

Analysis

'Or Marihuana': Amendment to VTL §1192(1) Should Be Passed

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By **Steven B. Epstein and Alexander R. Klein** | February 05, 2019 at 02:30 PM



The federal government was closed for business because politicians in Washington, D.C. had no middle ground on whether to erect a border wall. One side demanded wall-funding as a precondition for opening the

government. The other side looked at a wall as anti-American. The parties could not identify a halfway measure between a wall and no wall, so negotiations broke down, and damage flowed to an estimated 800,000 federal workers and their families.

New York state is about 2,000 miles from the southern border, but its criminal justice system is approaching a wall of its own. Every year, thousands of motorists in New York state face charges for driving while intoxicated. They fill courtrooms and dockets, require scores of court personnel and judges, and bear the focus of prosecutors and defense attorneys. One law above all others keeps this system's high cost from exploding: Vehicle and Traffic Law §1192(1). Under this law, DWI cases can resolve with a non-criminal infraction rather than a criminal misdemeanor—"impaired" rather than "intoxicated." So between the extremes of one side denying all guilt and the other side insisting upon a criminal record—a wall and no wall—§1192(1) is a middle ground that allows parties to agree and for many cases to get resolved efficiently with a plea.

However, VTL §1192(1) suffers a shortcoming that will render it anachronistic in the near future. With the approaching legalization of marijuana, criminal courts will experience a hurricane of new cases for motorists charged with driving under the influence of cannabis in addition to the thousands of cases presently prosecuted involving alcohol. Yet, as presently written, §1192(1)'s levy will offer no protection. That is because it only pertains to people who drive while impaired "by the consumption of alcohol." For those impaired by marijuana, then, the stakes will remain extreme—crime or acquittal, wall or no wall. A vast array of cases that would otherwise resolve quickly will thus require the full resources of the criminal justice system from arraignment through trial. The additional burden will cause the wheels of justice to turn

even more slowly, and will divert the attention of prosecutors away from cases that more richly deserve it.

The solution to this problem is obvious. The legislature should amend the Vehicle and Traffic Law to add two words to the end of §1192(1): “or marihuana” (this spelling would be prudent, because it is how the drug is spelled in New York’s Penal Law, where it is defined in Penal Law §220.00(6)).

A provision in the Vehicle and Traffic Law that permits non-criminal dispositions for motorists impaired “by the consumption of alcohol or marihuana” is sensible from a variety of perspectives. First, it will streamline the justice system by weeding out cases that all parties agree do not warrant criminal records. The benefit of §1192(1)’s clear statutory language is that it permits judges, prosecutors, and defense attorneys to agree upon non-criminal dispositions when the circumstances warrant them. As presently written, §1192(1) enables this freedom only for cases involving impairment by alcohol, not marijuana. “Or marihuana” will lift this anchor.

Second, punishing marijuana intoxication worse than alcohol intoxication lacks a sturdy bearing in the science. Research and studies done by the National Highway Traffic Safety Administration has revealed that unlike alcohol, the presence of THC in an individual’s blood stream does not equate to impairment. Roadway safety and quantified levels of THC—cannabis’s central intoxicating ingredient—are not closely related. This is in contrast to alcohol, whose effect on driving is beyond dispute, and which takes a grisly toll on the safety of our roads, bridges, and highways every year. Where the stated purpose of the Vehicle and Traffic Law is to promote roadway safety, the minimum penalties should not be higher for conduct that is less dangerous than alcohol.

Third, amending the Vehicle and Traffic Law is a matter of social justice. Despite an equal rate of marijuana use, Black and Hispanic people get prosecuted in marijuana-related cases at much higher rates than White people. They are also more likely to be pulled over in a traffic stop in the first place. So a regime that unduly elevates the minimum penalties for driving while impaired by marijuana builds an injustice into our state's criminal justice system shouldered disproportionately by racial minorities. This type of indirect targeting has been a stain on the United States since the infancy of the drug war. "Or marihuana" will not solve this problem, but they are two words that pace in the right direction.

Fourth, correcting the language of §1192(1) will align the Vehicle and Traffic Law with the wide array of other forces that rendered marijuana legalization a worthwhile experiment in the first place. Legalization will enable cannabis to be tested and quality-controlled before reaching consumers, who were otherwise susceptible to ingesting mold, contaminants, and other unknown chemicals. It will raise hundreds of millions of dollars in taxes every year in New York state. It will reduce the stigma surrounding people who use marijuana for medical purposes, like to reduce pain or anxiety, and who otherwise might be diverted to dangerous legal drugs like opioids. It will undermine gang activity funded in part by the sale of marijuana. And it will open up new research and development avenues for police to fight marijuana-related offenses—like the technological equivalent of a breathalyzer, but for cannabis—which the new tax revenues will make financially plausible. Adding "or marihuana" to §1192(1) is a simple legislative step, but it would prevent one corner of the criminal justice system from becoming a dark blot on an otherwise bright story.

Our state government has an opportunity to show it remains alive and well. One easy step—allowing non-criminal dispositions for motorists driving while impaired by alcohol *or marihuana*—is at once helpful, doable, forward-looking, just, and smart. The *or marihuana* amendment should be passed at once.

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