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MEDICAL CANNABIS AND THE AGE OF MAJORITY

KATHARINE SILBAUGH*

ABSTRACT

This Essay considers whether commercial cannabis retailers are adequately constrained in the sale of cannabis to 18- to 21-year-olds. It examines the intersection of the medical cannabis market, recreational cannabis market, and underlying status law regulating late adolescents aged 18 to 21. Because the age of majority licenses full medical decision-making, an 18-year-old can access medical cannabis but not recreational cannabis or alcohol. This Essay proceeds on the assumption that medical cannabis is a construct that has eased the process of achieving a legalized commercial cannabis market. The ambiguity around medical claims is comfortable in the libertarian soil of cannabis discourse, but it invites us to give special attention to 18-year-olds. This Essay argues that the right of an 18-year-old to access commercial cannabis using the medical construct is better understood as a right of the cannabis industry to access the 18-year-old market. People who do not use nicotine, alcohol, or cannabis before the age of 21 are much less likely to use and misuse later. Postponement becomes prevention. Therefore, when those access ages are raised, the industries are losing more than just three additional years of marketing; they are losing access to the creation of lifelong, high-volume users. The underage users are important to the business model because future misusers and abusers buy more reliably. Regulators should monitor the profit motive of the legal cannabis industry as it relates to late adolescents. The age of majority, which is the only explanation for 18-year-old access to medical cannabis, is too weak to justify what is actually self-medication in the colloquial sense. Similarly, the medical status of cannabis is too unclear to justify the risks that self-medication poses to developing brains. As medical users melt into recreational users, and as medical use receives only the weakest of guidance from physicians due to its unique hybrid character, we should acknowledge that 21 may be the appropriate age of access for both.

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INTRODUCTION

I know a 19-year-old college student from the East Coast who headed to California for a summer internship. Once there, they asked a coworker where they might procure weed. The coworker pointed them to an online Skype service. When they called the Skype service, a medical professional asked them what their issue was, offering some options: Do you have back pain? Anxiety? Difficulty sleeping? They chose back pain. The medical professional held up a piece of paper that read, “Indica = Sleep, Sativa = Pain, CBD = Well-Being,” and gave them the authorization they needed to obtain a medical cannabis card.¹ The student used the card to legally purchase cannabis during their summer in California. They have no back pain. Like resourceful 18- to 20-year-olds across the country, they used the medical cannabis structure to access recreational cannabis before they turned 21.

This Essay does not focus on the student’s conduct, as no teenager should be punished for accessing controlled substances, and criminal law responses are extremely damaging to both the buyer and the seller of black-market cannabis. This Essay focuses instead on the infrastructure that made it so easy for them to access commercial cannabis for recreational purposes, by deploying the medical construct and unexamined family law roots of that infrastructure.

This Essay considers whether commercial cannabis retailers are adequately constrained in their sales to 18- to 21-year-olds. It does this by considering the intersection of the medical cannabis market, recreational cannabis market, and underlying status law regulating late adolescents aged 18 to 21. This intersection produces a lacuna in access restrictions that requires greater attention: an 18-year-old can access medical cannabis, but not recreational cannabis or alcohol, in all states that have allowed commercial cannabis.² This Essay raises the need to monitor the profit motive of the legal cannabis industry as it relates to these late adolescents.

I. THE ALCOHOL BENCHMARK IN CANNABIS REGULATION

There are two age cutoffs in the laws regulating the legal markets in cannabis. The first is 21, which is the access age in every state that has a legal recreational

¹ See Ruth Lemon, *How to Get a California Medical Marijuana Card in 2021*, LEAFWELL (July 23, 2020), <https://leafwell.co/blog/get-california-medical-marijuana-card/> [<https://perma.cc/H2NS-DLF2>].

² See, e.g., *Medical Marijuana: Laws and Rules, Frequently Asked Questions*, WASH. STATE DEP’T OF HEALTH, <https://www.doh.wa.gov/YouandYourFamily/Marijuana/MedicalMarijuana/LawsandRules/FrequentlyAskedQuestions#7> [<https://perma.cc/R557-J88P>] (last visited Apr. 13, 2021); *The 5 Benefits of Medical Marijuana vs. Recreational Marijuana*, WAYOFLEAF (Mar. 17, 2021) [hereinafter *5 Benefits of Medical Marijuana*], <https://wayofleaf.com/cannabis/101/advantages-of-medical-weed-vs-recreational-weed> [<https://perma.cc/PDC8-UR78>].

market.³ The second is 18, which is the access age for medical cannabis in most of those same states.⁴ Both of those ages have significance in the larger legal landscape, and those legal meanings inform the use of those ages in cannabis regulation. Taken together, however, the tension between the two ages for cannabis access exemplifies the tension between the two ages in the legal landscape more broadly.

The recreational access age of 21 tracks the age of access to alcohol. The market for alcohol is only for recreational use. It would be hard to overstate the rhetorical significance of alcohol regulation to the regulation of cannabis.⁵ Actual regulation of the two substances differs significantly, largely due to the persistent criminal status of cannabis distribution under federal law and the consequences of that status for supply chain, banking, commercial law, and mechanisms for ensuring product safety.⁶ But the rhetorical significance of the comparison to alcohol has translated to the regulatory environment, with regulators themselves citing alcohol distribution as the benchmark for conceptualizing cannabis sale.⁷

³ Nick Hilden, *How Old Do You Have to Be to Smoke Weed Legally?*, CIVILIZED., <https://www.civilized.life/articles/how-old-do-you-have-to-be-to-smoke-weed-legally/> [<https://perma.cc/JFR8-NR2U>] (last visited Apr. 13, 2021).

⁴ *5 Benefits of Medical Marijuana*, *supra* note 2.

⁵ For example, the name of a current bill in Congress to decriminalize and deschedule cannabis references alcohol in its title. *See* Regulate Marijuana Like Alcohol Act, H.R. 420, 116th Cong. (2019). State coalitions focused on legalizing recreational marijuana also reference alcohol regulation. *See, e.g.*, Press Release, Marijuana Pol’y Project, Initiative to Regulate Marijuana Like Alcohol in Michigan Qualifies for November Ballot (Apr. 26, 2018), <https://www.mpp.org/news/press/initiative-to-regulate-marijuana-like-alcohol-in-michigan-qualifies-for-november-ballot/> [<https://perma.cc/4XN9-Q57B>]; *ACLU Joins Campaign to Regulate Marijuana Like Alcohol*, ACLU COLO., <https://aclu-co.org/aclu-joins-campaign-to-regulate-marijuana-like-alcohol/> [<https://perma.cc/87AU-WBBR>] (last visited Apr. 13, 2021); Melissa Schiller, *Ohio’s Regulate Marijuana Like Alcohol Campaign Suspends Effort to Get Cannabis Legalization Initiative on 2020 Ballot*, CANNABIS BUS. TIMES (May 12, 2020), <https://www.cannabisbusinesstimes.com/article/ohio-regulate-marijuana-like-alcohol-campaign-suspends-effort-covid-19/> [<https://perma.cc/ZK4A-JD34>].

⁶ *See, e.g.*, Symposium, *Marijuana Law 2020: Lessons from the Past, Ideas for the Future*, 101 B.U. L. REV. 857 (2021); Julie Andersen Hill, *Banks and the Marijuana Industry*, in MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE 139, 139-41 (Jonathan H. Adler ed., 2020) (describing how federally insured financial institutions must abide by federal law and thus may not bank cannabis-related businesses).

⁷ *See* H.R. 420; Memorandum from Comm’n Staff, Massachusetts Cannabis Control Comm’n, to Shawn Collins, Exec. Dir., Massachusetts Cannabis Control Comm’n 7 (Oct. 18, 2018), <https://mass-cannabis-control.com/wp-content/uploads/2018/10/Deliverymemo-v.Circulation.pdf> [<https://perma.cc/7MNZ-QQHJ>]; *Marijuana Legalization Leads to Rethinking of Massachusetts Alcohol Laws*, FOGELMAN: OUR BLOG, <https://www.fogelmanlawfirm.com/marijuana-legalization-leads-rethinking-massachusetts-alcohol-laws/> [<https://perma.cc/8HMD-7G2Z>] (last visited Apr. 13, 2021).

Very recently, the access age to nicotine products was raised from 18 to 21, first in localities, then select states, and finally nationwide.⁸ Restricting access to alcohol, cannabis, and nicotine products to age 21 and older reflects the increasingly solid understanding that brain development continues into the early 20s and that the brain is more vulnerable to permanent harm from alcohol, cannabis, or nicotine addiction during that development.⁹

In addition, because both alcohol and cannabis are intoxicants, 18-year-old users pose a threat to third parties when they mix adolescent judgment about motor vehicle use, for example, with intoxicants.¹⁰ While this nonpaternalistic explanation for restricting access to these intoxicants may be comfortable ideologically, paternalism cannot be so easily excised from these regulations. Injury to a user's brain development is often cited by regulators to justify regulations.¹¹ The example of nicotine complicates the nonpaternalistic third-party explanation because nicotine is not an intoxicant,¹² and thus the age-based regulation of it cannot be explained by immediate third-party harm. For nicotine, the 21-year-old age requirement is based on data showing that if one does not start using nicotine as a teenager, they are very unlikely to ever use it.¹³ For

⁸ CAMPAIGN FOR TOBACCO-FREE KIDS, STATES AND LOCALITIES THAT HAVE RAISED THE MINIMUM LEGAL SALE AGE FOR TOBACCO PRODUCTS TO 21 (2021), https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf [<https://perma.cc/4LPQ-J87M>].

⁹ See Claire Gorey, Lauren Kuhns, Eleni Smaragdi, Emese Kroon & Janna Cousijn, *Age-Related Differences in the Impact of Cannabis Use on the Brain and Cognition: A Systematic Review*, 269 EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE 37, 54 (2019); L.M. Squeglia, J. Jacobus & S.F. Tapert, *The Influence of Substance Use on Adolescent Brain Development*, 40 CLINICAL EEG & NEUROSCIENCE, no. 1, 2009, at 31, 36; Kirsten Weir, *Marijuana and the Developing Brain*, MONITOR ON PSYCH., Nov. 2015, at 48.

¹⁰ *Teen Drivers: Get the Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION: TRANSP. SAFETY, https://www.cdc.gov/transportationsafety/teen_drivers/teendrivers_factsheet.html [<https://perma.cc/VAE3-MTR9>] (last updated Nov. 18, 2020) (“Drinking any amount of alcohol before driving increases crash risk among teen drivers as compared with older drivers.”).

¹¹ *Cannabis and Youth*, MORE ABOUT MARIJUANA, <https://moreaboutmj.org/health-effects/youth-cannabis/> [<https://perma.cc/V7AB-8AFS>] (click “Health Effects”) (last visited Apr. 13, 2021) (“[R]egular cannabis use during adolescence and early adulthood can lead to brain changes that negatively affect memory, learning, and attention.”).

¹² Nora Volkow, *Recent Research Sheds New Light on Why Nicotine Is So Addictive*, NAT'L INST. ON DRUG ABUSE (Sept. 28, 2018), <https://www.drugabuse.gov/about-nida/noras-blog/2018/09/recent-research-sheds-new-light-why-nicotine-so-addictive> [<https://perma.cc/PJ58-LM4F>] (“Nicotine does not produce the kind of euphoria or impairment that many other drugs like opioids and marijuana do.”).

¹³ RICHARD A. MIECH, LLOYD D. JOHNSTON, PATRICK M. O'MALLEY, JERALD G. BACHMAN, JOHN E. SCHULENBERG & MEGAN E. PATRICK, 1 MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975-2019: SECONDARY SCHOOL STUDENTS 527

alcohol, the 21-year-old age requirement also responds to a public safety issue, because people between the ages of 18 and 21 are more prone to car accidents than those over 21.¹⁴ They are accident-prone both because they are inexperienced and because of the ongoing brain development occurring into the mid-20s.¹⁵

In 1984, the federal government effectively required states to raise their drinking ages to 21, in response to data about accident rates among those under 21.¹⁶ Because “regulate just like alcohol” has been a major part of the commercial cannabis movement, the 21-year-old age requirement for access to recreational cannabis was the obvious starting point. It was not contentious: the commercial cannabis industry never argued for a lower age for recreational cannabis.

Within the cannabis commercialization discourse, the benchmark for age of access questions is alcohol access. But to understand what makes the legal framework for cannabis distinct from alcohol, it is necessary to understand the legal framework surrounding the age of majority in other contexts, including medical decision-making that underlies access to medical cannabis.

II. THE AGE OF MAJORITY

Since the 1970s, the age of legal majority has been 18.¹⁷ Contrary to popular thinking, neuroscience is only a minor driver, not the main driver, of that legal maturity. There is a formal structure to the legal age of majority—an institutional framework that is not tailored to each legal question that might arise, much less to the variability in rates of development among individuals.¹⁸ At the age of

(2020), http://www.monitoringthefuture.org/pubs/monographs/mtf-vol1_2019.pdf [https://perma.cc/VD7G-RGM5]; U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. OF THE SURGEON GEN., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS 8 (2012), https://www.ncbi.nlm.nih.gov/books/NBK99237/pdf/Bookshelf_NBK99237.pdf [https://perma.cc/L2CN-F7DS]; U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. OF THE SURGEON GEN., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS 31 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf [https://perma.cc/39RL-PM5M].

¹⁴ *Teen Drivers: Get the Facts*, *supra* note 10.

¹⁵ NAT’L RSCH. COUNCIL, INST. OF MED. & TRANSP. RSCH. BD., PREVENTING TEEN MOTOR CRASHES: CONTRIBUTIONS FROM THE BEHAVIORAL AND SOCIAL SCIENCES 3 (2007), https://www.ncbi.nlm.nih.gov/books/NBK9667/pdf/Bookshelf_NBK9667.pdf [https://perma.cc/F4AM-ZJT7]; *Teen Drivers: Get the Facts*, *supra* note 10.

¹⁶ National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158; Phil Edwards, *Why the U.S. Drinking Age Is 21*, VOX (Aug. 23, 2019, 11:10 AM), <https://www.vox.com/2019/8/23/20828644/us-drinking-age-is-21>.

¹⁷ See Katharine Silbaugh, *Developmental Justice and the Voting Age*, 47 FORDHAM URB. L.J. 253, 266 (2020) [hereinafter Silbaugh, *Developmental Justice*].

¹⁸ Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-*

majority, a person becomes a legal adult and has full control over almost all spheres of decision-making, notably including medical decision-making.¹⁹ In states with medical cannabis, this means that an 18-year-old has complete control over the decision to pursue access to cannabis. That is not because of anything special about cannabis; it is because of the full-throated legal significance of the age of majority. In this regard, the rules of access to recreational alcohol, nicotine, and recreational cannabis are exceptions to the background rule that 18-year-olds are full legal decision makers.

To fully appreciate questions raised by the legal age of majority, it is helpful to consider the origins of the choice of 18 as the age of majority, as well as the consequences of that choice. As recently as the 1970s, the age of majority was 21 in almost all states.²⁰ State legislatures lowered the age of majority because the voting age dropped with the adoption of the Twenty-Sixth Amendment in 1972.²¹ When the voting age dropped during the Vietnam War era, the drinking age dropped to 18 for a few decades in response to that drop in the voting age.²² The drop in the voting age precipitated a downward shift in the legal definition of adulthood for almost all purposes.²³

Given the anchoring effect of the drop in the voting age, understanding its reasons helps us to appreciate the relationship between its limited purposes and its significant reach. We were drafting 18-year-olds, and “old enough to fight, old enough to vote” was the cry.²⁴ Though the age for the draft had been lowered

First Century, 118 MICH. L. REV. 1371, 1380-94 (2020) (describing developments in the parental rights and children’s rights movements underneath the status of legal childhood); Katharine Silbaugh, *More than the Vote: 16-Year-Old Voting and the Risks of Legal Adulthood*, 100 B.U. L. REV. 1689, 1693-98 (2020) [hereinafter Silbaugh, *More than the Vote*].

¹⁹ See *Age of Majority*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining the age of majority as “the age . . . at which a person attains full legal rights”); *State Laws that Enable a Minor to Provide Informed Consent to Receive HIV and STD Services*, CTRS. FOR DISEASE CONTROL & PREVENTION: HIV, <https://www.cdc.gov/hiv/policies/law/states/minors.html> [https://perma.cc/GFQ5-V23U] (last updated Jan. 8, 2021).

²⁰ See WENDELL W. CULTICE, *YOUTH’S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA* 228 (1992).

²¹ *Id.* at 212, 228, 235 (describing a rider amendment that automatically lowered the age of majority to 18 if the voting age was reduced to 18).

²² George B. Merry, *States Hike Drinking Age in Effort to Make Roads Safer*, CHRISTIAN SCI. MONITOR, July 23, 1982, at 14; Denali Tietjen, *Why 21? A Look at Our Nation’s Drinking Age*, BOSTON.COM (July 17, 2014), <https://www.boston.com/culture/health/2014/07/17/why-21-a-look-at-our-nations-drinking-age> [https://perma.cc/FX33-259X] (describing how nearly all states lowered the drinking age to 18 during the late 1960s and 1970s).

²³ See CULTICE, *supra* note 20, at 212, 228, 235; Silbaugh, *Developmental Justice*, *supra* note 17, at 266 (“Once the voting age moved down to 18, states lowered their legal age of majority to 18 in response . . .”).

²⁴ See CULTICE, *supra* note 20, at 225-27 (stating that lowering the voting age was

toward the end of World War II²⁵ and an immediate discussion of lowering the voting age followed, the issue went to the back burner when the war ended. The issue did not seriously reemerge until it was triggered by the extensive use of the draft during the Vietnam War.²⁶

If the age of majority changed because the draft age changed, then the same reasons for changing the draft age become the reasons for the change in the age of majority. The reason the draft age was lowered may seem obvious: to increase the total number of men available to draft into military service.²⁷ But the record is clear that this was only one of two main purposes of lowering the draft age. It was also lowered in an effort to find less mature people to serve—ones who did not yet have wives and children, and ones with more compliant dispositions.²⁸ Congressmen and military leaders said that they wanted to take the unmarried men first.²⁹ At that time, it was necessary to move the age down to 18 to find unmarried men because average marriage ages were much lower than today.³⁰ Conveniently, these men were too immature to be married. That immaturity yielded other benefits to the military. Younger men were also thought to be more compliant. As the Chairman of the Judiciary Committee noted in 1954,

When the draft age was lowered from 21 to 18 years of age, the generals told us that this was a necessary move because young men under 21 were more easily molded into good soldiers than were their elders who had grown to maturity. Young men under 21 are more pliable and more

“premiered almost solely on youth’s coerced military-citizenship position within our society”); Jenny Diamond Cheng, *How Eighteen-Year-Olds Got the Vote* 6, 10 (Aug. 4, 2016) (unpublished manuscript), <https://ssrn.com/abstract=2818730> [<https://perma.cc/MQF2-XZ6E>].

²⁵ See David Vergun, *First Peacetime Draft Enacted Just Before World War II*, U.S. DEP’T OF DEF. (April 7, 2020), <https://www.defense.gov/Explore/Features/story/Article/2140942/first-peacetime-draft-enacted-just-before-world-war-ii/> [<https://perma.cc/488E-5FHE>] (describing how Congress lowered age for draft to 18 after Japan’s attack on Pearl Harbor).

²⁶ CULTICE, *supra* note 20, at 225.

²⁷ Cheng, *supra* note 24, at 15.

²⁸ C.P. Trussell, *Deferring of Married Men in Draft Is Written into Allowances Bill*, N.Y. TIMES, June 13, 1942, at 1; Cheng, *supra* note 24, at 15.

²⁹ *Say Family Heads Do Not Face Draft*, N.Y. TIMES, June 15, 1942, at 21; Trussell, *supra* note 28, at 1; see also Kara Dixon Vuic, *Women May Soon Have to Register for the Draft. It’s Long Overdue.*, WASH. POST (Mar. 4, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/03/04/women-may-soon-have-register-draft-its-long-overdue/> (explaining that married men received exceptions not because they made good soldiers but because “the family is the fundamental unit of organized society”).

³⁰ U.S. CENSUS BUREAU, *MEDIAN AGE AT FIRST MARRIAGE: 1890 TO PRESENT (2020)*, <https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/ms-2.pdf> [<https://perma.cc/E7YD-5AHZ>].

amenable to indoctrination. They are not likely to exercise critical judgment in matters demanding instant obedience.³¹

The point is not subtle: those under 21 are not mature adults, and that immaturity makes them better soldiers. The historical record suggests that drafting 18-year-olds was not a measure of their maturity but a measure of relative immaturity, as well as expedience for a fairly brutal cause. Yet this change seeded what has become the elevated legal stature of the age of 18, now conceptualized as the measure of independence, maturity, and accountability.

Despite our current commitment to 18 as the age of majority, a commitment I have considered in other, noncannabis contexts,³² much was lost when the 21-year-old age of majority was lost. We owe minors an obligation of support, including housing, first from parents, and where that fails, from the state through the foster care system. The age at which one will no longer receive support from the foster care system was lowered from 21 to 18 when the age of majority fell.³³ Additionally, minors generally are not held to their contracts,³⁴ meaning they are protected from exploitation by an array of commercial entities, military recruiters, or lenders.³⁵ 18-year-olds lost all of those protections when the age of majority fell.

And while the list of other examples is long, one exceptionally important consequence of becoming an adult at 18 is facing the adult criminal justice system. At one time it was not uncommon to keep defendants in the juvenile justice system or in juvenile custody up to the age of 21.³⁶ Today, juvenile court jurisdiction tops out as a matter of law at 18. When a person is under 18, courts and prosecutors have discretion in deciding which system to put a person in. That discretion is influenced by how “adult” a youth seems to a court, which in

³¹ 100 CONG. REC. 3,050 (1954) (statement of Rep. Emanuel Celler).

³² See, e.g., Silbaugh, *Developmental Justice*, *supra* note 17, at 264 (concluding that lowering voting age may have harmed youths “in need of a more protective lens on teen years”); Silbaugh, *More than the Vote*, *supra* note 18, at 1691-93 (arguing against voting rights for 16-year-olds); Katharine Silbaugh, *The Legal Design for Parenting Concussion Risk*, 53 U.C. DAVIS L. REV. 197, 243-53 (2019) (examining parental waivers of liability in sports for minors).

³³ Silbaugh, *More than the Vote*, *supra* note 18, at 1695, 1697; *Termination of Child Support*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 29, 2020), <https://www.ncsl.org/research/human-services/termination-of-child-support-age-of-majority.aspx> [https://perma.cc/7M3S-D25W].

³⁴ See Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 50 (2012) (explaining that infancy doctrine allows minors to void contracts they entered into).

³⁵ Silbaugh, *More than the Vote*, *supra* note 18, at 1700.

³⁶ *Youth in the Justice System: An Overview*, JUVENILE L. CTR. <https://jlc.org/youth-justice-system-overview> [https://perma.cc/Y2ML-8GH7] (last visited Apr. 13, 2021).

turn is influenced by the juvenile's race.³⁷ As younger people are afforded more legal rights, they lose the appearance of youth in criminal court, which is only amplified by racialized responses to those youth.³⁸ There is an incredibly important movement right now to raise the age of juvenile court jurisdiction back to 21, but it has had limited success to date.³⁹ As youth age, they age out of criminal offending overall; maturity dramatically reduces the likelihood of criminal offenses.⁴⁰ Therefore, a higher age threshold in the criminal justice system can change lives by significantly shifting us away from mass incarceration.⁴¹

When the age of majority changed from 21 to 18, then, that age group lost rights to housing and support. They lost the protections from adult criminal consequences that the juvenile justice system afforded them. The fact that maturity dramatically reduces the likelihood of criminal offenses was not particularly considered or evaluated. That is the way the age of majority

³⁷ See Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1590-91 (2015) (“Black girls are often not viewed as children for purposes of protection under state and federal law.”).

³⁸ See generally JAMILIA J. BLAKE & REBECCA EPSTEIN, GEORGETOWN L. CTR. ON POVERTY & INEQ., LISTENING TO BLACK WOMEN AND GIRLS: LIVED EXPERIENCES OF ADULTIFICATION BIAS 1 (2019), <https://endadultificationbias.org/wp-content/uploads/2019/05/Listening-to-Black-Women-and-Girls-v7.pdf> [<https://perma.cc/664D-9FVA>] (describing adultification bias as the view of Black girls as “less innocent and more adult-like than their white peers”); REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GEORGETOWN L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 8 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [<https://perma.cc/RE3B-UQDF>] (providing data showing that Black girls are viewed as needing less protection or nurturing and knowing more about adult topics than White girls); Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 528 (2014) (hypothesizing that “Black children would be seen as less innocent as well as older than their other-race peers”).

³⁹ Teresa Wiltz, *How ‘Raise the Age’ Laws Might Reduce Recidivism*, PEW TRS. (May 31, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/31/how-raise-the-age-laws-might-reduce-recidivism> [<https://perma.cc/GU3H-TSMS>] (describing the impact of legislative efforts to raise age of criminal responsibility to 18 or higher in several states).

⁴⁰ Editorial, *18-Year Old Offenders Belong in the Juvenile Justice System*, BOS. GLOBE, Mar. 2, 2020, at A8 (advocating for raising the age for the juvenile justice system because neurological developments mean that most juvenile offenders “age out” of offending in their mid-20s).

⁴¹ See Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1524 (2018) (arguing that rehabilitative justice would prevent children from being transferred to the adult criminal justice system).

functions: it is a powerful default framework.⁴² In the same way, no real attention is given to the license to use medical cannabis at 18, because it travels with the bundle of attributes of legal adulthood. When the age for drafting soldiers dropped, the age for voting dropped, and everything else dropped with it. From that framework emerges the ability of an 18-year-old to access cannabis using a medical card. That may not be protective of the actual long-term health and welfare of the 18-year-old.

III. MEDICAL CANNABIS

Medical cannabis is a construct. Medical cannabis has a regulatory structure entirely independent of our framework for regulating the practice of medicine and the testing that the FDA imposes on the pharmaceutical industry.⁴³ There is some evidence that cannabis can be the best available medication for some medical issues.⁴⁴ However, none of those claims has been subject to the kind of scientific processes that would be imposed on any other pharmaceutical, much less a psychoactive pharmaceutical.⁴⁵ This Essay takes medical cannabis to be a political and cultural construct used to ease the process of commercializing recreational cannabis and to manage the damage wrought by the war on drugs.⁴⁶

⁴² Silbaugh, *More than the Vote*, *supra* note 18, at 1691-97.

⁴³ See, e.g., Katelyn D. Boatwright & Morgan L. Sperry, *Accuracy of Medical Marijuana Claims Made by Popular Websites*, 33 J. PHARMACY PRAC. 457, 461-62 (2020); Dawn MacKeen, *Extracting Facts Can Be Difficult*, N.Y. TIMES, Oct. 20, 2019, at F11 (evaluating claims regarding CBD's efficacy); Nathalie Bougenies, *Keep the FDA Off Your Back: Don't Make Medical Claims About CBD Products*, ABOVE THE L. (Apr. 21, 2020, 2:03 PM), <https://abovethelaw.com/2020/04/keep-the-fda-off-your-back-dont-make-medical-claims-about-cbd-products/?rf=1> [<https://perma.cc/UY48-2SVP>]; *What You Need to Know (and What We're Working to Find Out) About Products Containing Cannabis or Cannabis-Derived Compounds, Including CBD*, U.S. FDA [hereinafter U.S. FDA], <https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis> [<https://perma.cc/G7N9-YBWG>] (last updated Mar. 5, 2020); Christopher Curley, *FDA Warns CBD May Overpromise and Underdeliver*, HEALTHLINE (Aug. 1, 2019), <https://www.healthline.com/health-news/beware-fake-cbd-claims> [<https://perma.cc/DK9Z-LY8W>].

⁴⁴ See U.S. FDA, *supra* note 43 (noting that FDA has approved CBD to treat two rare, severe forms of epilepsy).

⁴⁵ See Theodore L. Caputi, Letter to the Editor, *Medical Marijuana, Not Miracle Marijuana: Some Well-Publicized Studies About Medical Marijuana Do Not Pass a Reality Check*, 114 ADDICTION 1128, 1128 (2019); Keith Humphreys & Wayne D. Hall, Editorial, *Reducing the Risks of Distortion in Cannabis Research*, 115 ADDICTION 799, 801 (2020); Celina Ribeiro, *Medicinal Cannabis: The Hype Is Strong, but the Evidence Is Weak*, GUARDIAN (Aug. 10, 2019, 6:00 PM), <https://www.theguardian.com/society/2019/aug/11/medicinal-cannabis-the-hype-is-strong-but-the-evidence-is-weak> [<https://perma.cc/W2C4-UUGP>].

⁴⁶ See generally JEFFREY A. SINGER, MEDICALIZATION: A "THIRD WAY" TO DRUG POLICY

This Essay does not fully mount the argument that medical cannabis is a construct used to achieve recreational cannabis but rather takes that proposition as a given. I would be quick to say that when medical cannabis is finally studied according to medical standards, rather than by an interested industry, there is reason to believe that there will be some uses that compete favorably with existing medical alternatives.⁴⁷ But these uses may not include many of the uses that are being called medical right now. That muddy line between real medicine and medicinal uses of cannabis may be a comfortable space for the cannabis industry, even as it is less comfortable for many medical researchers.⁴⁸

Both things can be true: cannabis can have medical uses and the force behind the emerging medical market can be a cover for achieving a legal recreational commercial cannabis industry. *Politico* recently described the medical cannabis market in Oklahoma as follows:

There's no set of qualifying conditions in order to obtain a medical card. If a patient can persuade a doctor that he needs to smoke weed in order to soothe a stubbed toe, that's just as legitimate as a dying cancer patient seeking to mitigate pain. The cards are so easy to obtain—\$60 and a five-minute consultation—that many consider Oklahoma to have a de facto recreational use program.⁴⁹

This lax regulatory framework raises the concern that 18-year-old medical access is actually 18-year-old recreational access.

As further support for the idea that medical cannabis is a construct used to ease the path to recreational cannabis, we can look at shifts in patterns of use after states that previously allowed only medical cannabis changed to commercializing recreational cannabis as well. When these states had medical cannabis only, there were many medical cannabis users.⁵⁰ But when those same states added recreational cannabis, the majority of users moved from medical to recreational.⁵¹ That flight from medical suggests that the medical demand had been in large part recreational demand.

(2001), https://www.fraserinstitute.org/sites/default/files/SensibleSolutionsSinger_0.pdf [<https://perma.cc/8JTW-PCFQ>].

⁴⁷ CBD has been found to be effective in controlling epileptic seizures in pediatric patients and young adults. Bruria Ben-Zeev, *Medical Cannabis for Intractable Epilepsy in Childhood: A Review*, RAMBAM MAIMONIDES MED. J., Jan. 2020, at 1, 5.

⁴⁸ Caputi, *supra* note 45, at 1128; Humphreys & Hall, *supra* note 45, at 799.

⁴⁹ *How One of the Reddest States Became the Nation's Hottest Weed Market*, POLITICO MAG. (Nov. 27, 2020, 7:09 AM), <https://www.politico.com/news/magazine/2020/11/27/oklahoma-cannabis-market-oklahoma-red-state-weed-legalization-437782> [<https://perma.cc/7REP-G5PN>].

⁵⁰ Paul Demko, *'Massive Exodus' of Medical Marijuana Patients Follows when States Legalize Recreational Pot*, OREGONIAN: OREGONLIVE (June 11, 2019), <https://www.oregonlive.com/news/2019/06/massive-exodus-of-medical-marijuana-patients-follows-when-states-legalize-recreational-pot.html> [<https://perma.cc/8XB9-5E3S>].

⁵¹ *Id.*

For example, when recreational cannabis was approved in Oregon, the number of medical cardholders dropped to one-third of the number of cardholders that existed before recreational cannabis was available.⁵² There had been 400 medical-only retail shops before recreational cannabis was legalized, but in the wake of the opening of recreational shops, just two medical-only shops remain.⁵³ The reduction in medical cardholders was similar in Alaska.⁵⁴ While the use of medical fell off less in Colorado and Nevada—19% and 40%, respectively—the trend is the same.⁵⁵

This consumer shift from medical use to recreational use is particularly surprising given that medical purchase has benefits to users when compared to recreational purchase. Medical use can mean lower taxes (and therefore lower cost to users).⁵⁶ It can mean access to more varied or better products, or higher concentrations of THC permitted by law than are allowed for recreational cannabis.⁵⁷ If the legalization of recreational cannabis nonetheless ushers in a decrease in medical cannabis cards, it seems possible that the medical cards were covering recreational use when recreational use was not yet commercially legal.

To be clear, it may be that the medical route was a necessary political construct to destigmatize cannabis use and to effectuate the commercialization of cannabis. But some have expressed concern that the medical and scientific processes have suffered from that expediency, as standards for medical claims were dramatically loosened to achieve the goal of a legal market.⁵⁸ The less-obvious harm of the medical construct is that 18-year-olds can access medical cannabis three years before they can access recreational alcohol.

The decision to use medical cannabis has been framed as relatively ordinary *medical* decision-making, which falls squarely in the autonomy zone of 18-year-olds because they are legal adults.⁵⁹ The policy of giving 18-year-olds complete control over the decision to use cannabis resulted from lowering the age of majority, rather than an analysis of the merits of this level of access. That said, giving 18-year-olds autonomy with health decision-making probably makes sense on the merits,⁶⁰ especially as it relates to the two most pressing health care

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 5 *Benefits of Medical Marijuana*, *supra* note 2.

⁵⁷ Ashley Slimak, *Benefits of Having a Medical Marijuana Card in Recreational States*, ARK. MARIJUANA CARD (Jan. 16, 2020), <https://www.arkansasmarijuanacard.com/post/benefits-of-having-a-medical-marijuana-card-in-recreational-states> [https://perma.cc/YE9Q-LZPQ].

⁵⁸ Caputi, *supra* note 45, at 1128; Humphreys & Hall, *supra* note 45, at 799; Ribeiro, *supra* note 45.

⁵⁹ *Medical Marijuana: Laws and Rules, Frequently Asked Questions*, *supra* note 2.

⁶⁰ Lee Black, *Limiting Parents' Rights in Medical Decision Making*, 8 AMA J. ETHICS 676, 676 (2006).

issues for youth: reproductive control and mental health services.⁶¹ But it is less clear that either the need for medical cannabis or the scientific status of medical cannabis justifies extending access to 18-year-olds, particularly in light of the uncertainty surrounding the medical benefits of medical cannabis.

In contrast to any other prescription medication, medical cannabis is deliberately structured to be self-medication because physicians cannot actually prescribe cannabis to patients.⁶² The physician instead indicates that cannabis could work for what ails the patient, and then the patient uses that certification to make her purchases. The patient makes her own choices about doses and frequency of use, entirely free of constraint by the physician, because it is not a prescription. This unique ambiguity is comfortable in the libertarian soil of cannabis discourse.

In the fall of 2019, I observed public meetings considering shortening the hours at the nation's largest cannabis shop for both recreational and medical customers. The shop closed at 10:00 p.m., and the neighbors sought an 8:00 p.m. close for recreational customers, with only medical customers being allowed to stay until 10:00 p.m.⁶³ Even though there would be no change for medical customers, the retailer argued vociferously that all customers are their patients—that all are in effect medical, whether they buy recreational or medical cannabis, because they all use cannabis to treat pains of some sort.⁶⁴ Therefore, the shop argued, even recreational customers needed access until 10:00 p.m. for their “medicine.”⁶⁵ Their point might also be made about alcohol customers: perhaps they are all self-medicating various pains to some degree. But if everyone is a

⁶¹ In certain contexts, exceptions are made to the 18-year-old age of majority that allow minors to make decisions regarding their own health care. SCHOOLHOUSE CONNECTION, MINOR CONSENT TO ROUTINE MEDICAL CARE (2019), <https://schoolhouseconnection.org/wp-content/uploads/2019/11/Statemedicallaws.pdf> [<https://perma.cc/GQG4-B58Q>]; B. Jessie Hill, *Medical Decision Making by and on Behalf of Adolescents: Reconsidering First Principles*, 15 J. HEALTH CARE L. & POL'Y 37, 43 (2012).

⁶² *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/2JR9-45FU>] (last updated Apr. 5, 2021) (“Since marijuana is still a Schedule I substance, federal law prohibits its prescription, making the initiative invalid. Medical marijuana ‘prescriptions’ are more often called ‘recommendations’ or ‘referrals’ because of the federal prescription prohibition.”).

⁶³ A recording of these hearings is available online. See Brookline Interactive Group, *Brookline Select Board Regular Meeting - October 22, 2019*, YOUTUBE (Oct. 23, 2019) [hereinafter *Brookline October Meeting*], <https://www.youtube.com/watch?v=ZrFvYWonlHs>; Brookline Interactive Group, *Brookline Select Board Regular Meeting - November 12, 2019*, YOUTUBE (Nov. 14, 2019) [hereinafter *Brookline November Meeting*], <https://www.youtube.com/watch?v=9oswi3S8W9k&t=7s>.

⁶⁴ *Brookline October Meeting*, *supra* note 63; *Brookline November Meeting*, *supra* note 63.

⁶⁵ *Brookline October Meeting*, *supra* note 63; *Brookline November Meeting*, *supra* note 63.

medical user, then might it be said that no one is a medical user, or at least that we are using the term “medical” metaphorically. Within this gray area, where does the 18-year-old belong?

This “medical” cannabis construct leaves a gap in protection of late adolescent neurodevelopment that requires attention. As adults with medical cards make their own purchasing and use decisions, there is no real line between recreational use, which allows adults to decide how much and what type of intoxicants are right for them, and medical use, which authorizes adults to make the same decisions. Because the physician does not actually prescribe cannabis, the medical user enjoys more freedom to tailor their consumption than users of physician-prescribed, FDA-approved medications.⁶⁶

If medical cannabis has been to a significant extent a conceit for recreational cannabis, filling a gap in demand before recreational use becomes legal, we should give some special attention to 18-year-olds. Medical cannabis might become slowly obsolete as recreational cannabis becomes capacious enough to address medicinal and recreational uses, where the two can even be distinguished. One way to forestall that obsolescence would be to find another demand gap to fill, the way medical cannabis used to fill that recreational demand. The new purpose for retaining a medicinal cannabis structure might be the under-21 market.

It is in this context that we should ask why 18-year-olds can access medical cannabis and why the young cannabis industry would not work to make medical access more difficult until age 21 in order to secure a good reputation? Surely, many in the industry are invested in the authenticity of the medical construct. Even as the industry moves more fully into recreational use, there is an attachment to the medical ideology that succeeded in bringing us legalization.

At the same time, we have to consider the possibility that the cannabis industry, whether recreational or medical, wants to be able to sell to 18-year-olds. That alone would give continued life to the infrastructure of medicinal cannabis.

The other industries that are regulated for use under the age of 21—alcohol and tobacco—did not want to lose legal access to 18- to 21-year-olds, and they fought to retain that access.⁶⁷ People who do not use nicotine, alcohol, or

⁶⁶ Compare *State Medical Marijuana Laws*, *supra* note 62, with *Opioid Painkiller Prescribing*, CTRS. FOR DISEASE CONTROL & PREVENTION: VITAL SIGNS (July 2014), <https://www.cdc.gov/vitalsigns/opioid-prescribing/index.html> [<https://perma.cc/84P2-ZQC5>] (noting that increase in painkiller prescribing is key driver of increase in prescription overdoses).

⁶⁷ *The Tobacco Settlement: Views of Tobacco Industry Executives: Hearing Before the H. Comm. on Com.*, 105th Cong. 116-25 (1998) (prepared statement of Geoffrey C. Bible, Chairman, Philip Morris Co.); Merry, *supra* note 22; Dorie E. Apollonio & Stanton A. Glantz, *Minimum Ages of Legal Access for Tobacco in the United States from 1863 to 2015*, 106 AM. J. PUB. HEALTH 1200, 1203 (2016); Susan E. Foster, Roger D. Vaughan, William H. Foster &

cannabis before the age of 21 are much less likely to use and misuse later.⁶⁸ Postponement can be prevention. When those access ages are raised, the businesses are losing more than just three additional years of marketing. They are losing access to the creation of lifelong, high-volume users—users who the public health community calls misusers, but who are really important customers to the substance seller because of their reliability and volume.

Is the cannabis industry like the tobacco industry? In the sense that every industry seeks to make money and to have a future, it is.⁶⁹ The cannabis industry is a big, billionaire-financed industry.⁷⁰ We should be able to ask what it would look like if it tracks nicotine and alcohol in terms of the business goals. In those cases, the underage users are important to the business model, because misusers and abusers buy more reliably.

CONCLUSION

There is a tendency to think about questions surrounding 18- to 21-year-olds as questions of their rights and their capacities. That tendency asks what neuroscience can justify and examines how the teenagers themselves act in different contexts. But the reality is that the laws that appear to infantilize them actually constrain third parties more than those laws constrain the youth

Joseph A. Califano, Jr., *Estimate of the Commercial Value of Underage Drinking and Adult Abusive and Dependent Drinking to the Alcohol Industry*, 160 ARCHIVES PEDIATRICS & ADOLESCENT MED. 473, 473 (2006); Ore. Health Auth., *Building a Movement to Fight Big Tobacco*, METRO. GRP., <https://www.metgroup.com/our-work/case-studies/oregon-health-authority/> [<https://perma.cc/MUJ5-EHCJ>] (last visited Apr. 13, 2021).

⁶⁸ MASS. CANNABIS CONTROL COMM'N & MASS. DEP'T OF PUB. HEALTH, THE PARENTS GUIDE TO MARIJUANA IN MASSACHUSETTS (2018), <http://files.hria.org/files/CC5815.pdf> [<https://perma.cc/TK88-WU4G>] (noting that people using marijuana before age of 18 are four to seven times more likely to develop a marijuana use disorder); Katy Butler, *The Grim Neurology of Teenage Drinking*, N.Y. TIMES, July 4, 2006, at F1 (citing study which found that “47 percent of those who begin drinking alcohol before the age of 14 become alcohol dependent at some time in their lives, compared with 9 percent of those who wait at least until age 21”).

⁶⁹ Foster et al., *supra* note 67, at 473; Pamela J. Trangenstein, Jennifer M. Whitehill, Marina C. Jenkins, David H. Jernigan & Megan A. Moreno, *Active Cannabis Marketing and Adolescent Past-Year Cannabis Use*, 204 DRUG & ALCOHOL DEPENDENCE 1, 6 (2019).

⁷⁰ Rhys Blakely, *The Cannabis Billionaire (Who Doesn't Inhale)*, TIMES (London), Oct. 26, 2019, at 10; Debra Borchardt, *Here Are the Top 5 Financial Leaders in the Cannabis Industry*, FORBES (May 26, 2017, 2:38 PM), <https://www.forbes.com/sites/debraborchardt/2017/05/26/here-are-the-top-5-financial-leaders-in-the-cannabis-industry/?sh=3d6a0ca72486> [<https://perma.cc/7X9M-6BRU>]; Jen Wiczner, *The Marijuana Billionaire Who Doesn't Smoke Weed*, YAHOO! (Jan. 16, 2019), <https://www.yahoo.com/now/marijuana-billionaire-doesn-t-smoke-113003851.html> [<https://perma.cc/Q8BV-QDHR>]; Sean Williams, *These Billionaire Money Managers Bought Aurora Cannabis Stock in the First Quarter*, YAHOO! (May 20, 2019), <https://www.yahoo.com/now/billionaire-money-managers-bought-aurora-122100196.html> [<https://perma.cc/8HVW-XR2C>].

themselves. They constrain the military in recruiting and drafting soldiers,⁷¹ commercial entities and internet platforms from exploiting youth,⁷² the tobacco industry from addicting youth to nicotine, and, to some extent, law enforcement and courts in their treatment of youth. This Essay encourages readers to be skeptical of institutions, especially industries, that would promote the rights and autonomy of teenagers. These industries seek to remove constraints from themselves in their interactions with youth. In the context of medical cannabis, that means that the autonomy of an 18-year-old to access commercial cannabis using the medical construct is better understood as the right of the cannabis industry to access the 18-year-old market. As medical users melt into recreational users and as medical use receives only the weakest of guidance from physicians due to its unique hybrid character, we should acknowledge that 21 may be the appropriate age of access for either.

A final essential thought: under no circumstances am I advocating for any criminal law response to those under 21 who attempt to access cannabis, either as medical customers, as commercial customers, or on the black market. To the contrary, my overall project aligns closely with “raise the age” campaigns aimed at removing criminal law responses from late adolescents. This Essay thus focused on monitoring the profit motive of the legal cannabis industry as it relates to late adolescents. The age of majority, which is the only explanation for 18-year-old access, is too weak to justify what is actually self-medication in the colloquial sense, and the medical status of cannabis is too feeble to justify the self-medicating risks to developing brains.

⁷¹ 20 U.S.C. § 7908(a)(2) (allowing parents to opt their children out of military recruiting); see also Lila A. Hollman, Note, *Children’s Rights and Military Recruitment on High School Campuses*, 13 U.C. DAVIS J. INT’L L. & POL’Y 217, 232 (2007); Damien Cave, *Growing Problem for Military Recruiters: Parents*, N.Y. TIMES, June 3, 2005, at A1; *Parents, Teens and Military Recruiting*, NPR (July 5, 2005, 12:00 AM), <https://www.npr.org/templates/transcript/transcript.php?storyId=4730222> [<https://perma.cc/76U3-ALDU>] (“[A] growing number of parents are questioning the presence of military recruiters in their children’s schools and criticizing the techniques recruiters use to convince potential enlistees.”).

⁷² Silbaugh, *More than the Vote*, *supra* note 18, at 1699.