

MARIJUANA LEGALIZATION IN INDIANA: AMENDING THE INDIANA CODE TO PROTECT MOTORISTS AND PEDESTRIANS

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INTRODUCTION

Between 2012 and 2016, Colorado, Alaska, Oregon, Washington State, and Washington, D.C. legalized recreational marijuana for adults over the age of twenty-one.¹ Additionally, by 2016, twenty other states had legalized marijuana for solely medicinal purposes.² On November 8, 2016, through each state's respective election ballots, California, Nevada, Massachusetts, and Maine legalized recreational marijuana, while Florida, Arkansas, and North Dakota legalized medicinal marijuana.³ This means that nearly twenty-one percent of Americans now live in a state where recreational marijuana use is legal, and over half the states in the nation now allow medicinal marijuana.⁴ The sweeping spread of marijuana legalization and reform is nearly impossible to ignore and creates the necessity for states to consider the positive and negative effects of legalization. Indiana is no exception, and, despite the conservative nature of the Indiana legislature, the issue of marijuana legalization is live and significant.⁵

While advocates and opponents continue to debate the outcome of legalization on a variety of issues, one common issue is the effect legalization could have on impaired driving, also referred to as drugged driving or marijuana-impaired driving.⁶ The argument is quite simple; if marijuana is legal, more

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1. Meghan Demaria, *These Are All the States That Have Legalized Weed*, REFINERY29 (Dec. 5, 2016, 5:30 PM), <http://www.refinery29.com/2016/04/107985/where-is-weed-legal> [<https://perma.cc/48BK-AEFV>].

2. *Id.*

3. See Thomas Fuller, *Californians Legalize Marijuana in Vote That Could Echo Nationally*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/marijuana-legalization.html> [<https://perma.cc/8W77-2FKC>]. Additionally, Montana significantly reduced restrictions on its existing medicinal use law. *Id.*

4. *Id.*

5. *Indiana Legislature in session with medical marijuana on the agenda*, MARIJUANA POL'Y PROJECT (Jan. 12, 2017), <https://www.mpp.org/states/indiana/> [<https://perma.cc/PGS8-ERR8>].

6. See generally David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 375 (2014) (recognizing that impaired driving is a concern that arises with the conversation of marijuana legalization).

people may use it and become impaired.⁷ Therefore, more impaired drivers may ultimately be driving on the road, thus causing a higher risk of injury or death to themselves, other motorists, or pedestrians.⁸ This particular topic begins with identifying whether marijuana truly impairs driving behavior, creating a valid concern for motorists and pedestrians in Indiana.

Driving is a complex task that requires all faculties to be operating efficiently and unimpaired.⁹ Dr. Gary M. Reisfield of the University of Florida College of Medicine explains:

Driving is a complex task requiring alertness, sustained and divided attention, visual, auditory, and kinesthetic information processing, eye-hand-foot coordination and manual dexterity. Drugs that affect the central nervous system, therefore, have the potential to adversely affect driving performance and highway safety. Indeed, drivers with measurable quantities of potentially impairing licit or illicit drugs in bodily fluids are many times more likely to be involved in nonfatal and fatal MVCs than those without drugs in their bodies [].¹⁰

The concern, then, is whether marijuana impairs those driving faculties. It is widely accepted that there is at least a “general correlation between blood THC levels and driving impairment.”¹¹ Marijuana’s effect on the central nervous system is derived from its main active chemical, responsible for most of its intoxicating effects, delta-9-tetrahydro-cannabinol (THC).¹² THC can alter the functioning of the hippocampus and orbitofrontal cortex, areas of the brain “that enable a person to form new memories and shift their attentional focus.”¹³ “As a result, using marijuana causes impaired thinking and interferes with a user’s ability to learn and to perform complicated tasks.”¹⁴ Marijuana significantly impairs coordination, decision-making, and reaction time and is the illicit drug most commonly found in those involved in vehicular accidents, including fatalities.¹⁵ Furthermore, the psychic effects of marijuana impair psychomotor

7. *Id.*

8. *Id.*

9. Gary M. Reisfield et al., *The Mirage of Impairing Drug Concentration Thresholds: A Rationale for Zero Tolerance Per Se Driving Under the Influence of Drugs Laws*, 36 J. ANALYTICAL TOXICOLOGY 353 (2012).

10. *Id.*

11. *Id.* at 354.

12. *What is Marijuana?*, NAT’L INST. ON DRUG ABUSE (Aug. 2016), <https://www.drugabuse.gov/publications/research-reports/marijuana/does-marijuana-use-affect-driving> [https://perma.cc/7YMF-2W8M] [hereinafter *What is Marijuana*].

13. *How does marijuana produce its effects?*, NAT’L INST. ON DRUG ABUSE (Aug. 2016), <https://www.drugabuse.gov/publications/research-reports/marijuana/does-marijuana-use-affect-driving> [https://perma.cc/ME8R-CVPK].

14. *Id.*

15. *Does marijuana use affect driving?*, NAT’L INST. ON DRUG ABUSE (Aug. 2016), <https://www.drugabuse.gov/publications/research-reports/marijuana/does-marijuana-use-affect-driving>.

skills for several hours after taking the drug, making it ill-advised for any user to drive during that time.¹⁶ Moreover, no amount of compensatory behavior can prepare a driver for unexpected events or accelerate reaction time hampered by cannabis.¹⁷ In all, there is strong evidence showing that marijuana may have a significant impact on motorists and their driving ability.¹⁸ Because evidence supports the finding that marijuana use has a negative impact on drivers, the next concern is whether marijuana users are actually operating vehicles after marijuana use.

Some trauma centers have reported a higher incidence of positive tests for illicit drugs than for alcohol among drivers involved in vehicle crashes.¹⁹ In a 2009 report, the National Highway Traffic Safety Administration (NHTSA) presented the results of its first survey on drug use and driving.²⁰ The NHTSA found that 11% of daytime drivers and 14.4% of nighttime drivers tested positive for drug use.²¹ Marijuana was the most commonly found illicit drug, showing up in 8.6% of the drivers tested.²² Furthermore, The White House Office of National Drug Control Policy (ONDCP) first identified drugged driving as a significant national concern in 2010.²³ This report also found that “more than 16 percent of weekend nighttime drivers tested positive for drugs.”²⁴ Even a few years before recreational marijuana was legalized in any state, reports indicate a high number of drivers, specifically those involved in accidents resulting in injury or death, were operating with drugs in their system.²⁵ However, a major drawback to these findings is that while drugs were found in these individuals’ systems, the presence of those drugs, namely marijuana, may not be indicative of impairment causing the accident.²⁶ While this issue will be addressed at length in this Note,

driving [<https://perma.cc/8K3P-4B3Q>] [hereinafter *Does marijuana use affect driving?*].

16. LESLIE L. IVERSEN, *THE SCIENCE OF MARIJUANA* 27-65, 163 (2d ed. 2008).

17. WORLD HEALTH ORG., *CANNABIS: A HEALTH PERSPECTIVE AND RESEARCH AGENDA* 15-16 (1997), available at http://apps.who.int/iris/bitstream/10665/63691/1/WHO_MSA_PSA_97.4.pdf [<https://perma.cc/U74Y-SW3Y>].

18. See *Does marijuana use affect driving?*, *supra* note 15.

19. See Daniel Brookoff et al., *Testing Reckless Drivers for Cocaine and Marijuana*, 331 *NEW ENG. J. MED.* 518 (1994).

20. Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 *AM. CRIM. L. REV.* 453, 466 (2015).

21. RICHARD COMPTON & AMY BERNING, *RESULTS OF THE 2007 NATIONAL ROADSIDE SURVEY OF ALCOHOL AND DRUG ABUSE BY DRIVERS*, at 1, 3 (NHTSA 2009).

22. *Id.*

23. OFFICE OF NATIONAL DRUG CONTROL, *NATIONAL DRUG CONTROL STRATEGY* 1, 23 (2010), available at https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/ndcs2010_0.pdf [<https://perma.cc/A3AN-33DW>].

24. *Id.* at 23.

25. See COMPTON & BERNING, *supra* note 21, at 1.

26. See *Drugs and Human Performance Fact Sheet*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm> [<https://perma.cc/4AVV-EBJD>] (last visited Oct. 13, 2016) [hereinafter *Drugs Fact Sheet*].

the findings indicated here simply help to illustrate that drivers are operating vehicles after drug use, creating a valid concern for Indiana legislators.

Furthermore, while it is true that marijuana was not the only drug found in impaired drivers' systems, marijuana was the most prevalent and is the third most commonly used recreational drug in the world, behind only alcohol and tobacco.²⁷ Another concern with whether marijuana users are taking to the road is that marijuana use is very common among young people, with the average age of first-time use being five years less than it was in the 1960s, where people often smoked marijuana for the first time in college.²⁸ This is especially troublesome because young drivers account for a disproportionate share of traffic accidents.²⁹ Young drivers generally pose an increased risk due to their inexperience, overconfidence, thrill-seeking attitude, and failure to wear seatbelts.³⁰ If marijuana is legalized, even restricted to those over the age of twenty-one, there is a legitimate reason to believe that more impulsive, young drivers may use marijuana and then operate a vehicle. In the event of legalization and increased ease of access to marijuana, the concern over an amplified number of users on the roadway is real. Therefore, in order to keep Indiana roadways safe, it is imperative that marijuana legalization be met with other appropriate legislation.

The more complex issue of legalization is how the statutes and policies in Indiana would need to be adopted or amended to protect motorists in Indiana and allow for appropriate enforcement and deterrence of impaired driving. This Note will address those concerns and argue that if Indiana's legislators decide to legalize marijuana for recreational use, they should first consider how the criminal code should be amended in order to protect against marijuana-impaired driving. For the purposes of this Note, legalization in Indiana will refer to recreational use. By proposing a few amendments to the Indiana Code, this Note will attempt to show how marijuana legalization can take place in Indiana while limiting the increased danger to its drivers and pedestrians.

Part I begins by explaining the process of how police officers in Indiana stop suspected impaired drivers and how officers conduct tests to determine impairment. Next, this Part addresses the current state of affairs in Indiana in regard to detection and enforcement against marijuana-impaired driving and how it differs from the detection and enforcement against alcohol-impaired driving. More importantly, this Part examines how states that have legalized marijuana have addressed the problems with marijuana-impaired driving enforcement, along with the two approaches that have emerged and the challenges that have arisen out of those different approaches. Lastly, Part I argues that the Indiana Code

27. JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 18 (2d ed. 2012).

28. *Id.* at 12.

29. R. Andrew Sewell et al., *The Effect of Cannabis Compared with Alcohol on Driving*, 18 AM. J. ON ADDICTIONS 185 (2009). "[D]rivers under age 25 account for a quarter of all traffic fatalities . . . [T]he fatality rate for teenage [drivers] is four times that of drivers age 25 to 69[.]" *Id.*

30. *Id.*

should adopt the “per se” rule for marijuana-impaired driving, as it would yield the highest degree of deterrence and overall safety.

Part II argues that a major step to keeping motorists safe in Indiana would be to create stronger prosecution against marijuana-impaired drivers, enhance punishments against convicted impaired drivers, and create stricter suspensions of driving privileges. Specifically, Part II argues that the Indiana Code should be amended to include an inclusive, but not exhaustive, list of factors that may be considered in establishing probable cause so that officers and prosecutors can bring stronger, more reliable cases against impaired drivers, while screening out those that are not impaired. Lastly, this Part addresses the need for stricter punishment as deterrence by amending the Indiana Code to reflect more severe charges for repeat offenders as well as strict punishments on driving privileges for those who are convicted.

Finally, Part III argues that the Indiana Code should decriminalize marijuana usage in some public spaces. This Part argues that restrictions on marijuana use in all public places inadvertently creates an increased risk of impaired driving on state roads and highways by forcing users to smoke marijuana in their vehicles, oftentimes while operating them. Specifically, this Part calls for modeling marijuana public usage after Title 7 of the Indiana Code so that users can enjoy their legalized right without jeopardizing the safety of Indiana motorists and pedestrians.

This Note is not intended to serve as a proponent or opposition piece to marijuana legalization. Rather, this Note is designed to address one potential concern, keeping motorists and pedestrians safe, and how it should be addressed. As the discussion unfolds, the underlying issue at the heart of this argument will become transparent. That is, whether the protective measures required to maintain safety on the road, in the event marijuana is legalized, are an intrusion upon an individual’s Constitutional rights and, if so, will such an intrusion be accepted in order to obtain the right to legalized marijuana.

I. CHALLENGES OF MARIJUANA DETECTION AND ENFORCEMENT AND THE NEED FOR THE PER SE RULE

A. Detection of Marijuana-Impaired Driving vs. Alcohol-Impaired Driving

The Fourth Amendment permits a law enforcement officer to make a brief investigative stop of a vehicle if, based on the totality of circumstances, he has “a particularized and objective basis for suspecting” that the driver is intoxicated.³¹ Generally speaking, this threshold is quite low, as officers may conduct traffic stops whenever a driver has committed any traffic violation.³² These violations range from basic traffic infractions, such as speeding, driving left of center, or

31. *Navarette v. California*, 134 S. Ct. 1683, 1685 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

32. See generally Wayne R. LaFare, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

driving with expired license plates to criminal misdemeanors such as leaving the scene of an accident.³³ Once a driver is stopped, officers initiate a conversation at the driver's window to determine if any signs of impairment are present.³⁴ There are several physiological signs of intoxication, including bloodshot or glazed eyes, the odor of alcohol on the suspect's breath, poor manual dexterity, and slurred speech, to name a few.³⁵ If these signs of impairment are present, an officer will ask the driver to exit the vehicle to perform Standardized Field Sobriety Tests (SFSTs).³⁶

Standardized Field Sobriety Tests, developed by the National Highway Traffic Safety Administration (NHTSA), allow an officer to establish probable cause that a driver is impaired by conducting noninvasive roadside tests, including Horizontal Gaze Nystagmus, Nine Step Walk and Turn, and One Leg Stand.³⁷ Along with SFSTs, an officer may use a portable breath test, or breathalyzer, to give an estimation of a person's blood alcohol content (BAC).³⁸ A portable handheld preliminary breath test (PBT) device, "employing fuel cell sensors for use at the roadside, have been found to be as accurate for measuring BACs as the large desk evidential units employed at police stations for collecting BAC measures for submission in court."³⁹ Despite its accuracy, a portable breath test is not as highly regulated and inspected as a certified instrument and is, therefore, not admissible as evidence.⁴⁰ Nevertheless, these devices are still used in the field early in an officer's investigation of a potential impaired driver to avoid delaying drivers who are not impaired and to avoid consuming an officer's time in an unnecessary investigation.⁴¹ The result is that curbside or roadside breathalyzer tests permit law enforcement officers to police drunken driving in a more effective and non-degrading manner.⁴²

If an officer establishes probable cause to believe that a driver is impaired during these roadside tests, all states, including Indiana, have implied consent laws, sometimes called express consent laws, which allow the officer to subject

33. See generally IND. CODE § 9-21-8 (2017); *id.* § 9-26-1-1.1.

34. Larkin, *supra* note 20, at 481.

35. *Id.* at 481.

36. Steven J. Rubenzer, *The Standardized Field Sobriety Tests: A Review of Scientific and Legal Issues*, 32 L.A.W. & HUM. BEHAV. 293 (2008).

37. *Id.*

38. ROBERT L. DUPONT ET AL., DRUGGED DRIVING RESEARCH: A WHITE PAPER, at 20 (Inst. for Behav. & Health 2011), available at <https://dfaf.org/Drugged%20Driving%20-%20A%20White%20Paper%202011.pdf> [<https://perma.cc/WA24-52F9>].

39. *Id.*

40. See IND. CODE § 9-30-6-5 (2017) (indicating how the state department of toxicology takes and has precise requirements for the maintenance, inspection, and use of certified breath test machines).

41. DUPONT ET AL., *supra* note 38, at 20.

42. Larkin, *supra* note 20, at 483 (recognizing that the current measures for alcohol testing, namely breath testing, are far less intrusive than the measures that exist for marijuana testing and provide more accurate, immediate results).

an individual to a chemical test to determine impairment.⁴³ A person who operates a vehicle impliedly consents to submit to a chemical test as a condition of operating a vehicle in Indiana.⁴⁴ Failure to submit to a chemical test is a violation of the implied consent laws, and the suspected violator could face a suspension of his or her driving privileges.⁴⁵ A chemical test refers to taking a subject's breath, blood, urine, or other bodily substance for analysis to determine the presence of alcohol or other drugs.⁴⁶ The use of a certified chemical breath test, or certified breathalyzer, allows officers to determine an accurate estimation of a person's blood alcohol content (BAC), by measuring the alcohol in a person's lungs.⁴⁷ Every state in the United States has adopted the BAC limit for intoxication at .08 gram of alcohol per 100 milliliters of blood or .08 gram of alcohol per 210 liters of breath.⁴⁸ Breath testing, therefore, can be used in lieu of blood testing or a urinalysis test to detect the presence and debilitating effect of alcohol.⁴⁹ States have adopted a BAC limit of .08 as the legal limit because numerous studies have indicated that the average person, although not all individuals, consistently show signs of impairment and intoxication at such a level, including slowed reaction time, blurred vision, and poor judgment.⁵⁰ Studies have also revealed an increased risk of being involved in a car accident, including fatal accidents, at a BAC of .08 or higher.⁵¹

As mentioned, enforcement against impaired driving, whether the impairment is caused by alcohol or marijuana, turns on whether an officer establishes probable cause during his or her interactions with a suspected violator.⁵² Whether or not there is probable cause depends on the "totality of the circumstances," meaning all legally obtained information that the arresting officers know or reasonably believe at the time the arrest is made.⁵³ Probable cause continues to evade a stable definition and what constitutes the totality of the circumstances

43. IND. CODE § 9-30-6-2.

44. *Id.* § 9-30-6-1.

45. *Id.* § 9-30-7-5.

46. *Id.* § 9-30-6-6.

47. *Frequently Asked Questions*, BREATHALYZER.NET, <http://www.breathalyzer.net/pages/frequently-asked-questions> [<https://perma.cc/P9LK-47LN>] (last visited Oct. 20, 2016).

48. *See Drunk Driving Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (Oct. 2016), http://www.ghsa.org/html/stateinfo/laws/impaired_laws.html [<https://perma.cc/WY6L-4SLR>]; *see* IND. CODE § 9-30-5-1(a).

49. Larkin, *supra* note 20, at 483.

50. *See generally* ROBERT APSLER ET AL., THE EFFECTS OF 0.08 BAC LAWS (Nat'l Highway Safety Admin. 1999) (addressing the reasoning behind the .08 BAC laws and the evidence that supports why .08 is a proper threshold that is indicative of impairment).

51. *See generally* Andrea Roth, *The Uneasy Case for Marijuana as Chemical Impairment Under a Science-Based Jurisprudence of Dangerousness*, 103 CAL. L. REV. 841 (2015) (addressing the history behind the legislative establishment of the .08 legal limit and the studies that revealed the increased danger of car accidents and fatalities at or above that limit).

52. *See* IND. CODE § 9-30-6-2(a) (2017).

53. *United States v. Humphries*, 372 F.3d 653, 657 (4th Cir. 2004).

often depends on how the court interprets the reasonableness standard.⁵⁴ The Supreme Court has favored a flexible approach, viewing probable cause as a “practical, non-technical” standard that calls upon the “factual and practical considerations of everyday life on which reasonable and prudent men [sic] act.”⁵⁵ Courts often adopt an even broader, more flexible view of probable cause when the alleged offenses are more serious.⁵⁶ While probable cause has a multitude of definitions, the “substance of all the definitions is a reasonable ground for belief of guilt.”⁵⁷ Keeping this blurred concept of probable cause in mind, it will become quite apparent why enforcement against marijuana-impaired driving is a challenge.

While the detection of alcohol impairment is supported by reliable instruments and well-established field tests, such as SFSTs and certified breath tests, field tests and instruments designed for marijuana detection are not as reliable.⁵⁸ SFSTs are often unreliable because individuals impaired by marijuana will not display the same indicators, such as nystagmus, as individuals impaired by alcohol.⁵⁹ Additionally, there is no device comparable to a breathalyzer to identify marijuana intoxication or the presence and amount of THC, the psychoactive ingredient in marijuana, in a driver's blood.⁶⁰ Police officers can still establish probable cause for a chemical test, based on a totality of the circumstances,⁶¹ by relevant evidence at the scene of the traffic stop, including bloodshot eyes, greenish-yellow colored tongue, dilated pupils, the odor of marijuana (especially that of burnt marijuana), the presence of marijuana, or slow or slurred speech.⁶² The problem that arises is whether the officer's observations alone, without support of scientifically backed nystagmus indicators or breath-test results, are enough to arrest the suspected impaired driver or continue with the investigation of impairment. As there are limited measures available to determine impairment, officers must turn to more intense alternatives.

Because of the lack of a less intrusive breath test, the option generally used

54. JAMES A. ADAMS & DANIEL D. BLINKA, PROSECUTOR'S MANUAL FOR ARREST, SEARCH AND SEIZURE § 6-6(b) (2d ed. 2004).

55. *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Probable Cause*, LEGAL INFO. INST., CORNELL LAW SCH., https://www.law.cornell.edu/wex/probable_cause [<https://perma.cc/9DFP-HNU7>] [hereinafter LEGAL INFO. INST.] (last visited Oct. 19, 2016).

56. LEGAL INFO. INST., *supra* note 55.

57. *Carroll v. United States*, 267 U.S. 132, 161 (1925) (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (Pa. 1881)).

58. *See generally* Larkin, *supra* note 20, at 483 (discussing how Standardized Field Sobriety Tests, including nystagmus, are not as reliable as they are for the detection of alcohol impairment).

59. W.M. Bosker et al., *A Placebo-Controlled Study to Assess Standardized Field Sobriety Tests Performance During Alcohol and Cannabis Intoxication in Heavy Cannabis Users and Accuracy of Point of Collection Testing Devices for Detecting THC in Oral Fluid*, 223 PSYCHOPHARMACOLOGY 439, 442 (2012).

60. Sewell et al., *supra* note 29, at 188.

61. *United States v. Humphries*, 372 F.3d 653, 657 (4th Cir. 2004).

62. *See* Brookoff et al., *supra* note 19, at 518.

by law enforcement to determine the presence of marijuana in a person's system is a blood draw.⁶³ While a blood draw is certainly more intrusive, the Fifth-Amendment self-incrimination privilege does not bar the government from compelling a person to provide a blood sample for a BAC test.⁶⁴ If the officer can articulate that, based on evidence on the scene as well as his or her observations, the officer has probable cause to believe the driver is impaired, Indiana implied consent laws once again become effective.⁶⁵ At this point, the officer will offer the driver an opportunity to submit to a chemical test, a blood draw in the event that marijuana is the suspected drug.⁶⁶ Just as when the suspected intoxicant is alcohol, the driver may submit to the chemical test or refuse the test.⁶⁷ Once again, if the driver refuses any reasonable chemical test offered by an officer, that refusal may be offered into evidence,⁶⁸ and the driver's driving privileges will be suspended accordingly.⁶⁹

Blood draws must be performed by a physician or a person trained in obtaining bodily substance samples.⁷⁰ The sample must be taken in a medically accepted manner at a medical facility.⁷¹ Blood draws reveal not only a person's blood alcohol content, but also the presence of other licit and illicit drugs, including the amount of THC in a person's blood.⁷² Recall that THC is the psychoactive ingredient in marijuana, responsible for its impairing effect.⁷³ There are two "types" of THC that may be found in a person's blood.⁷⁴ For purposes of determining impairment or intoxication, it is important to note that not all THC found in the body is necessarily indicative of impairment.⁷⁵

THC is primarily metabolized to 11-hydroxy-THC which has equipotent psychoactivity, proven to create impairment.⁷⁶ The 11-hydroxy-THC is then rapidly metabolized to the 11-nor-9-carboxy-THC (THC-COOH), which is not psychoactive and unproven to be responsible for driving impairment.⁷⁷ Due to the quick metabolization of THC, an officer must, under current statutory design, ensure that a blood draw is performed within three hours of the initial detention

63. See *Schmerber v. California*, 384 U.S. 757, 761 (1996).

64. *Id.*

65. IND. CODE § 9-30-6-1 (2017).

66. *Id.* § 9-30-6-2.

67. *Id.* § 9-30-6.

68. *Id.* § 9-30-6-3(b).

69. *Id.* § 9-30-6-9.

70. *Id.* § 9-30-6-6(g).

71. *Id.* § 9-30-6-6(g)(i).

72. *Marijuana Drug Test Detection Times*, CAL. NORML, <http://www.canorml.org/healthfacts/drugtestguide/drugtestdetection.html> [<https://perma.cc/TTM3-ZBQH>] (last visited Oct. 21, 2016).

73. See *What is Marijuana*, *supra* note 12.

74. See *Drugs Fact Sheet*, *supra* note 26.

75. *Id.*

76. *Id.*

77. *Id.*

of the suspected violator to help ensure that the THC measure in the blood is indicative of psychoactive-producing THC.⁷⁸ After a medical professional takes a suspect's blood in the form of a blood draw, the blood is immediately tested by a blood chemistry analyzer for the presence of alcohol and other drugs.⁷⁹ This process takes only a few minutes, and an officer is given the results from the blood draw, regardless of whether a suspected violator consents to such a release of information.⁸⁰

Currently in Indiana, as in several other states that still prohibit marijuana usage, any indication of THC in a person's blood could lead to the individual being arrested and charged with operating while intoxicated (OWI), regardless of the level of impairment.⁸¹ This strict standard is referred to as a "zero tolerance law."⁸² One argument for aggressive zero tolerance laws is that waiting until a driver displays obvious signs of drug-induced intoxication or impairment may come too late to prevent needless mortality.⁸³ This argument coincides with the idea that marijuana-impaired driving is more difficult to determine and requires stricter laws, but studies are split as to whether zero tolerance laws actually decrease highway mortality.⁸⁴

Another common argument is that zero tolerance laws were justified under a jurisprudence of prohibition of marijuana, based on the moral blameworthiness of drug use.⁸⁵ In those states that have now legalized marijuana, the moral stigma has dissipated, and zero tolerance laws, under the idea of prohibition, no longer fit as a theory of punishment.⁸⁶ Because the proper threshold for punishment is no longer appropriate at zero, states are forced to identify what, if any, numerical limit they will place on marijuana-impaired driving.

The major concern among states that legalize marijuana is that even when THC levels are determined, there is no medical or scientific consensus regarding the amount of THC that would impair the average driver.⁸⁷ In essence, there is no agreed upon number, such as the .08 BAC measure for alcohol that is indicative

78. IND. CODE § 9-30-6-2(c) (2017).

79. See generally *id.* § 9-30-6-6.

80. *Id.* § 9-30-6-6(a)(2).

81. See Larkin, *supra* note 20, at 488-90 (identifying various state statutes that prohibit the operation of a motor vehicle with any amount of THC in an individual's system).

82. See generally *id.* at 488-91 (discussing the existence of zero tolerance laws pertaining to alcohol and marijuana and, more precisely, the issues with zero tolerance laws with marijuana).

83. See Brookoff et al., *supra* note 19, at 521.

84. See Christopher Carpenter, *How Do Zero Tolerance Drunk Driving Laws Work?*, 23 J. HEALTH ECON. 61, 64 (2004) (concluding that zero tolerance laws reduce the number of traffic fatalities); but see Darren Grant, *Dead on Arrival: Zero Tolerance Laws Don't Work*, 48 ECON. INQUIRY 756 (2010) (concluding that zero tolerance laws are ineffective at reducing traffic fatalities).

85. Roth, *supra* note 51, at 844.

86. *Id.* at 844-45.

87. Larkin, *supra* note 20, at 483 (discussing the shortcomings of marijuana testing in comparison to testing procedures for alcohol impairment in suspected impaired drivers).

of impairment.⁸⁸ While alcohol certainly affects users differently—those with alcohol dependence are typically more functional at a BAC of .08 than a first time drinker—research has indicated that at a BAC of .08, a person’s cognitive abilities generally have begun to decline.⁸⁹ Likewise, individuals with a history of significant marijuana use will have their THC levels affected much differently than individuals that are new users, creating unreliable connections between THC levels and impairment.⁹⁰ Without a reliable measure such as the .08 BAC standard, states must determine how their legislation will combat marijuana-impaired driving. As marijuana would be a legal substance, the adoption or continuation of existing zero tolerance laws is not a viable option because trace amounts of THC can remain in a person’s system for a long period, and such trace amounts are not indicative of recent use or impairment.⁹¹ The question then is whether a state should adopt a “per se” rule for impairment by setting a precise non-zero number to reflect legality, despite it being known to have some measure of unreliability,⁹² or if the state will attempt to find another “rule” regarding enforcement against marijuana-impaired driving.

States across the nation differ in their approach to marijuana-impaired driving laws, including those states that first legalized recreational use.⁹³ In Washington, for example, the state has adopted a strict per se rule for impairment.⁹⁴ Colorado, the first state to legalize recreational marijuana use, has adopted what it calls a “permissible inference test” to combat marijuana-impaired driving.⁹⁵ The next section will examine two different approaches that have been implemented by early adopters of marijuana legalization. These approaches are the per se rule and the permissible inference test.

B. The “Per Se Rule” and the Permissible Inference Test

The term illegal per se means that the act is inherently illegal.⁹⁶ Essentially, an act is illegal on its own, without extrinsic proof of any surrounding circumstances or other defenses.⁹⁷ Acts are made illegal per se by case law, the

88. *See id.*

89. *See generally* Reisfield et al., *supra* note 9, at 353.

90. *Id.*

91. Larkin, *supra* note 20, at 490.

92. *Id.* at 490-91.

93. *See* Sarah Breitenbach, *As Legal Marijuana Expands, States Struggle With Drugged Driving*, PEW CHARITABLE TRS. (Aug. 21, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/08/21/as-legal-marijuana-expands-states-struggle-with-drugged-driving> [https://perma.cc/MRX9-WCEF].

94. WASH. REV. CODE ANN. § 46.61.502(1)(b) (West 2017).

95. COLO. REV. STAT. § 42-4-1301(6)(a)(IV) (West 2017).

96. *Per se*, BLACK’S LAW DICTIONARY (9th ed. 2009).

97. Matthew Izzi, *Illegal Per Se Laws*, LEGALMATCH (Feb. 27, 2018, 4:32 AM), <http://www.legalmatch.com/law-library/article/illegal-per-se-laws.html> [https://perma.cc/RD39-D83A].

U.S. Constitution, or statute.⁹⁸ An example of a per se law is the BAC limit, already discussed, of .08.⁹⁹ If a driver in Indiana is found to operate a vehicle with a BAC over .08, that driver is found guilty, per se, of operating while intoxicated.¹⁰⁰

In states adopting a per se rule for marijuana-impaired driving, a blood draw analysis revealing a THC amount of five nanograms per milliliter of whole blood (“5ng/mL”) has generally been recognized as the per se amount for impairment.¹⁰¹ This means that a driver who is found to have a THC amount equal to or greater than 5ng/mL of whole blood is in per se violation of operating while intoxicated and may be arrested and charged.¹⁰² Washington’s Revised Code, for example, provides that:

A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

. . . .

The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood¹⁰³

In Colorado however, there is no strictly stated per se rule.¹⁰⁴ Rather, a THC level of 5ng/mL of whole blood gives a “permissible inference” of impairment only, such that a judge or jury could infer impairment.¹⁰⁵ The Colorado statute holds that:

If at such time the driver’s blood contained five nanograms or more of the delta 9-tetrahydrocannabinol [THC] per milliliter in whole blood, as shown by analysis of the defendant’s blood, such fact gives rise to a *permissible inference* that the defendant was under the influence of one or more drugs.¹⁰⁶

An individual whose THC level is above five nanograms may be arrested but is not automatically in violation of the law.¹⁰⁷ However, an officer may also arrest an individual whose THC level is below 5ng/mL of whole blood if the arresting

98. *Id.*

99. .08 *Per Se*, MADD (Aug. 31, 2016), http://www.madd.org/laws/law-overview/08_Per_Se_Law_Overview.pdf [<https://perma.cc/NK7Y-7EXW>].

100. *See* IND. CODE § 9-30-5-1(a) (2017).

101. *See* WASH. REV. CODE ANN. § 46.61.502(1)(b) (West 2017).

102. *See generally id.*

103. *Id.*

104. COLO. REV. STAT. ANN § 42-4-1301(6)(a)(IV) (2017).

105. *See* Blake & Finlaw, *supra* note 6, at 375-76.

106. COLO. REV. STAT. ANN. § 42-4-1301(6)(a)(IV) (emphasis added).

107. *See* Blake & Finlaw, *supra* note 6, at 375-76.

officer believes, in his opinion, that the driver is impaired.¹⁰⁸ Because there is still no widely accepted numerical threshold for marijuana impairment, allowing a presumption of innocence for those testing under a certain THC level is likely to be under-inclusive, since the novice marijuana user could still be impaired at such a level.¹⁰⁹ While the benefit of such a policy is clear, the concept that an officer has the ability to arrest an individual on nothing more concrete than a “permissible inference” of impairment raises concerns about whether this is an unreasonable seizure, protected by an individual’s Fourth Amendment Rights.¹¹⁰

Laws, whether agreed with or not, are established by elected legislators, and the public is aware of what is deemed illegal behavior. Per se laws create a strict standard of what constitutes legal and illegal acts, while the Colorado statute leaves too much of that determination in the hands, or minds, of state officials. As a result of this concern and the questions about citizens’ rights, Colorado’s permissible inference test has created challenges to prosecution.¹¹¹ Disputes raise questions surrounding an officer’s determination of probable cause, and without a per se rule to aid in prosecution, cases are often dismissed for lack of probable cause.¹¹²

There are several scholarly works that discuss the shortcoming of the per se rule.¹¹³ This Note is not intended to make the case that the per se rule for marijuana-impaired driving is flawless or without several points of criticism. Rather, this Note accepts that a perfect model, or even one as strong as that which exists for alcohol detection, does not exist. Nevertheless, impaired driving poses a threat to innocent people,¹¹⁴ and there must be some measure put in place that provides safety to motorists and pedestrians in Indiana through deterrence against impaired driving. With that goal in mind, adoption of a per se rule is the best option for Indiana.

108. See *id.* (noting probable cause and subsequent observations by law enforcement remain key in cases of drugged driving).

109. See Johannes G. Ramaekers et al., *Tolerance and Cross-Tolerance to Neurocognitive Effects of THC and Alcohol in Heavy Cannabis Users*, 214 *PSYCHOPHARMACOLOGY* 391, 398 (2011).

110. See U.S. CONST. amend IV.

111. See generally Neal Simpson, *Police face obstacles in enforcing laws against driving while stoned*, PATRIOT LEDGER (Dec. 11, 2016, 12:16 PM), <http://www.wcvb.com/article/police-face-obstacles-in-enforcing-laws-against-driving-while-stoned/8488716> [https://perma.cc/AKY6-SHD3] (discussing how conflicting studies, lack of scientific evidence, and split courts make prosecution against drugged-driving difficult).

112. See generally *id.*

113. See, e.g., Larkin, *supra* note 20, at 490-97; see also Charles R. Cordova, Jr., *DWI and Drugs: A Look at Per Se Laws for Marijuana*, 7 *NEV. L.J.* 570 (2007); see also Roth, *supra* note 51, at 841.

114. See, e.g., *Does marijuana use affect driving*, *supra* note 15; see also IVERSEN, *supra* note 16, at 163.

C. The Need for the Indiana Code to Adopt the “Per Se” Rule

Per se laws create uniformity in defining what constitutes illegal conduct.¹¹⁵ This uniformity helps protect against unequal administration of justice, whether on the basis of race, gender, or any other discriminatory motive that certain laws create.¹¹⁶ Not all individuals are equally impaired at a BAC of .08, yet every state has still adopted a per se limit of .08, as this measure is indicative of some level of impairment.¹¹⁷ One significant reason for adopting a specific non-zero limit is the idea that individuals may be deterred from driving if they believe they could be close to a legal limit, regardless of how impaired they feel they are. Adoption of a per se rule sends the general message to legal marijuana users that driving while impaired, even if that impairment is not perfectly measured, will not be accepted.¹¹⁸ While zero-tolerance rules prohibit any amount of THC to be found in the system, the proposed per se law allows a finding of low level of THC while encouraging marijuana users to wait longer between use and vehicle operation.

Adopting a per se limit of 5ng/mL of THC also helps dilute a major criticism of marijuana testing and driving enforcement; marijuana can potentially stay in a person’s system long after usage, having no impairment effect.¹¹⁹ By setting the per se limit at 5ng/mL of THC, rather than a lower standard, the law can better safeguard against trace amounts that are not indicative of impairment or non-recent usage.¹²⁰ As discussed with the blood draw requirement, an officer is required to obtain a blood draw within three hours of the initial detention of a suspected violator.¹²¹ Although this requirement helps address the rapid metabolism of hydroxy-THC, which causes impairment, to carboxy-THC, which does not, the three-hour measure may prove too liberal a standard.¹²² To mirror other states with per se laws, creating more uniformity, and to better enforce marijuana driving laws against those that pose an actual threat, Indiana

115. See generally Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 380-87 (1966) (discussing the importance of the per se rule in defining legality in regard to antitrust and non-monopolistic business practices).

116. See generally Jesse Alejandro Cottrell, *‘Stop and Frisk’ May be Working—But Is It Racist?*, ATLANTIC (Jan. 23, 2013), <https://www.theatlantic.com/national/archive/2013/01/stop-and-frisk-may-be-working-but-is-it-racist/267417/> [<https://perma.cc/R9LW-AQUY>] (discussing how the less strict parameters of the ‘Stop and Frisk’ law creates racism and discrimination in its applicability to citizens).

117. See *Drunk Driving Laws*, *supra* note 48.

118. See generally NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., DOT HS 809 286, LEGISLATIVE HISTORY OF .08 PER SE LAWS (July 2001), *available at* https://one.nhtsa.gov/people/injury/research/pub/alcohol-laws/08History/4_arguments.htm [<https://perma.cc/G2RG-4EFS>] (discussing proponents’ arguments that the .08 per se law deters impaired driving and serves the purpose of enhanced safety).

119. IVERSEN, *supra* note 16, at 189; see also Blake & Finlaw, *supra* note 6, at 375-76.

120. Larkin, *supra* note 20, at 490.

121. IND. CODE § 9-30-6-2(c) (2017).

122. See *Drugs Fact Sheet*, *supra* note 26.

should also reduce its blood draw requirement time to two hours.¹²³ If a blood draw taken within two hours of detention reveals a THC amount over 5ng/mL of blood, then such results should serve as proof of impairment. Ultimately, the Indiana Code should be amended to reflect the following adoption of a per se rule under IC 9-30-5:¹²⁴

9-30-5-1 (e)¹²⁵

A person who operates a motor vehicle under the influence of marijuana, such that the individual's blood, taken within two hours of operating a vehicle, contains a delta 9-tetrahydrocannabinol (THC) level greater than five nanograms per milliliter of whole blood commits a Class C Misdemeanor.

II. STRONGER PROSECUTION AND DETERRENCE

A. Strengthening Cases Against Impaired Drivers

As discussed earlier, the resources available for marijuana detection are not as plentiful as those for alcohol detection, and the most reliable measure to determine the presence of marijuana in a person's body, specifically THC, is to perform a blood draw.¹²⁶ A suspected violator may simply consent to a blood draw in compliance with Indiana implied consent laws;¹²⁷ however, if they refuse to submit voluntarily, an officer must obtain a search warrant for the suspect's blood.¹²⁸ Warrantless blood draws, without consent, are not permitted except in extreme circumstances.¹²⁹ Obtaining a blood draw warrant is not an easy step, as the Fourth Amendment of the Constitution protects people from unjust searches and seizures.¹³⁰ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹³¹

Essentially, to submit an individual to a blood draw, whether voluntarily or through use of a search warrant, an officer must firmly establish probable

123. See WASH. REV. CODE ANN. § 46.61.502(1)(b) (West 2017).

124. IND. CODE § 9-30-5-1 (2017).

125. See *id.*

126. See Roth, *supra* note 51, at 841; see *Schmerber v. California*, 384 U.S. 757, 761 (1996).

127. IND. CODE § 9-30-6-2.

128. See *Missouri v. McNeely*, 569 U.S. 141, 165 (2013).

129. See *id.*

130. See U.S. CONST. amend. IV.

131. *Id.* (identifying that a search warrant, including a search warrant for a blood draw, must only be issued when probable cause exists).

cause.¹³²

This Note has already addressed the flexibility of the concept of probable cause and the challenges created by less reliable marijuana testing instruments.¹³³ The blood draw warrant requirement creates yet another barrier to enforcement against marijuana-impaired driving as violators often challenge an officer or prosecutor's establishment of probable cause under a Fourth Amendment unreasonable search or seizure claim.¹³⁴ For these reasons, in order to protect motorists and pedestrians against impaired driving, the Indiana Code needs to more clearly define elements that may be considered in the determination of probable cause for a blood draw.

Although the *per se* rule establishes an illegality threshold on its own, combining the *per se* violation with well-established documented factors constituting probable cause could potentially increase the likelihood of impaired driving convictions. In the criminal context, if violators are confident their actions will not yield consequences, they are less likely to be deterred from committing such acts.¹³⁵ Therefore, logic would dictate that higher conviction rates for marijuana-impaired driving could potentially deter such behavior. Factors establishing probable cause for a chemical test are commonly acknowledged, but these factors are not acknowledged by any Indiana statute.¹³⁶ Again, some of these factors include bloodshot eyes, slurred or slowed speech, dizziness, the odor of marijuana, a yellowish-green tongue, and pupil dilation.¹³⁷ By codifying an inclusive, but not exhaustive, list of factors that may be considered in establishing probable cause in Indiana, the number of challenges against sufficient probable cause could be decreased. In order to strengthen evidentiary findings of probable cause that an individual has operated a vehicle while intoxicated by marijuana, the Indiana Code should be amended as follows:

132. *See id.*

133. *See generally* Larkin, *supra* note 20, at 483 (discussing how Standardized Field Sobriety tests, including nystagmus, are not as reliable in determining whether someone is under the influence of marijuana as they are for the detection of alcohol impairment).

134. U.S. CONST. amend. IV (identifying that a search warrant, including a search warrant for a blood draw, must only be issued when probable cause exists); 4 RICHARD J. ESSEN, DEFENSE OF DRUNK DRIVING CASES PRACTICE GUIDE § 45.02 (Matthew Bender, 3d ed. 2018).

135. Charles Braun, Attorney and Criminal Law Instructor, Indiana Law Enforcement Academy, Lecture on Criminal Law and Crime Deterrence (May 2014).

136. *See generally* IND. CODE (2017) (The Indiana Code does not specify any particular factors that help to establish probable cause. While many of these are accepted by most courts in Indiana, they are only documented on charging forms or court forms, not in the Indiana Code.).

137. *See Signs of Marijuana Use and Addiction*, NAT'L INST. ON DRUG ABUSE, <https://easyread.drugabuse.gov/content/signs-marijuana-use-and-addiction> [<https://perma.cc/9QD6-PQVF>] (last visited Oct. 20, 2016).

IC 9-30-6-2(a)¹³⁸

- (1) The following provides a non-exhaustive list of factors that may contribute to an officer's establishment of probable cause to submit an individual to a chemical test or to apply for a blood draw search warrant, for alcohol or other drugs, although the ultimate determination is based on the totality of the circumstances:
- (A) bloodshot or glassy eyes;
 - (B) poor balance or dizziness;
 - (C) slowed or slurred speech;
 - (D) greenish-yellow colored tongue;
 - (E) odor of marijuana or alcohol emitting from the person's breath;
 - (F) admission of use of alcohol or marijuana; or
 - (G) possession of marijuana or alcohol in the vehicle.

B. Driving Privileges

In order to increase deterrence against impaired driving, stricter penalties need to be sanctioned against impaired drivers by addressing both drivers that simply refuse chemical tests as well as those that are convicted of operating while intoxicated. While Indiana imposes suspensions for refusals, other states are imposing stricter penalties.¹³⁹ Colorado, for example, revokes driving privileges for any individual who fails to cooperate with the chemical testing process requested by an officer during the investigation of an alcohol or drug-related DUI arrest.¹⁴⁰ In Colorado, "Any driver who refuses to take a blood test will immediately be considered a high-risk driver; Consequences include: mandatory ignition interlock for two years, and level two alcohol education and therapy classes as specified by law."¹⁴¹ These penalties are administrative and applied regardless of a criminal conviction.¹⁴² In Washington, a driver who refuses a chemical test, with no prior OWI convictions in the last seven years, receives an automatic suspension of two years.¹⁴³ If that driver has a prior OWI conviction within seven years, their driving privileges are suspended for three years.¹⁴⁴

In Indiana, a person who refuses to submit to a portable breath test or

138. See IND. CODE § 9-30-6-2.

139. IND. CODE § 9-30-6-9; *Marijuana and Driving*, COLO. DEP'T OF TRANSP., <https://www.codot.gov/safety/alcohol-and-impaired-driving/druggeddriving/marijuana-and-driving> [https://perma.cc/64CN-UPX2] [hereinafter *Marijuana and Driving*] (last visited Oct. 19, 2016); WASH. REV. CODE ANN. § 46.61.5055(9)(c) (West 2017).

140. *Marijuana and Driving*, *supra* note 139.

141. *Id.*

142. *Id.*

143. WASH. REV. CODE ANN. § 46.61.5055(9)(c)(i) (2017).

144. *Id.* § 46.61.5055(9)(c)(ii).

chemical test offered by an officer commits a Class C infraction;¹⁴⁵ however, the person commits a Class A infraction if he or she has at least one previous conviction for operating while intoxicated.¹⁴⁶ “In addition to any other penalty imposed, the court shall suspend the person's driving privileges for: (1) for one (1) year; or (2) if the person has at least one (1) previous conviction for operating while intoxicated, for two (2) years.”¹⁴⁷ Indiana’s current statute covers tests for both alcohol and marijuana-impaired driving, as it specifically states “chemical test.”¹⁴⁸ A chemical test includes any chemical test legally offered, including a blood draw,¹⁴⁹ but in order to create the greatest deterrent against impaired driving, the Indiana statute should combine its current elements with the refusal statutes in Colorado and Washington. The Indiana Code should be amended as follows:

9-30-7-5(b)¹⁵⁰

In addition to any other penalty imposed, the court may suspend the person’s driving privileges:

- (1) for two (2) years; or
- (2) if the person has at least one (1) previous conviction for operating while intoxicated, for three (3) years.

9-30-7-5(d)¹⁵¹

In addition to, or in lieu of, any other penalty imposed, the court shall order mandatory ignition lock for a period of one (1) year after the reinstatement of the violator’s license, as well as drug education and therapy classes for a period of six (6) months.

The aim of strict refusal statutes in Indiana would be to encourage suspected violators to submit to a chemical test. Consent to a chemical test drastically reduces the time between initial detention and blood analysis, which allows for a more accurate indication of a person’s active THC level at the time of vehicle operation.¹⁵² This would increase accurate enforcement against those who drive while truly impaired and penalize those attempting to mask impairment by prolonging the blood analysis with refusals.

Penalties differ for those actually convicted of operating while intoxicated.¹⁵³

145. IND. CODE § 9-30-7-5(a) (2017).

146. *Id.*

147. *Id.* § 9-30-7-5(b).

148. *Id.* § 9-30-7-5(a).

149. *See id.* § 9-30-6-6.

150. *See id.* § 9-30-7-5(b).

151. *See generally id.* § 9-30-7-5.

152. *See Drugs Fact Sheet, supra* note 26.

153. *See* IND. CODE § 9-30-6-9.

Currently in Indiana, the Bureau of Motor Vehicles is required to suspend the licenses of those convicted of operating while intoxicated for a period of 180 days or until the related charges are dropped, whichever comes earlier.¹⁵⁴ This policy is a significantly relaxed approach and a recent departure from tougher sanctions previously imposed under Indiana law.¹⁵⁵ In 2015, Indiana repealed a statute providing for specific suspensions of driving privileges for those convicted of OWI.¹⁵⁶ Under the previous statute, an individual convicted of operating while intoxicated may have received a suspension of their driver's license for a period of at least ninety days, but not more than two years, if they had no prior record of OWI or if their previous OWI was more than ten years ago.¹⁵⁷ If an individual had a previous OWI conviction that was between five and ten years prior, their license may have been suspended for a period of at least 180 days, but not more than two years.¹⁵⁸ If the driver's previous OWI conviction was within the last five years, then their license may have been suspended for a period of at least one year, but not more than two years.¹⁵⁹ In order to best safeguard against impaired driving, a version of this repealed statute should be reinstated to provide for even stricter suspensions.

The drawback to strict penalties and driving suspensions is that they create hardships for those affected. Those that lose their licenses, especially those of low-income or without family or friends, will have trouble traveling to work and generating an income. This creates a circular effect in that those individuals may turn to further drug use as a result of lost income and the inability to pay necessary fines to have their licenses reinstated. These concerns are understandable and certainly require further attention in areas such as government assistance for public transportation; however, the hardships suffered by these individuals cannot be placed ahead of the danger impaired driving poses to the citizens of Indiana. Impaired driving itself would best be deterred by reinstating a version of Indiana Code Section 9-30-5-10 and increasing the minimum suspension of driving privileges for those convicted of impaired driving. To best accomplish that goal, the Indiana Code should be amended as follows:

9-30-5-10¹⁶⁰

- (b) If the person has no prior conviction for OWI or that conviction is more than ten (10) years prior, a suspension of at least one hundred eighty (180) days but not more than two (2) years shall be recommended.
- (c) If the person has a prior conviction for OWI between five (5) and ten

154. *Id.*

155. *See id.* § 9-30-5-10, *repealed by* P.L.188-2015, § 107, effective July 1, 2015.

156. *See id.*

157. *Id.* § 9-30-5-10(b).

158. *Id.* § 9-30-5-10(c).

159. *Id.* § 9-30-5-10(d).

160. *See generally id.*

- (10) years prior, a suspension of at least one (1) year but not more than two (2) years shall be recommended.
- (d) If the person has a conviction for OWI within the last five (5) years, a suspension of at least two (2) years shall be recommended.
- (e) If an individual has a conviction under any of the enumerated offenses of this section, a suspension of their driving privileges for at least five (5) years shall be recommended.¹⁶¹

C. Enhanced Punishment and Constitutional Rights

The current statutes in Indiana allow for increased classifications of offenses, based on prior convictions or other dangerous actions.¹⁶² However, several of these statutes only impose changes in classifications when violators have a previous conviction for operating while intoxicated with a specified alcohol concentration or with a controlled substance, under Schedule I or II, in their system.¹⁶³ If marijuana is legalized, it will no longer fall into the category of a “controlled substance under Schedule I or Schedule II.”¹⁶⁴ As such, the Indiana Code simply needs to be amended to include increases in classification of offenses for prior convictions of OWI for “persons who operate a motor vehicle with a THC amount equal to or greater than 5ng/mL blood.”¹⁶⁵ Ultimately, creating more severe charges for repeat offenders deters impaired driving and protects Indiana motorists and pedestrians.

While stricter punishments and enhanced prosecution could provide greater deterrence to impaired driving, these measures certainly raise questions regarding defendants’ Constitutional rights. Certain claims are likely without merit while others pose a significant issue. As the penalties themselves already exist under Indiana’s implied consent laws, simply applying the penalties more stringently does not likely constitute an unreasonable seizure, protected under the Fourth Amendment.¹⁶⁶ The penalties proposed are existing sanctions on a person’s privileges only, and these changes do not draw into question individuals’ Eighth Amendment rights protecting against excessive fines or cruel and unusual punishment.¹⁶⁷

Perhaps the primary argument against these recommendations for enhanced prosecution and punishment is that they intrude upon equal protection and due process covered under the Fourteenth Amendment.¹⁶⁸ Opponents may assert that these amendments seek to target a specific group, marijuana users, as an underlying motive, without such restrictions, thereby furthering the state’s

161. *See id.* § 9-30-5-10(e)(1)-(6).

162. *See* IND. CODE §§ 9-30-5-(2)-(5) (2017).

163. *Id.*

164. *See generally id.* § 35-48-2 (explaining the drug classifications in Indiana).

165. *See id.* § 9-30-5-1.

166. *See id.* § 9-30-6-2; *see* U.S. CONST. amend. IV.

167. *See* U.S. CONST. amend. VIII.

168. *See* U.S. CONST. amend. XIV.

interest.¹⁶⁹ However, neither impaired drivers nor marijuana users are considered disparaged groups entitled to a higher standard of Constitutional review regarding equal protection.¹⁷⁰ Therefore, it would be highly unlikely that Indiana laws regarding driving restrictions and penalties would fail to pass rational basis review.¹⁷¹ The state of Indiana certainly has an interest in protecting its motorists and pedestrians from impaired drivers, and imposing strict penalties to deter impaired driving is rationally related to achieving that interest. Additionally, driving is a privilege and not a fundamental right.¹⁷² As such, Indiana's denial of such a privilege is unlikely to raise due process issues.¹⁷³ While it is likely that Indiana could enforce these recommended changes, there remains a strong feeling that persons' rights are, at the least, being intruded upon. If marijuana legalization in Indiana requires marijuana users to have their rights encroached upon in the name of highway safety, then the same argument for highway safety should allow marijuana users certain other rights.

Up to this point, this Note has served to address the need for strict Indiana laws that would protect motorists and pedestrians in the event of marijuana legalization. The proposal of such laws is not aimed at fighting off legalization or stripping citizens of what would be a legalized right. Rather, the strict laws recommended are designed to help force individuals to restrict their marijuana use from Indiana roadways. However, if these proposals were to be accepted, exclusive of any other changes, the safety of Indiana roadways would not be greatly improved. Enhanced restrictive laws and prosecutorial advantage in regard to Indiana roads is only appropriate if the same marijuana users who would face tightening restraints on some of their Constitutional liberties would also be granted additional freedoms to exercise their legalized right. If Indiana legalizes marijuana, a significant way to restrict its impairing usage on Indiana roads is to allow marijuana use in select public places.

III. THE NEED FOR LEGALIZED MARIJUANA USE IN SELECT PUBLIC PLACES

States that have legalized marijuana for either medicinal or recreational use continue to outlaw marijuana use in public.¹⁷⁴ In Colorado, a person who openly and publicly displays, consumes, or uses two ounces or less of marijuana commits a petty drug offense and could be punished by a fine of up to one hundred dollars and up to twenty-four hours of community service.¹⁷⁵ Open and public display,

169. *See* *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

170. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (discussing the Constitutional standards of review, namely strict scrutiny, and its application to protected persons).

171. *See generally id.*

172. *See id.* at 1281-82.

173. *See id.*; *see* U.S. CONST. amend. XIV.

174. *See* COL. REV. STAT. ANN. § 18-18-406 (2017); *see* WASH. REV. CODE ANN. § 69.50.445 (2017).

175. COL. REV. STAT. ANN. § 18-18-406(5)(b)(I).

consumption, or use of more than two ounces of marijuana or any amount of marijuana concentrate is considered possession, and violators can be charged with either a felony, level 1 drug misdemeanor, or level 2 drug misdemeanor, depending on the amount of marijuana the individual is found in possession of.¹⁷⁶ In the state of Washington, it is unlawful to open a package containing marijuana, useable marijuana, marijuana-infused products, or marijuana concentrates, or to consume marijuana, useable marijuana, marijuana-infused products, or marijuana concentrates, in view of the general public or in a public place.¹⁷⁷ A person who violates this section is guilty of a Class 3 civil infraction and can be fined.¹⁷⁸ These examples simply serve to illustrate that the term “legalized marijuana” does not entail the absolute right to use that marijuana whenever or however one chooses. More directly, these examples serve as a platform for how public restrictions inadvertently affect highway safety.

A. Consequences of Public Use Restrictions

As discussed above, marijuana public display and use is still generally prohibited in legalized states.¹⁷⁹ In Colorado, for example, restrictions include, but are not limited to, areas accessible to the public such as transportation facilities, schools, amusement/sporting/music venues, parks, playgrounds, sidewalks and roads, outdoor and rooftop cafes, indoor-but-public locations like bars, restaurants and common areas in buildings, apartment complexes, and hotels.¹⁸⁰ Marijuana use is restricted to private, personal use only.¹⁸¹ However, not all individuals may be able to use marijuana in their home, due to the presence of children, disapproval of a spouse, or restrictions from landlords or parents. Furthermore, legalized states get a large influx of vacationers who come to the state to legally use marijuana and are unaware of the public restrictions.¹⁸² The ongoing issue is that the right to use marijuana has been legalized, but states are drastically restricting individuals’ ability to enjoy that right by civilly and criminally punishing public use.¹⁸³ This causes a high number of people to use marijuana while driving, as their vehicle becomes their best option for going undetected and avoiding fines or penal consequences.¹⁸⁴ To reduce the number of drivers who

176. *Id.* § 18-18-406(5)(b)(II); *see id.* § 18-18-406(4)(a)-(c).

177. WASH. REV. CODE ANN. § 69.50.445(1).

178. *Id.* § 69.50.445(3).

179. *See* COL. REV. STAT. ANN. § 18-18-406; *see* WASH. REV. CODE ANN. § 69.50.445.

180. *See Retail Marijuana Use Within the City of Denver*, COL. OFFICIAL STATE WEB PORTAL (2017), <https://www.colorado.gov/pacific/marijuanainfodenver/residents-visitors> [<https://perma.cc/DT75-CC8M>] [hereinafter *Retail Marijuana in Denver*].

181. *See id.*

182. *See* Jason Blevins, *Marijuana has huge influence on Colorado tourism, state survey says*, DENVER POST (Dec. 9, 2015, 8:10 AM), <http://www.denverpost.com/2015/12/09/marijuana-has-huge-influence-on-colorado-tourism-state-survey-says-2/> [<https://perma.cc/7ZEZ-8TGS>].

183. *See* COL. REV. STAT. ANN. § 18-18-406; *see* WASH. REV. CODE ANN. § 69.50.445.

184. *See generally Retail Marijuana in Denver*, *supra* note 182 (identifying the restrictions

concurrently use marijuana and operate a vehicle, state laws, in legalized states, need to expand the rights of marijuana users to include usage in some limited public places.

B. Marijuana Public Use Under Title 7

In order to create safe public zones for marijuana use, and thereby decrease the number of impaired drivers on the road, Title 7 of the Indiana Code should adopt marijuana usage laws that mirror those currently in place for public tobacco use.¹⁸⁵ Under current Indiana law, smoking (tobacco) is prohibited in public spaces (with exceptions), within eight feet of a public entrance or place of enjoyment, a place of employment, or a vehicle owned, leased, or operated by the state if being used for governmental purposes.¹⁸⁶ Locations that are currently exempt from the Indiana smoking ban include horse-racing facilities, riverboats, facilities with a gambling license, or other specified businesses that meet stringent requirements.¹⁸⁷ Though this list is not extensive, it does allow smokers to use a legal product in select public places in a manner that has been determined acceptable. The same model could be successful with marijuana legalization and public usage. The Indiana Code should be amended to reflect the limitations of marijuana public use and display as follows:

(I) IC 7.1-5-12-3¹⁸⁸

Sec. 3 As used in this chapter, “smoking” means the:

- (3) carrying or holding of a lighted cigarette, cigar, or pipe or any other lighted marijuana smoking equipment; or
- (4) inhalation or exhalation of smoke from lighted marijuana smoking equipment.

(II) IC 7.1-5-12-5¹⁸⁹

Sec. 5. (a) Except as provided in subsection (c) and subject to section 13 of this chapter, smoking of tobacco or marijuana may be allowed in the following:

on marijuana use in public and private locations as well as the displayed use of marijuana).

185. *See generally* IND. CODE § 7.1 (2017) (explaining the current laws and regulations regarding tobacco (and alcohol) use in Indiana).

186. *Id.* § 7.1-5-12-4.

187. *See id.* § 7.1-5-12-5 (listing the facilities and businesses that are currently exempt from the smoking ban).

188. *See id.* § 7.1-5-12-3.

189. *See id.* § 7.1-5-12-5 (listing the facilities and businesses that are currently exempt from the smoking ban).

- (1) Horse-racing facility, provided the facility has an outdoor area designated for marijuana use only.
 - (2) Riverboats, provided the riverboat has an outdoor area designated for marijuana use only, and using marijuana is limited to that outdoor space.
 - (3) Facility with a gambling license, provided the facility has an outdoor area designated for marijuana use only, and using marijuana is limited to that outdoor space.
 - (4) A restaurant allowing occupancy over the age of 21 only, provided that the restaurant has an outdoor area for smoking that is separated from any other outdoor seating by at least one unoccupied side of the building.
- (i) The owner of such an establishment reserves the right to refuse service of alcoholic beverages to individuals engaging in marijuana use.

The idea of public marijuana use, even on a limited basis, certainly poses some problems. The first is that those not engaging in marijuana or tobacco use or those only engaging in tobacco use may not want to be around marijuana or marijuana users. By implementing language in the code, as shown above, providing that an establishment with legal marijuana use must provide a designated area for marijuana use only, this problem can be greatly condensed. This policy allows marijuana users to enjoy a legalized right without disrupting others with the threat of a “contact high” or unpleasant odor.¹⁹⁰

The larger problem with allowing public marijuana use is that it could, in some instances, directly conflict with its stated purpose. The purpose of allowing public marijuana use is that it could reduce the number of people using marijuana in their vehicles, especially while driving. By allowing public use, the risk of individuals driving to and from a legalized place of use will likely be increased. However, when people have a legalized right to engage in something, the law should yield to trusting the people. Alcohol is arguably more dangerous than marijuana,¹⁹¹ but alcohol is still legally served at restaurants, bars, and clubs across Indiana and the rest of the country. The state trusts, or at least hopes, that those drinking alcohol will find a responsible means of travel and not engage in drunk-driving. With the expansion of shuttle services such as Uber and Lyft, finding safe transportation is easier than ever.¹⁹²

190. See generally Christina Sterbenz & Lauren F. Friedman, *Can You Really Get a ‘Contact High’ From Marijuana?*, BUS. INSIDER (Jan. 16, 2014, 5:36 PM), <http://www.businessinsider.com/randi-kaye-contact-high-2014-1> [<https://perma.cc/AXY5-82ME>] (explaining what a “contact high” is and the likelihood of such an occurrence).

191. See Jen Christensen & Jacque Wilson, *Is marijuana as safe as--or safer than--alcohol?*, CNN (Jan. 22, 2014, 11:19 AM), <http://www.cnn.com/2014/01/20/health/marijuana-versus-alcohol/> [<https://perma.cc/5TQ2-C2B8>].

192. See generally UBER, <https://www.uber.com/> [<https://perma.cc/4DX9-FC6U>] (last visited

Those that consume alcohol and choose to ignore these options break that trust and will likely face consequences through police and state enforcement, but the law still does not attempt to restrict their freedom to make such choices. The same trust should be given to marijuana users in the event that marijuana, too, is a legal substance. This Note has largely focused on strict measures of enforcement, punishment, and deterrence for impaired driving, but these are all measures recommended against those who have already made the decision to operate their vehicle and potentially endanger others. In this country, people have the right to consume alcohol, carry firearms, and speak freely.¹⁹³ It is only the misuse of such rights that poses a problem. If marijuana is a legal substance, people should be given some degree of trust that they will use it responsibly and not endanger others.

CONCLUSION

The issue of marijuana legalization is sweeping through the nation.¹⁹⁴ Legalization in Indiana may take longer than other states, but it is inevitable that it will be highly debated for years to come. Accepting that legalization will eventually occur, either by state or federal recognition, it is important to think ahead to the potential issues that could arise. One area of concern that legalized states have had to address is the effect legalization has on impaired driving. Research has indicated that marijuana use causes impairment by slowing reaction time, disrupting vision, and negatively affecting judgment.¹⁹⁵ While studies are split as to whether legalization actually causes an increase in impaired drivers on the road,¹⁹⁶ legislation must concede to caution to protect motorists and pedestrians in Indiana.

By implementing certain amendments to the Indiana Code, marijuana legalization could occur while limiting the increased danger to drivers and pedestrians in Indiana. These amendments require that Indiana adopt a per se rule regarding marijuana impaired driving, strengthen prosecution against impaired drivers, enhance punishment for repeat offenders, intensify driving suspensions for convicted violators, and provide for limited public use of marijuana. While these necessary changes certainly raise questions about individual liberty and Constitutional rights, the likely alternative, primarily in a conservative legislature, is to simply reject recreational marijuana legalization. The question then becomes whether individuals are willing to give up some rights in exchange for others. In 2018, and the foreseeable future, this compromise may be the only safe way to bring legalized recreational marijuana to Indiana.

March 9, 2017); LYFT, <https://www.lyft.com/> [<https://perma.cc/3B6J-XEAM>] (last visited March 9, 2017) (explaining what these companies are, how to use their services, and their availability in the city in question).

193. U.S. CONST. amend. XXI; U.S. CONST. amend. II; U.S. CONST. amend. I.

194. See Fuller, *supra* note 3, at 15; see Damaria, *supra* note 1.

195. See *Does marijuana use affect driving*, *supra* note 15.

196. See Larkin, *supra* note 20, at 471.