷⁷ *Id.* at 139–40 n.5.

¹⁷⁸ See *id.* at 139–45.

“constructive possession,” it assumes that the Commonwealth can prove it. The Act’s deviation from “knowingly and intentionally possess” in § 18.2-250.1 blurred how the theories of actual and constructive possession applied in cases where police found felony quantities of marijuana in the accused’s home.

2. Original Iteration of Virginia Code § 4.1-1100 and its Discontents

Code § 4.1-1100 as originally found in the Act allowed a person over twenty-one years old to lawfully “possess on his person or in any public place not more than one ounce of marijuana”¹⁷⁹ The Act punished possessing over one ounce of marijuana with a civil penalty and over one pound with an unclassified felony carrying up to ten years in prison.¹⁸⁰ Alone, “possess . . . in any public place”¹⁸¹ was clear. If courts applied “public place” as defined by the Act and the term “possess” as is usually used in Virginia criminal law, the Act clearly made it a felony to possess, actually or constructively, more than one pound of marijuana in “any place, building, or conveyance to which the public has, or is permitted to have, access, including restaurants, soda fountains, hotel dining areas, lobbies and corridors of hotels, and any park, place of public resort or amusement, highway, street, lane, or sidewalk adjoining any highway, street, or lane.”¹⁸² However, the preceding phrase “on his person” as applied to home possession was ambiguous, and courts could have interpreted it in inconsistent ways.

Under the original version of § 4.1-1100, it was unclear if “on his person” meant that possession of more than one pound of cannabis in a home was only criminal when one actually—not constructively—possessed it. This interpretation posed the possibility that one could have avoided criminal prosecution through savvy maneuvering and mere technicalities. For instance, under this interpretation, one could have lawfully constructively possessed two pounds of weed in their bedroom closet, but if cops caught them sitting in their house with a pound in their lap, they faced a felony.

¹⁷⁹ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 155.

¹⁸⁰ *Id.* at 155–56.

¹⁸¹ *Id.* at 155.

¹⁸² *Id.* at 124 (codified as amended at VA. CODE ANN. § 4.1-600 (2022)).

There is no rational distinction between possessing two pounds of marijuana just out of reach, but accessible, from having it in-hand. One still maintains dominion and control over that marijuana, and they can still smoke it or sell it, just in some cases it is further away.

Therefore, it was possible that the Statute could have meant that both actual and constructive possession of one pound of marijuana anywhere was criminal. This reading would have aligned with the old Code § 18.1-250.1 penalizing marijuana possession¹⁸³ and the current Code § 18.2-250 penalizing possession of controlled substances generally.¹⁸⁴ However, this reading would not have comported with the distinctions between § 4.1-1100 and those possession statutes. The General Assembly surely intended a difference with the distinctive words “on his person or in a public place” The other statutes criminalizing the actual and constructive possession of narcotics showed the legislature could expressly word the Code to do so if it so chose.¹⁸⁵ Thus, with the express language of Code § 4.1-1100 alone offering little interpretational help, courts may have looked elsewhere.

Courts could have looked to other parts of the Act for clarification. Just below Code § 4.1-1100 was Code § 4.1-1101, which gave Virginians the right to grow up to four marijuana plants for personal use in their homes.¹⁸⁶ To entirely criminalize both actual and constructive possession would not only have made the unique words of § 4.1-1100 a meaningless change, but it could have also made someone who tried to exercise their new right to grow four plants under § 4.1-1101 a criminal upon harvesting their crop because four plants can produce much more than an ounce, and sometimes many pounds.¹⁸⁷ Further, the words “for personal use” indicated that one could actually “use” the material produced from their plants. To “use” marijuana means to consume it, and to consume it, it must first be stripped from the

¹⁸³ VA. CODE ANN. § 18.2-250.1 (repealed 2021).

¹⁸⁴ *Id.* § 18.2-250 (2022).

¹⁸⁵ *See id.* (“It is unlawful for any person knowingly or intentionally to possess a controlled substance”).

¹⁸⁶ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 156 (codified as amended at VA. CODE ANN. § 4.1-1101 (2022)) (“[A] person 21 years of age or older may cultivate up to four marijuana plants for personal use at their place of residence”).

¹⁸⁷ *See discussion supra* Section IV.A.

plant, dried, then either ignited or heated to achieve decarboxylation.¹⁸⁸ Therefore, by the term “use” alone, the Act insinuated that one could have exercised dominion and control over their harvest.

However, courts faced another difficult interpretational challenge regarding whether a home exception to the possession caps extended beyond marijuana lawfully cultivated in the home. A court could have found that the General Assembly intended to legalize possession of any amount of marijuana procured from any source in one’s place of residence because one could have argued the words “on his person or in a public place” only criminalized the public possession of marijuana, and the General Assembly wrote it to ensure the old, broad language of “knowingly or intentionally possess” did not criminalize one’s ability to generally possess marijuana privately in their home. Such a reading would comport with the legislature’s less punitive attitude towards marijuana embodied by the Act while fixing the issue of possessing material grown under § 4.1-1101. This interpretation, however, would undermine the purpose of marijuana legalization broadly by allowing any home to become a stash house. But this is the interpretation the General Assembly adopted through the 2022 Budget Amendment.

3. The 2022 Budget Amendment

Through a 2022 Budget Amendment, the General Assembly made key changes to Code § 4.1-1100.¹⁸⁹ First, Code § 4.1-1100 now imposes a misdemeanor criminal penalty for possession of between four ounces and a pound of marijuana.¹⁹⁰ This eliminates the jump from a \$25 civil penalty for possessing over an ounce of marijuana to an unclassified felony for possessing over a pound as promulgated by the first iteration of Code § 4.1-1100.¹⁹¹ It is now a Class 3 misdemeanor for a first-offense possession of between four ounces and a pound, and a Class 2 misdemeanor for a subsequent offense.¹⁹² Second, and most importantly, Code § 4.1-1100

¹⁸⁸ See discussion *supra* Section II.A.4.

¹⁸⁹ See H.B. 30, Gen. Assemb., Spec. Sess. I, ch. 2, 2022 Va. Acts 668 (codified as amended at VA. CODE ANN. § 4.1-1100 (2022)).

¹⁹⁰ *Id.*

¹⁹¹ S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 155–56.

¹⁹² H.B. 30, Gen. Assemb., Spec. Sess. I, ch. 2, 2022 Va. Acts 668 (codified as amended at VA. CODE ANN. § 4.1-1100 (2022)).

excepts from prosecution those who possess more than the statutory limits—both felony and misdemeanor—of marijuana in their homes.¹⁹³ This blanket exception is still suboptimal even though it solves the interpretational problems of the original iteration of Code § 4.1-1100.

The new exception solves the interpretational problem of the original iteration of Code § 4.1-1100 because it clearly protects one's ability to keep their home-cultivated marijuana. However, it protects far more activity than the General Assembly could have reasonably wanted to protect. Now, not only is the marijuana produced by four legally cultivated plants safe in the home, but all marijuana from any source is safe in the home. Theoretically, intelligent dealers could repeatedly transport legal quantities of marijuana to their homes. They could then turn their homes into unregulated-marijuana repositories without the possible repercussions attendant to storage literally anywhere else. This is poor policy because it could stimulate the already thriving illicit market by giving black-market salesmen a safe place to house their product. Further, as discussed below, if it is coupled with the repeal of § 18.2-248.1, dealers could use homes to easily peddle unregulated marijuana. This undermines the legitimacy of the possession caps supposedly in place to deter illegal sales¹⁹⁴ because they are arbitrary if the legislature wants to encourage the maneuvering of potentially felonious quantities around the state by providing a statutory safe harbor in homes or even the establishment of unregulated residential marijuana shops. The reader may wonder if the Virginia criminal code has other provisions that deter this behavior. The answer is partially yes, for now.

There are two current statutory provisions that could refute the argument above. First, Virginia currently criminalizes maintaining a fortified drug house.¹⁹⁵ Anyone caught doing so faces a Class 5 Felony.¹⁹⁶ Therefore, one who maintains mountains of marijuana in their home could catch a charge under this provision. However, the Statute requires that the

¹⁹³ *Id.*

¹⁹⁴ See JLARC, *supra* note 139, at 24–25 (“Virginia should also limit the amount of marijuana that a person can legally possess. Possession limits are needed to help prevent illegal distribution.”) (discussing the statutes Virginia should enact for effective marijuana legalization).

¹⁹⁵ VA. CODE ANN. § 18.2-258.02 (2022).

¹⁹⁶ *Id.*

house be “substantially altered from its original status by means of reinforcement with the intent to impede, deter, or delay lawful entry by a law-enforcement officer into such structure”¹⁹⁷ Therefore, this Statute requires that someone accused under this section do more than just possess large amounts of marijuana in their home. They must also alter their home to create a barrier against lawful searches. Thus, this Statute does nothing to deter wrong doers from storing only. Second, Virginia still punishes both the distribution of and the possession with the intent to distribute marijuana under Code § 18.2-248.1.¹⁹⁸ Further, possession of large quantities of marijuana alone may be enough for a fact finder to infer the intent to distribute.¹⁹⁹ Thus, one could argue that if someone is housing pounds of marijuana in their home, they will likely be punished under Code § 18.2-248.1, which is enough of a deterrent such that an additional possession penalty is not needed. This is a compelling argument, but it might be short-lived because SB 391 proposes to strip Code § 18.2-248.1 from the criminal code and replace it with a mushy successor.²⁰⁰

Therefore, this Comment proceeds by first explaining the proposed illegal distribution statute in SB 391 and the problems with it. Then, this Comment proposes two solutions. The first is an amendment to Code § 4.1-1100 that would combat both the interpretational problems of the first iteration and the illegal distribution problems attendant to the second iteration should the General Assembly pass SB 391. Second, and in the alternative to the first solution, the General Assembly should keep § 18.2-248.1.

B. Proposed Changes to Marijuana Distribution Criminalization

SB 391 proposes to radically change how the Commonwealth criminalizes illegal marijuana distribution by repealing Code § 18.2-248.1 and replacing it with a soft distribution penalty.²⁰¹ This shift, coupled with the home-possession exception of Code § 4.1-1100, could undermine the implementation of a regulated retail market. Although the General

¹⁹⁷ *Id.*

¹⁹⁸ VA. CODE ANN. § 18.2-248.1 (2022).

¹⁹⁹ *Dukes v. Commonwealth*, 313 S.E.2d 382, 383 (Va. 1984).

²⁰⁰ S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

²⁰¹ *Id.*

Assembly will not vote on SB 391 until later in 2023²⁰² and, until then, Code § 18.2-248.1 is still the law of the land, this change will likely happen because the Act proposed this change and the language in SB 391 is the same.²⁰³ Therefore, it is crucial for those practicing criminal law in Virginia to grasp the significance of this change and its difference from historic law. This section highlights those differences. Further, this section highlights the potential ramifications of this change in law coupled with the home-possession exception now contained in Code § 4.1-1100. First, to understand the uniqueness of the new provision in SB 391, this section examines the current marijuana distribution statute.

1. Code § 18.2-248.1

The penalties for the sale, gift, distribution, manufacture, and possession of marijuana with the intent to distribute are currently covered by § 18.2-248.1.²⁰⁴ Currently, it is a Class 1 misdemeanor to distribute less than one ounce of marijuana.²⁰⁵ Distributing between one ounce and five pounds is a Class 5 felony.²⁰⁶ The Code imposes an unclassified felony with a sentence between five and thirty years on those who distribute more than five pounds of marijuana.²⁰⁷ Virginia Code § 18.2-248.1 criminalizes both the overt act of distribution and possession with the intent to distribute marijuana, and it imposes the same sentencing gradations on both offenses.²⁰⁸

A factfinder can infer the intent to distribute circumstantially from the presence of bulk quantities of marijuana, scales, baggies, large amounts of cash, and other indicia of sale all located in the same vicinity.²⁰⁹ Therefore, the unlucky drug dealer who has six pounds of weed, a scale, Ziplock bags, and \$10,000 dollars in their trunk would face the same five-to-thirty-year

²⁰² 2022 Session, *supra* note 13.

²⁰³ Compare S.B. 1406, Gen. Assemb., Spec. Sess. I, ch. 550, 2021 Va. Acts 157, with S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

²⁰⁴ VA. CODE ANN. § 18.2-248.1 (2022).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See *Servis v. Commonwealth*, 371 S.E.2d 156, 165 (Va. Ct. App. 1988); see also *Park v. Commonwealth*, No. 2578-02-4, 2003 Va. App. LEXIS 620, at *6 (Va. Ct. App. Dec. 2, 2003).

penalty as one who sells six pounds to an undercover cop wearing a wire. Further, § 18.2-248.1 bakes in a rebuttable presumption that less than one ounce of marijuana is only for personal use.²¹⁰ Under SB 391’s proposal, distinctions between the overt acts of sale and possession with the intent to distribute are irrelevant, presumptions of personal use are meaningless, and quantity-based gradations are nonexistent.

2. SB 391’s Radical Shift

SB 391 proposes that all illegal marijuana sales be punished under its proposed Code § 4.1-1103.²¹¹ Code § 4.1-1103 first distinguishes between legal “adult sharing” of less than one ounce of marijuana between those who are over twenty-one from illegal transactions.²¹² “Adult sharing” will *not* include three types of transactions. First, where “marijuana is given away contemporaneously with another reciprocal transaction between the same parties.”²¹³ Second, where “a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services.”²¹⁴ Third, where “a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services.”²¹⁵ These distinctions criminalize unlicensed sale, as well as the old Washington, D.C. system of buying an \$80 bumper sticker with half an ounce of weed on the side as a “gift.”²¹⁶ In contrast, one who wants to give their sister a gram of Pineapple Express²¹⁷ as a Christmas present would be perfectly within their rights. How § 4.1-1103 proposed to punish those without licenses who deal outside the legal boundaries of “adult sharing” is where the Statute grows interesting.

²¹⁰ VA. CODE ANN. § 18.2-248.1 (2022).

²¹¹ S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Natasha Frost, *Washington DC’s Weird Weed Economy Means Pot is Free and Stickers Cost \$80*, QUARTZ (May 10, 2019), <https://qz.com/1615820/the-safe-cannabis-sales-act-could-end-dcs-weed-gifting-economy/>.

²¹⁷ A real strain of marijuana popularized by the 2008 movie *Pineapple Express*. See *Pineapple Express*, LEAFLY, <https://www.leafly.com/strains/pineapple-express> (last visited Feb. 15, 2023).

Section B of § 4.1-1103 states that “[i]f any person who is not licensed sells, gives, or distributes any marijuana or marijuana products . . . he is guilty of a Class 2 misdemeanor. A second or subsequent conviction under this section shall constitute a Class 1 misdemeanor.”²¹⁸ There are two striking differences between Code § 4.1-1103 and Code § 18.2-248.1 that are transformative for prosecuting illegal marijuana sales. First, note that possession with the intent to distribute is not included in § 4.1-1103. Code § 4.1-1103 includes only the active tense “sells, gives, or distributes.” Therefore, only the *overt act* of distribution will be criminalized. So, referring to the previously mentioned drug dealers, only those selling to the undercover cop can be prosecuted for sale. Our friend with a trunkful of goodies will escape the possession with intent to distribute charge they would have faced under § 18.2-248.1, although they will still face a felonious possession charge of over one pound of marijuana under § 4.1-1100.²¹⁹ Further, since possession with intent to distribute would no longer be an offense, quantity-based presumptions of personal use would be irrelevant. Second, there are no gradations based on the quantity of marijuana sold. Therefore, someone’s first one-ounce marijuana sale to an undercover officer will get the same Class 2 misdemeanor imposed on one who sold that officer five pounds.

3. Potential Problems with Coupling Soft Penalties with a Blanket Home Exception

As discussed earlier, the Budget Amendment’s change to Code § 4.1-1100 alone may encourage people to store more than the statutory amount of marijuana—homegrown or not—in their homes. Such might stimulate the black market by giving unregulated dealers a perceived place to lawfully store their illicit wares. However, the penalties imposed by Code § 18.2-248.1 for distributing or possessing marijuana with the intent to distribute it may be enough to deter many of those who might engage in that behavior. The General Assembly will annihilate this final deterrent if it repeals Code § 18.2-248.1 and replaces it with an unamended Code § 4.1-1103 through SB 391. Such could result in a myriad of problems.

²¹⁸ S.B. 391, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

²¹⁹ VA. CODE ANN. § 4.1-1100 (2022).

In a Commonwealth with such laws, it would be legal for one to store five—or even five hundred—pounds of marijuana in their home. One would not have to fear that if they were caught the Commonwealth could use the large quantity to prosecute them for possession with the intent to distribute. One would have literal immunity from any possession charge no matter how absurd. Conversely, if one were to possess those quantities in their car, in a warehouse, or anywhere else, they could go to prison for up to ten years.²²⁰ This bizarre contrariety will naturally push those who seek to profit from the hottest new cash crop—such as those running the previously mentioned pop-up shops—to do so where it is statutorily safest: their homes. Should the current Code § 4.1-1100 and SB 391 coexist, Virginia would likely see unregulated marijuana dispensaries popping up in residential neighborhoods because, unless the police catch dealers selling red-handed, there would be nothing the Commonwealth could do.

One could call this argument hyperbole and counter that the misdemeanors imposed on illegal marijuana sales in SB 391 will be deterrence enough. That argument fails for two reasons. First, because possession with the intent to distribute would not be criminalized, there would be a heavier burden on law enforcement to catch illegal dealers because law enforcement would have to catch them in the act—and the small penalty may not be worth the effort. Second, California’s current situation should prove that light misdemeanor penalties do not stop those who can make big money through unregulated cannabis.²²¹ If the chance for profit increases—which it would if there is no quantity-based penalty for possessing or selling out of a home—then the deterrent effect of any criminal penalty decreases.

One could also argue that the Commonwealth is taking a light stance on unregulated marijuana sales because selling marijuana is tolerable because the Commonwealth sees marijuana itself as innocuous. Such an argument is short sighted. First, throwing gas on a flaming black market will undermine

²²⁰ H.B. 30, Gen. Assemb., Spec. Sess. I, ch. 2, 2022 Va. Acts 668.

²²¹ California imposes a misdemeanor on illegal marijuana distribution. CAL. HEALTH & SAFETY CODE § 11359 (Deering 2022). This has done little to deter illegal marijuana shops. There are over 3,000 illegal marijuana dispensaries compared to only 823 licensed dispensaries in the state. Alexander Nieves, *California’s Legal Weed Industry Can’t Compete with Illicit Market*, POLITICO (Oct. 23, 2021, 7:00 AM), <https://www.politico.com/news/2021/10/23/california-legal-illicit-weed-market-516868>.

the Commonwealth's efforts to legalize and regulate recreational marijuana sales. As seen in California, when the black market is churning out marijuana for a lower price (because it is unregulated) than the legitimate market, it continues to thrive, thus robbing the Commonwealth of tax dollars and legitimate growers of profits.²²² Further, this argument forgets that selling unregulated marijuana is a crime, and crime typically breeds more crime. In states that fumbled possession caps and deterrence statutes, human and weapons trafficking and organized crime increased.²²³ Virginians will likely not be enthusiastic about such problems infiltrating their residential neighborhoods. Finally, the safety regulations that the Commonwealth plans to put on legal marijuana²²⁴ will be meaningless if the black market remains strong because black-market marijuana is notoriously full of hazardous pesticides²²⁵—and these laws would allow potentially contaminated products to be pumped out in mass.

In sum, if Code § 4.1-1100—as it currently sits—couples with SB 391, there is a real possibility that illegal marijuana dealers could spring up in residences across the Commonwealth with few legal obstacles, thus bringing other forms of criminality and unsafe products with them.

C. Possible Solutions

This Comment proposes two possible solutions to the problems above. The first proposal is a change to Code § 4.1-1100. This would allow the General Assembly to pass SB 391 without significant alterations. The second is to keep Code § 4.1-1100 the same but not repeal Code § 18.2-

²²² See Nieves, *supra* note 221.

²²³ See Paige St. John, *The Reality of Legal Weed in California: Huge Illegal Grows, Violence, Worker Exploitation, and Deaths*, L.A. TIMES (Sept. 8, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-09-08/reality-of-legal-weed-in-california-illegal-grows-deaths> (documenting the expansion of illegal grows in California that bring with them violent criminal syndicates that local sheriffs are not equipped to combat); see also Scott McGovern, *11 Facts Cannabis Entrepreneurs Should Know About the Black Market*, LMTONLINE (Dec. 17, 2018), <https://www.lmtonline.com/news/article/11-Facts-Cannabis-Entrepreneurs-Should-Know-About-13471474.php> (black market marijuana producers exploited a legal loophole allowing for up to 99 plants to be grown in a domicile, which resulted in an uptick in human and weapons trafficking and illegal sales).

²²⁴ See discussion *supra* Section III.A.

²²⁵ See St. John, *supra* note 223.

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248.1, thus maintaining a blanket home-possession exception without losing the main deterrent of illegal sales.

1. Change Code § 4.1-1100

To reiterate, the previous versions of Code § 4.1-1100 caused two major problems. First, the original iteration did not expressly create an exception for marijuana possessed in the home and produced by a lawful home grow. Courts could have found there was no such exception, thus creating a risk that those who thought they were following the law were in fact not. Second, the alternative interpretation—and the one codified in the Budget Amendment—is a blanket exception to the possession caps for marijuana possessed in the home. This exception risks fortifying an already strong illegal market. To remedy these problems, this Comment proposes the following amendment to Code § 4.1-1100:

§ 4.1-1100. Possession, etc., of marijuana and marijuana products by persons 21 years of age or older lawful; penalties.

A. It is lawful for a person 21 years of age or older to possess up to one ounce of marijuana or an equivalent amount of marijuana product as determined by regulations promulgated by the Board.

B. Any person who knowingly and intentionally possesses more than one ounce but less than one pound of marijuana product as determined by regulations promulgated by the Board is subject to a \$25 civil penalty.

C. With the exception of a licensee in the course of his duties related to such licensee's marijuana establishment, any person who knowingly or intentionally possesses (i) more than four ounces but not more than one pound of marijuana or an equivalent amount of marijuana product as determined by regulation promulgated by the Board is guilty of a class 3 misdemeanor, and, for a second or subsequent offense, a class 2 misdemeanor and (ii) more than one pound of marijuana or an equivalent amount of marijuana product as determined by regulation promulgated by the Board is guilty of a felony punishable by a term of imprisonment of not less than one year nor more than 10 years and a fine of not more than \$250,000, or both.

D. Exception: It is lawful for a person who lawfully cultivates marijuana in their place of residence in accordance with Code § 4.1-1101 to possess the product of that cultivation in the residence in which it was cultivated, even if the consumable marijuana harvested from that cultivation exceeds the amounts listed in §§ 4.1-1100 (B)–(C). There shall be a rebuttable presumption that marijuana found in one’s place of residence was a product of cultivation done in accordance with Code § 4.1-1101.

The suggested statutory wording does four things. First, it eliminates the interpretational issues of “on his person or in a public place” by reverting to the traditional possession language to which courts are already accustomed. Second, it ensures that harvesting and possessing marijuana legally grown under Code § 4.1-1101 is expressly preserved. Third, it avoids any notion of a safe harbor to those who wish to use their residence for bulk marijuana storage.

Finally, to further protect those who legally cultivate, a fact finder will hear that there is a presumption that the defendant legally cultivated the marijuana found in their residence. This presumption will be important in instances where it is not obvious that the possessed marijuana came from a home grow. While it may be obvious that one’s possession was legal when police discovered their pound next to a labeled bush of the same strain, it is not so obvious when one may have harvested and then discarded their depleted plants. The Commonwealth may overcome this presumption through circumstantial evidence such as possession of amounts so ridiculous it is unlikely it all came from four plants (perhaps eight pounds or more), possession of various strains (though not conclusive), or no evidence of cultivation activity. If the General Assembly adopts this language, the Board should suggest that a home cultivator save the plant tags required by § 4.1-1101²²⁶ from their expired plants as proof of cultivation. These statutory recommendations are not only unambiguous, but logically fit the legislature’s newfound acceptance of marijuana without being so overly relaxed as to defeat the purpose of having criminal possession sanctions.

²²⁶ VA. CODE ANN. § 4.1-1101 (2022).

2. Keeping Code § 18.2-248.1

If the General Assembly chooses not to amend Code § 4.1-1100, it should maintain Code § 18.2-248.1. First, keeping Code § 18.2-248.1 would continue to deter illegal sales. Although there would still be a home exception for possession over the statutory limits, Code § 18.2-248.1 would continue to criminalize possession with the intent to distribute.²²⁷ Because those who intend to abuse the home exception by storing copious amounts of marijuana not produced by home-cultivated plants are likely to engage in illegal sales, such activities would fall squarely into Code § 18.2-248.1. Second, keeping Code § 18.2-248.1 would not likely criminalize one who lawfully produces more than the statutory possession limits unless they sell the marijuana and there are indicia of such (such as bags, scales, and firearms). While courts do use the quantity of marijuana alone to find that a defendant possessed it with the intent to distribute,²²⁸ quantity only helps to dispel any notion that the marijuana is for personal use, not sale.²²⁹ Code § 4.1-1101, which is the statute that allows one to legally cultivate four plants in their home, explicitly states that those four plants are for personal use.²³⁰ Therefore, unless circumstances clearly indicate otherwise, courts will likely—and should—presume that marijuana produced through legal home cultivation is possessed for personal use, thus escaping Code § 18.2-248.1.

V. CONCLUSION

Marijuana legalization has the chance to do substantial good for the Commonwealth. It could give those who have had few life opportunities a chance to better themselves and their families. It could stimulate the Commonwealth's economy and produce tax dollars that could benefit Virginia's most vulnerable communities. It could end the unnecessary criminalization of those who simply want to temporarily escape the drudgery of living with a relatively innocuous mind-altering compound. However, if done improperly, it could undermine its own purpose. Therefore, the General Assembly should reexamine how it handles the

²²⁷ *Id.* § 18.2-248.1 (2022).

²²⁸ See discussion *supra* Section IV.B.1.

²²⁹ See *Monroe v. Commonwealth*, 355 S.E.2d 336, 337 (Va. Ct. App. 1987).

²³⁰ VA. CODE ANN. § 4.1-1101 (2022).

possession of marijuana and how it plans to handle its illegal distribution. The General Assembly should either adopt language that clearly only allows the possession of marijuana greater than the statutory limit when it came from four legally cultivated plants, or it should maintain Code § 18.2-248.1. If the General Assembly decides to do neither, Virginia could experience the same—if not worse—legalization fumbles experienced by some other legal states. Virginia should learn from others' mistakes and spare both its citizens and its law enforcement the turmoil.