Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms

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Nearly forty years after President Richard Nixon first declared a "war on drugs"—calling drugs the "modern curse of the youth, just like the plagues and epidemics of former years"[1]—it seems the war may finally be coming to an end. In his first interview after being confirmed as the Director of the Office of National Drug Control Policy, Gil Kerlikowske told the *Wall Street Journal* that he thought it was time to retire the war rhetoric when it comes to addressing drug abuse.[2] At the state level, the past year has seen proposals to legalize marijuana introduced in a handful of states with polls showing approximately forty-five percent of Americans nationwide in support of the idea.[3] Importantly, these recent developments follow nearly a decade and a half of successful drug reform measures at the state level on issues ranging from medical marijuana, treatment instead of incarceration, asset forfeiture, and marijuana decriminalization. In short, the argument that we should end the war on drugs in favor of a new approach no longer resides in the world of the politically unthinkable, and has quickly become a subject of serious policy and political discussion.

This article considers how we might think about federal drug laws in a post-drug war context, particularly one in which states are increasingly passing laws that are at-odds with federal law. I argue that, when it comes to federal drug law, traditional debates about prohibition, legalization, or decriminalization turn out to

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1 DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 11–12 (1997).

2 Gary Fields, *White House Czar Calls for End to 'War on Drugs*,' WALL ST. J., May 14, 2009, at A3.

3 Dave Ferrell, *Weed Takes Root: Marijuana's Steady Creep Toward Legalization Nationwide*, S.F. WEEKLY, Jan. 6, 2010, at 14, 17.

be surprisingly unimportant. Instead, as states begin to enact new policies, the key question facing federal lawmakers and administration officials will be how to harmonize federal law with state reforms.

My argument proceeds in four Parts. Part I provides a brief overview of the mounting evidence that the war on drugs strategy has proven to be an extremely costly and largely ineffective method for dealing with the problem of drug abuse. Further, this section also looks at how dissatisfaction with the current approach has led to increased interest in decriminalizing or legalizing marijuana, even at the federal level. In Part II, I argue that the focus on debates over legalization or decriminalization at the federal level is misplaced. This is because, even if it wanted to, the federal government would not have the ability to unilaterally "legalize" or "decriminalize" any controlled substances. Using the example of medical marijuana laws as a case study, Part III contends that, just as the federal government does not have the ability to unilaterally decriminalize a drug, it also does not have the power to stop states from reforming their own laws. In Part IV, I consider the implications of Parts II and III and conclude that they counsel in favor of reforming federal drug laws in a way that would respect states' decisions to innovate in the area of drug policy, while also providing important controls and incentives to prevent against negative externalities in the form of spillover effects in neighboring states.

I. THE EMERGING CONSENSUS FOR REFORM

The central principle of the drug war strategy has been that vigorous enforcement of increasingly strict criminal laws, though expensive, is necessary to reduce drug abuse and related problems.[4] This philosophy has had a dramatic effect on our criminal justice system. In 2008, 12.2 percent of all arrests in the United States were for drug offenses—more than any other category of offense[5]—and 82.3 percent of all drug arrests were for simple possession.[6] Meanwhile, nearly one quarter of the 2.3 million Americans behind bars today are there for drug-related offenses.[7] Indeed, the number of Americans incarcerated

4 This Part of my article draws heavily from my article *Toward a Public Health Approach to Drug Policy*, 3 ADVANCE: J. ACS ISSUE GROUPS 43, 43–47 (2009).

5 FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2008, ARRESTS (2009).

6 *Id.*

7 Kreit, *supra* note 4, at 43.

for drug offenses today is larger than the *entire* United States prison and jail population was in 1980.[8]

Maintaining this effort has been quite costly to taxpayers. The annual price tag of our drug policies is notoriously difficult to measure, due in large part to the various agencies at the federal, state, and local levels that are involved.[9] As a result, measurements vary. But, while the specific figure is open to debate, there is no doubt that the number is in the tens of billions each year. In one of the more recent and prominent drug war cost-estimates, for example, Harvard economist Jeffrey Miron reported that net annual expenditures, across all levels of government, is approximately $44 billion after subtracting drug law-related revenue from fines and asset forfeitures.[10]

Despite all of this, however, our policies appear to have had little impact on drug abuse. Drug war proponents often cite temporary reductions in use within particular time periods or drug categories, yet as each apparent success has given way to another drug epidemic—from heroin in the 1970s, to crack in the 1980s, to methamphetamine in recent years—it has become increasingly clear that our policies have had, at most, a negligible impact on abuse and overall use. The drug war's inability to achieve its stated goal of reducing the overall use of illegal drugs along with the continued occurrence of new drug epidemics are due, at least in part, to the substitution effect: "[I]f enforcement increases the price of an illicit drug, consumers often can shift to alternative illegal substances or to new products that have not yet been declared illegal."[11] In short, while the use of certain drugs have decreased over the life of the drug war, the overall effort to reduce drug use and abuse through law enforcement has not succeeded. Indeed, as vocal drug war supporter Joseph Califano observes in his book *High Society*, the "number of Americans twelve and older who use[d] illicit drugs more than doubled" between 1992 and 2005.[12] Gil Kerlikowske recently

8 *Id.*

9 Erik Luna, *The Big Picture, Drug Détente*, 20 FED. SENT'G REP. 304, 305 (2008) ("Frankly, however, calculating the aggregate expense of prohibition may be an impossible task, given the myriad areas of spending and the disinterest of drug warriors in revealing the actual cost of their crusade.").

10 JEFFREY A. MIRON, THE BUDGETARY IMPLICATIONS OF DRUG PROHIBITION 2 (2008), *available at* http://leap.cc/dia/miron-economic-report.pdf.

11 David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 692–93 (2003).

12 JOSEPH A. CALIFANO, JR., HIGH SOCIETY: HOW SUBSTANCE ABUSE RAVAGES AMERICA AND WHAT TO DO ABOUT IT 2 (2007).

summarized the drug war strategy by acknowledging: "In the grand scheme, it has not been successful."[13]

Perhaps the starkest evidence that our current strategy has failed came in the first comparison of drug use rates across countries, which was undertaken by the World Health Organization. The World Health Organization concluded that despite having the most punitive policies, the United States had the highest rates of illegal drug use of the seventeen countries included in the study.[14] Among the report's findings: The number of Americans who have used cocaine is approximately four times higher, at 16.2 percent, than any other country.[15] And more than twice as many Americans have tried marijuana than residents of the Netherlands, where the drug is openly bought and sold in regulated shops. That gap is even wider among adolescents fifteen years and younger, with just under three times as many American teens (twenty percent) having tried the drug than their contemporaries in the Netherlands (seven percent).[16]

The World Health Organization's findings present a particularly difficult challenge to those who support our current approach to drug policy. This is because, even if we were to assume that the war on drugs has reduced overall substance use and abuse—a questionable premise—the lower usage rates in other countries indicate that we could almost surely be achieving the same or better results at significantly reduced economic and human costs.

Indeed, even when we look at the impact on drug supply, the drug war appears to have been relatively ineffective. While few would dispute that prohibition increases the price of illegal drugs above what they would be in a legal and regulated market, most illegal drugs remain relatively affordable. Moreover, prices for some drugs have actually *decreased* over the past three decades, even as we have undertaken costly and environmentally questionable efforts, such as crop eradication programs. A 2008 Brookings report on U.S.-Latin American relations found that

13 Martha Mendoza, *US Drug War Has Met None of Its Goals*, ASSOCIATED PRESS, May 13, 2010, http://www.google.com/hostednews/ap/article/ALeqM5iLZNYd6C9SGpa2oeiZIqT-HKVrCQD9FMCM103.

14 Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MED. 1053, 1057 Table 2, 1062 (2008) [hereinafter *WHO Survey*], *available at* http://medicine.plosjournals.org/archive/15491676/5/7/pdf/10.1371_journal.pmed.0050141-L.pdf (concluding that the United States "stands out with higher levels of [drug] use . . . despite punitive illegal drug policies").

15 *Id.* at 1057.

16 *Id.* at 1057–59.

"the street prices of cocaine and heroin fell steadily and dramatically" between 1980 and 2007, and that "cocaine production in the Andean region is currently at historic highs."[17]

It is perhaps not surprising, then, that the overwhelming public support for ever-more punitive drug policies during the 1980s and early 1990s has disappeared and we now see substantial majorities in favor of reform measures.[18] According to a 2008 Zogby poll, three quarters of Americans say that they believe the "war on drugs" policy is failing.[19] Similarly, voters have generally embraced proposals to move state and local drug policies away from the drug war strategy.[20] Since California voters passed the first modern state medical marijuana law in 1996, thirteen other states have followed suit.[21] Most recently, proposals to decriminalize or legalize marijuana have begun to attract an especially great deal of attention. In 2008, Massachusetts voters approved a ballot initiative to decriminalize the drug with sixty-five percent in favor.[22] And, within the past year, legislation and ballot initiatives to legalize marijuana have been proposed in California, Nevada, New Hampshire, Oregon, and Washington, with legislators in Rhode Island establishing a panel to study the issue.[23] In California, where the issue will come before voters in a ballot initiative this fall, recent polling has shown that fifty-six percent of residents are in support of taxing and regulating marijuana like alcohol.[24]

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17 THE BROOKINGS INSTITUTION, RETHINKING U.S.-LATIN AMERICAN RELATIONS: A HEMISPHERIC PARTNERSHIP FOR A TURBULENT WORLD, 25–26 (2008).

18 The past decade has also seen an emerging consensus among policy analysts and some foreign leaders that the war on drugs has proven to be less effective than lower-cost and more humane policies adopted by other countries. *See* Kreit, *supra* note 4, at 45–47.

19 ZOGBY INT'L, LIKELY VOTERS 9/23/08 THRU 9/25/08, 43–45 (2008) http://www.zogby.com/news/X-IAD.pdf.

20 For an overview of the first decade of state drug policy reform efforts, see Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 828–37 (2004) (discussing drug reform ballot initiatives in the areas of medical marijuana, mandatory treatment, forfeiture reform and marijuana decriminalization).

21 Gardiner Harris, *Researchers Find Study of Medical Marijuana Discouraged*, N.Y. TIMES, Jan. 19, 2010, at A18 (reporting that New Jersey became the fourteenth state to enact a medical marijuana law). *See also* MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST (2008), *available at* http://www.mpp.org/assets/pdfs/download-materials/SBSR_NOV2008_1.pdf (providing an overview of state medical marijuana laws).

22 Kreit, *supra* note 4, at 44.

23 Ian Geronimo, *Effort to Get Legalization Measure on Ballot Grows*, DAILY EMERALD, May 13, 2010, http://www.dailyemerald.com/effort-to-get-legalization-measure-on-ballot-grows-1.1479730.

24 Wyatt Buchanan, *Pot Initiative: 700,000 Signatures Gathered*, S.F. CHRON., Jan. 29, 2010, at C1 (reporting that backers of a marijuana legalization ballot initiative had gathered the necessary signatures to place the issue before the voters and that a Field Poll had found fifty-six percent of Californians in favor of the idea).

II. REFORMING FEDERAL DRUG LAWS: THE IMPORTANCE OF ASKING THE RIGHT QUESTIONS

As this brief overview reveals, after forty years, it is difficult to describe the war on drugs strategy as anything other than a failure. Our effort appears to have had little, if any, sustained success at reducing drug use or abuse. More importantly, to the extent drug war policies may have had an impact on the use of illegal drugs, the experiences of European countries give us every reason to believe that we could have achieved the same or better results at a substantially reduced cost. As a result, there is now a strong consensus among voters that the war on drugs strategy has failed. We have also begun to see substantial support for particular reforms, including some ideas that were viewed as politically unimaginable just a decade ago.

However, as proposals to alter our drug laws have entered the political spotlight, there has been relatively little attention paid to the different roles of the federal government and the states in the area of drug policy. This oversight is not new. Indeed, as Michael O'Hear observes in his authoritative article *Federalism and Drug Control*, the question of how drug enforcement and policy-making decisions should be distributed between state and federal authorities has been surprisingly under-examined for quite some time.[25] The changing political landscape in this area, however, reveals even more clearly why this question is such an important one. When state and federal efforts are closely aligned in the pursuit of the same strategy, as they were for some time during the war on drugs, policy discussions will naturally tend to revolve around the best tactics for implementing the strategy, or about the wisdom of the strategy as a general matter. Perhaps it is not surprising, then, that drug policy questions are typically viewed through the same lens, regardless of whether the context is state or federal law. While this tendency may make sense when state and federal strategies are closely aligned, it becomes problematic when the two diverge.

The example of marijuana law reform, which has started to gain some attention at the federal level, is instructive. In 2008, and again in 2009, Congressman Barney Frank introduced bills to "decriminalize" marijuana, saying that the government should allow people to "make their own choices as long as they are not

25 O'Hear, *supra* note 20, at 785–87.

impinging on the rights, freedom or property of others[.]"[26] And, when President Barack Obama held an online town-hall meeting to answer questions submitted and voted on by voters through a White House website, reformers worked to help push a question about marijuana legalization to the top of the list. President Obama offered only a brief response to the question that garnered the most votes, joking, "I don't know what this says about the online audience," before dismissing the idea.[27] Meanwhile, when faced with questions about proposals to tax and regulate marijuana like alcohol, President Obama's "drug czar" Gil Kerlikowske has taken to saying that "[l]egalization isn't in the President's vocabulary, and it certainly isn't in mine."[28]

Kerlikowske's "vocabulary" line has been a source of frustration among marijuana legalization advocates and has been viewed as a sign that the administration is not willing to engage the question with a serious response, even if it were to ultimately remain opposed to the idea. The criticism is certainly understandable. After all, President Obama gave serious and substantive responses to all of the other questions he received in his online town hall meeting, but only a one-sentence humor-based reply to the question about marijuana policy.[29]

In an important sense, however, the debate about legalizing or decriminalizing marijuana truly is misplaced in the context of federal drug laws. Indeed, to ask if the federal government should legalize marijuana is to ask an essentially irrelevant question—irrelevant not because it is unimportant or on the political fringe (certainly, if the polling is to be believed, it is not), but because it misunderstands the role of the federal law in shaping drug policy. Whether or not legalizing or decriminalizing marijuana is a good idea, the federal government simply does not have the power to effect such a change.

Imagine, for example, that every federal elected official decided tomorrow that marijuana should be taxed and regulated like alcohol. Even if they were to pass legislation that removed all federal criminal penalties for possessing, manufacturing, or

26 Bob Egelko, *Lee Backs Bill to Ease Pot Laws*, S.F. CHRON., July 31, 2008, at B2 (reporting that Frank's bill was "the first marijuana decriminalization measure introduced in Congress since 1978").

27 Michael A. Fletcher & Jose Antonio Vargas, *The White House, Open for Questions*, WASH. POST, Mar. 27, 2009, at A2.

28 Donna Leinwand, New Drug Czar Ready to Corral Forces; Putting Focus on Abuse of Prescriptions, USA TODAY, May 21, 2009, at A3.

29 See Aaron Houston, Laws Subsidizing Mexican Drug Gangs Are No Laughing Matter, S.F. CHRON., March 31, 2009, at A18 (criticizing President Obama for failing to take marijuana policy seriously).

selling marijuana, the drug would still be illegal everywhere in the country because all fifty states have their own laws criminalizing the sale of marijuana.[30] To be sure, if the federal government were to remove criminal penalties for the cultivation and distribution of marijuana, it would have a substantial impact on the enforcement of marijuana laws in the United States. That impact, however, would not be "legalization" of the drug inasmuch as marijuana would not be legal to buy and sell in any state unless and until that state also changed its laws. In short, unless the federal government decided to preempt state law,[31] it could not unilaterally "legalize" a controlled substance even if it wanted to.

To see why this point has important implications for thinking about federal drug laws, consider Congressman Frank's proposed legislation. Congressman Frank and the media framed the bill, dubbed the "Act to Remove Federal Penalties for Personal Use of Marijuana by Responsible Adults," as a proposal to decriminalize marijuana nationwide.[32] But, if we think a bit more about what the bill would actually do, we find that the question of whether or not our country should decriminalize marijuana is not particularly relevant to assessing the merits of Congressman Frank's proposal.

The Personal Use of Marijuana by Responsible Adults Act would enact a simple change in federal law by eliminating federal penalties for "the possession of marijuana for personal use," defined as 100 grams or less of marijuana, "or for the not-for-profit transfer between adults of marijuana for personal use."[33] How would this change in the law impact marijuana enforcement in the United States? A quick look at the data for

30 Though some states have decriminalized possession of personal-use amounts of marijuana, no state has made the sale or cultivation of marijuana legal other than for medicinal purposes. *See* Robert MacCoun et al., *Do Citizens Know Whether Their State Has Decriminalized Marijuana? Assessing the Perceptual Component of Deterrence Theory*, 5 REV. OF LAW & ECON. 347, 351–53 (2009) (listing states that have considered decriminalizing marijuana).

31 The likelihood of this happening is, not surprisingly, virtually zero. Indeed, the federal government has not even sought to preempt state medical marijuana laws despite fervent efforts to stop their implementation and almost certainly could not, even if it wanted to. *See infra* note 79 and accompanying text. *Cf. also*, Whalen v. Roe, 429 U.S. 589, 603 (1977) (noting that "the State no doubt could prohibit entirely the use of particular Schedule II drugs," which are legal under federal law).

32 *See* David Knowles, *Barney Frank and Ron Paul Team Up to Decriminalize Marijuana*, POLITICS DAILY, Jul. 15, 2009, http://www.politicsdaily.com/2009/07/15/barney-frank-and-ron-paul-team-up-to-decriminalize-marijuana. Although the Act has been called by other names, its official name is the Personal Use of Marijuana by Responsible Adults Act of 2009. H.R. 2943 111th Cong. § 2 (2009). For purposes of consistency, I will refer to it by its official name.

33 H.R. 2943, 111th Cong. § 2 (2009).

federal prosecutions reveals that the actual effect of the legislation would be quite minimal. In 2008 there were a total of only 626 simple marijuana possession cases disposed of in federal court.[34] To put this number in perspective, there were approximately 754,223 arrests for marijuana possession nationwide in 2008.[35] In other words, the bill would impact about 0.0008 percent of all individuals arrested for marijuana possession.

It is also worth noting that the 626 figure is almost certainly larger than the number of individuals who would have been charged with a federal crime based on simple possession of a personal use amount of marijuana alone. This is because, in all likelihood, a number of the 626 defendants were initially charged with a more severe offense but were convicted of marijuana possession as part of a plea deal.[36] Indeed, of the 370 defendants convicted of federal marijuana possession in 2008, 367 were based on guilty pleas.[37] And, though data is not available on the number of individuals who were federally charged based on the not-for-profit transfer of personal use amounts of marijuana, there is no reason to believe that it is significantly larger than the number of individuals charged with simple possession.

With this in mind, to say that the Personal Use of Marijuana by Responsible Adults Act would have a negligible impact on marijuana arrests and prosecutions would be an understatement, particularly when one considers that individuals who might avoid federal prosecution under the legislation would not necessarily escape punishment, as they could still be prosecuted at the state level. Far from "decriminalizing" marijuana, then, the direct impact of Congressman Frank's proposal would be to remove a few hundred defendants from the federal system and leave their cases to local prosecutors. Indeed, even if the proposal were expanded beyond marijuana to take the federal government out of the business of prosecuting simple possession

34 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, DEFENDANTS DISPOSED OF IN U.S. DISTRICT COURTS BY OFFENSE AND TYPE OF DISPOSITION, FISCAL YEAR 2008 TABLE 5.24.2008 (2009), http://www.albany.edu/sourcebook/pdf/t5242008.pdf [hereinafter CRIMINAL JUSTICE STATISTICS]. *See also, e.g.*, Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1464–65 (2009) (describing the comparatively minimal role federal law enforcement plays in the enforcement of marijuana laws).

35 *See* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2008 ARRESTS & TABLE 29 (2009), http://www.fbi.gov/ucr/cius2008/arrests/index.html.

36 *See* OFFICE OF NAT'L DRUG CONTROL POLICY, WHO'S *REALLY* IN PRISON FOR MARIJUANA? 23 (2005) (arguing that plea bargaining "can distort the statistics on marijuana possession offenders, consequently leading some people to claim that our prisons are overflowing with pot smokers").

37 CRIMINAL JUSTICE STATISTICS, *supra* note 34.

for *all* drugs, the real-world effect would still be surprisingly trivial, as there were only 394 prosecutions for simple possession for all drugs other than marijuana in 2008.[38]

When viewed in this light, it becomes clear that to discuss a proposal like the Personal Use of Marijuana by Responsible Adults Act primarily by reference to terms like decriminalization and prohibition is really to misstate the relevant issue. A debate over whether to remove federal penalties for small amounts of marijuana or other drugs is not a debate about decriminalization, but about the best use of federal resources and the most sensible role for federal law in addressing the problem of drug abuse. In other words, the policy question posed by Congressman Frank's bill is not *whether* to criminalize possession of small amounts of marijuana, but rather *who* is best able to enforce criminal laws against possession of small amounts of marijuana, and whether the activity is one that the federal government can or should concern itself with.

Not only would reframing the debate over federal drug laws on these terms be more accurate, it may also make it easier to bridge the divide between different sides of the debate on drug policy issues and find common ground. For example, even those who are opposed to the idea of decriminalizing drugs as a general matter may nevertheless believe that it is unwise to have a federal law that is so infrequently enforced. As has been observed in other contexts, rarely enforced laws can become problematic on that basis alone because they are especially susceptible to being applied in a discriminatory or arbitrary fashion.[39] The potential for arbitrary or discriminatory enforcement may be all the stronger in an area like drug possession, where the overwhelming majority of defendants will find themselves in state court while an unlucky few may face more severe penalties for the same conduct in federal court.[40] Meanwhile, others who oppose decriminalization may nonetheless believe that the federal government should not criminalize activity that can be (and already is) much more

38 *Id.*

39 *See, e.g.*, Cass Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 73 (2004) (arguing in the context of laws against sodomy that rarely enforced statutes "are a recipe for unpredictable and discriminatory enforcement . . . [and] do violence to both democratic values and the rule of law").

40 *See, e.g.*, United States v. Clary, 846 F. Supp. 786, 788–91 (E.D. Mo. 1994) (discussing the role of prosecutorial discretion in the enforcement of federal crack cocaine laws); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 668–75 (1997) (arguing that the federalization of crimes over which states also have authority results in disparate treatment because defendants fare worse when prosecuted in federal court than in state court).

efficiently dealt with by the states because doing so detracts from federal efforts to police more complex interstate crimes.[41] State governments are much better equipped than the federal government to investigate and prosecute local, street-level crimes such as drug possession. Perhaps, then, federal law enforcement resources should be reserved for crimes that are more difficult for state officials to detect.[42]

Whatever one's view about the appropriate role of federal law in drug enforcement, recognizing that a proposal to remove simple drug possession from federal authority is only tangentially related to the idea of "drug decriminalization" is critical if we want to achieve a more rational and constructive dialogue about federal drug laws. So long as every structural change in federal drug laws is viewed within the framework of the debate about prohibition or legalization, there will be little room for agreement and compromise. Likewise, questions that are much more relevant in the context of today's drug policy landscape—in which states are enacting and considering a diverse range of different reforms—like how to most effectively use state and federal law enforcement resources, or which policy decisions should be left to state discretion and which require uniformity across the country, will continue to be pushed to the background.

III. LEARNING FROM THE FEDERAL RESPONSE TO STATE MEDICAL MARIJUANA LAWS

A. Why the Federal Government Has Been Unable to Block State Medical Marijuana Laws

The case for moving beyond the legalization debate when thinking about federal drug laws becomes even stronger when we consider the sort of changes to state drug laws that we are most likely to see over the coming five to ten years. Among the most prominent and viable state reforms that appear to be on the horizon are the continued enactment of state medical marijuana laws and the probability that one or more states will legalize marijuana for recreational purposes. As discussed above, since

41 *Cf. e.g.*, Stephen Chippendale, Note, *More Harm than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 469 (1994) (arguing that "federalization [of criminal law] dilutes the resources of federal law enforcement agencies . . . as federal prosecutors devote their time and resources to local crimes").

42 *Cf.* Gonzales v. Raich, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting) ("[I]f I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.").

1996, fourteen states have legalized the use and, in some instances, distribution of marijuana for medicinal purposes. Similar proposals have already been introduced in the legislatures of other states[43] and, unless there is a sudden reversal in public opinion on the issue, it is very likely we will continue to see more states enacting medical marijuana laws. Moreover, with proposals to tax and regulate marijuana like alcohol, and polls showing support for doing so at above fifty percent in parts of the country, a number of political observers believe we may see marijuana legalized for recreational use in one or more states within the near future.[44]

As in the case of the Congressman Frank's Personal Use of Marijuana by Responsible Adults Act, we find that the debate over prohibition and legalization is only tangentially relevant to how federal law should address these proposed state reforms. A review of the federal response to state medical marijuana laws is particularly useful to help see why this is so.

Perhaps the most significant, though largely underappreciated, lesson to be learned from fourteen years of state medical marijuana laws is that the ability of the federal government to override or interfere with state drug laws is actually quite limited. As Robert A. Mikos persuasively argues in his insightful article, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, "states [have] retain[ed] both de jure and de facto power to exempt medical marijuana from criminal sanctions, in spite of Congress' uncompromising—and clearly constitutional—ban on the drug."[45] In other words, just as the federal government does not have the power unilaterally to legalize or decriminalize a controlled substance, it also appears unable to prevent states from doing so.

Not long after California voters enacted Proposition 215—also known as the Compassionate Use Act (CUA)—the federal

43 *See, e.g.*, Matthew Clark, *State Rep. Introduces Medical Marijuana Bill*, MORNINGSUN.NET, Feb. 5, 2010, http://www.morningsun.net/news/kansas/x1431749203/State-Rep-introduces-medical-marijuana-bill (reporting on a proposal to legalize medical marijuana in Kansas).

44 *See* Nate Silver, *Americans Growing Kinder to Bud*, FiveThirtyEight.com, Feb. 22, 2009, http://www.fivethirtyeight.com/2009/02/americans-growing-kinder-to-bud.html (discussing polling trends on the issue of marijuana legalization). I should emphasize, of course, that it is far from certain that these reforms will occur. Predicting political shifts is always a tricky endeavor; indeed, the sudden surge in public opinion support for marijuana legalization has itself taken many political observers by surprise. But guesses at what the future may hold are a necessary part of thinking about the issues that federal officials are most likely to be confronted with in the area of drug enforcement in the coming years.

45 Mikos, *supra* note 34, at 1423.

government began a vigorous effort to effectively block implementation of the law. The federal effort targeted both physicians who recommended medical marijuana to their patients and dispensaries that sought to cultivate and distribute the medicine.[46] Just months after passage of the CUA, then-drug czar Barry McCaffrey announced that the administration would seek to revoke the DEA registrations of physicians who recommended medical marijuana to their patients, thereby leaving them unable to prescribe other controlled substances.[47] The strategy was a smart one: because the ability to prescribe medication is necessary for a doctor to effectively practice medicine, the odds were that very few physicians would do anything that would put their DEA registration at risk.[48] In a lawsuit by a group of California doctors and patients, however, the Ninth Circuit found that the DEA's plan was unconstitutional as an infringement on physicians' First Amendment rights because it restricted a physician's ability to speak "frankly and openly" with their patients[49] and discriminated based on the viewpoint of physicians' speech.[50] Accordingly, the Ninth Circuit enjoined the federal government "from either revoking a physician's license to prescribe controlled substances or conducting an investigation of a physician that might lead to such revocation, where the basis for the government's action is solely the physician's professional 'recommendation' of the use of medical marijuana."[51] The ruling effectively closed the door on the federal government's least expensive and most promising method for shutting down California's medical marijuana law.

With its effort to target physicians thwarted, the federal government was left to focus on enforcement efforts against those involved in the medical marijuana market as the only potentially viable avenue for disrupting state medical marijuana laws. As judged by the results of court rulings, the government was far

46 *See id.* at 1465–69 (describing the federal effort to block implementation of Proposition 215); Alex Kreit, Comment, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787, 1797–1800 (2003) (same).

47 *See* Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997) (stating that the "DEA will seek to revoke the DEA registrations of physicians who recommend or prescribe Schedule I controlled substances").

48 Conant v. Walters, 309 F.3d 629, 639–40 (9th Cir. 2002) (Kozinski, J., concurring) (noting that the DEA's planned revocation policy would mean that physicians who spoke "candidly to their patients about the potential benefits of medical marijuana [would] risk losing their license to write prescriptions, which would prevent them from functioning as doctors").

49 *Id.* at 636.

50 *Id.* at 637.

51 *Id.* at 632.

more successful on this front. In *United States v. Oakland Cannabis Buyers' Cooperative*, brought one year after passage of the CUA, the federal government sought an injunction under the federal Controlled Substances Act against six different medical marijuana cooperatives.[52] The Oakland Cannabis Buyers' Cooperative (OCBC) successfully argued before the Ninth Circuit that the medical necessity defense would likely apply to their activities.[53] This time, however, the Supreme Court reversed and held that medical necessity was not a valid defense for the manufacture and distribution of marijuana because, under the terms of the "Controlled Substance Act, the balance already has been struck against a medical necessity exception."[54] As a result, the government was able to obtain an injunction against the OCBC and the other dispensaries.

Just four years after *OCBC*, California's medical marijuana law was back before the Supreme Court, this time in the context of a Commerce Clause challenge. In 2002, DEA agents raided the home of Dianne Monson, a California medical marijuana patient, and seized six marijuana plants. Although the government did not bring charges against Monson, Monson, along with fellow patient Angel Raich and her two caregivers, filed suit to enjoin the DEA from enforcing the Controlled Substances Act against them for cultivating medical marijuana.[55] The *Raich* plaintiffs relied on two recent Supreme Court decisions, *United States v. Lopez*[56] and *United States v. Morrison*,[57] which had restricted the federal government's authority under the Commerce Clause. In essence, *Lopez* and *Morrison* had held that the commerce power did not extend to "noncommercial" activity, placing such activity beyond the reach of federal law.[58] Thus, for example, the Court in *Lopez* struck down a provision of the Gun Free School Zones Act of 1990 that made possession of a gun in a school zone a federal crime on the grounds that it was not commercial activity.[59] Raich and Monson argued that, like possession of a gun in a school zone, the cultivation of marijuana for person medical use was the sort of

52 United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001).

53 United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109, 1115 (9th Cir. 1999), *rev'd*, 532 U.S. 483 (2001).

54 532 U.S. at 499 (Stevens, J., concurring).

55 Gonzales v. Raich, 545 U.S. 1, 7 (2005).

56 United States v. Lopez, 514 U.S. 549 (1995).

57 United States v. Morrison, 529 U.S. 598 (2000).

58 *See* Alex Kreit, *Why is Congress Still Regulating Noncommercial Activity?*, 28 HARV. J.L. & PUB. POL'Y 169, 169–79 (2004) (describing the holdings in *Lopez* and *Morrison* and the interpretation of the cases prior to the decision in *Raich*).

59 *Lopez*, 514 U.S. at 567–68.

noncommercial activity that fell outside the federal government's authority under the Commerce Clause.

In a familiar procedural pattern for these cases, the Ninth Circuit ruled in favor of the *Raich* plaintiffs and, in a 6-3 decision, the Supreme Court reversed. The Court reasoned that the regulation of the possession and noncommercial cultivation of marijuana was a necessary part of Congress' efforts to criminalize the interstate market for the drug under the Controlled Substances Act. This distinguished *Raich* from *Lopez* and *Morrison*, according to the majority, because the regulation of the possession and cultivation for personal use of marijuana was an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[60]

Between them, *OCBC* and *Raich* left little doubt that federal officials could constitutionally prosecute medical marijuana growers, providers, and even patients themselves.[61] And, throughout the past decade, the federal government enthusiastically exercised this authority, at least in California.[62] It has raided at least 190 medical marijuana collectives[63] and brought criminal charges against medical marijuana growers and collective operators,[64] many of whom were operating in strict compliance with California's law. In one high profile prosecution, for example, the federal government obtained a conviction against Charlie Lynch, who operated a medical marijuana collective in Morro Bay, California. Lynch had the backing of town officials and even held a ribbon-cutting ceremony attended by the mayor and members of the city council when he opened up shop.[65] At his sentencing, District Court Judge George H. Wu

60 *Id.* at 561.

61 On remand, Raich pressed a substantive due process-based argument before the Ninth Circuit, claiming that she had a fundamental right to use marijuana where it could be proven that it was necessary for her life or health. This time, however, the Ninth Circuit held for the government. Raich v. Gonzales, 500 F.3d 850, 866 (2007).

> For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner . . . .

Id.

62 *See* O'Hear, *supra* note 20, at 841 (noting that the federal government has only undertaken vigorous efforts to block state medical marijuana laws in California).

63 MARIJUANA POLICY PROJECT, *supra* note 21, at S-1.

64 *See, e.g.*, Americans for Safe Access, Federal Cases, http://www.safeaccessnow.org/section.php?id=184 (last visited Mar. 15, 2010) (providing an overview of federal medical marijuana prosecutions).

65 John Stossel, Andrew Sullivan & Patrick McMenamin, *California Man Jailed for Medical Marijuana: Purveyor Charlie Lynch Gets a Year in Jail Though His Product is*

indicated some displeasure with having to impose a one-year jail sentence for Lynch. The *New York Times* reported that Wu "talked at length about what he said were Mr. Lynch's many efforts to follow California's laws on marijuana dispensaries" before concluding: "I find I cannot get around the one-year sentence[.]"[66] The DEA has even gone after landlords who have knowingly rented their property to medical marijuana collective operators and growers through asset forfeiture proceedings.[67]

Despite all of these efforts, however, the federal government has not succeeded in blocking California's medical marijuana law. By 2009, there were an estimated 300,000 to 400,000 qualified patients under California's medical marijuana laws.[68] Even more telling, there were over 700 medical marijuana collectives openly distributing the medicine via storefronts.[69] The majority of these stores, which are organized pursuant to a California statute that permits patients to associate "collectively or cooperatively to cultivate marijuana for medical purposes,"[70] have been operating with the acceptance or even active support of city and county governments. Indeed, over three dozen cities and counties in the state have adopted ordinances to regulate the zoning and land-use permitting of medical marijuana collectives.[71]

Perhaps because it is one of the few medical marijuana states that has allowed a distribution system to develop,[72] California has drawn more attention from the federal government than most of the others.[73] But, despite a dedicated

Legal Under State Law, ABCNews.com, June 11, 2009, http://abcnews.go.com/Business/Stossel/Story?id=7816309&page=1.

66 Solomon Moore, *Prison Term for a Seller of Medical Marijuana*, N.Y. TIMES, June 12, 2009, at A18.

67 Mikos, *supra* note 34, at 1467. For a more detailed discussion of federal efforts to interfere with state medical marijuana laws, see Ruth C. Stern & Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673 (2009).

68 Roger Parloff, *How Medical Marijuana Became Legal*, FORTUNE MAG., Sept. 18, 2009, at 141, 144.

69 *Id.*

70 CAL. HEALTH & SAFETY CODE § 11362.775 (West 2007). *See also* Memorandum from Edmund G. Brown Jr., Cal. Att'y Gen., on Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (Aug. 2008), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines (providing an overview of guidelines for the operation of medical marijuana collectives and cooperatives).

71 *See* Americans for Safe Access, Local California Dispensary Regulations, http://www.safeaccessnow.org/article.php?id=3165 (last visited Apr. 9, 2010). *See also* AMERICANS FOR SAFE ACCESS, MEDICAL CANNABIS DISPENSING COLLECTIVES AND LOCAL REGULATION 17 (2010).

72 *See* Mikos, *supra* note 34, at 1431–32 (discussing the differences between different states' medical marijuana laws).

73 O'Hear, *supra* note 20, at 841 ("Except in California, it does not appear that medical marijuana has become a priority for federal enforcers.").

and sustained effort, the federal government has been unable to impede California's medical marijuana law. Federal officials have been no more successful in stopping other states from implementing their own medical marijuana laws.[74] Perhaps as a result, after a nearly fifteen year effort to stop state medical marijuana laws, the Obama Administration recently signaled a new course by issuing prosecutorial guidelines advising federal prosecutors that they "should not focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," in part because doing so "is unlikely to be an efficient use of limited federal resources."[75]

As Robert Mikos explains, the federal government's inability to block state medical marijuana laws results from a few different factors. First, the federal government's limited law enforcement resources mean that it cannot arrest and prosecute more than a small fraction of collective operators and growers, let alone patients.[76] Thus, although federal law may make marijuana possession, cultivation, and distribution illegal for any and all purposes, that fact has little deterrent power in states with medical marijuana laws. Unless the federal government was to radically increase both the federal drug control budget as well as the percentage of the budget devoted specifically to the prosecution of medical marijuana cases in states where the drug is legal, it can do little to change this dynamic.[77] Similarly, Mikos argues that state laws hold greater sway over social norms and personal preferences than federal laws, at least in the area of drug policy.[78] As a result, the existence of a federal ban does little to alter people's personal beliefs about medical marijuana. Finally, the federal government is unable to resort to preemption to try to block state medical marijuana laws. This is because

74 Mikos, *supra* note 34, at 1481 ("Though Congress has banned marijuana outright through legislation that has survived constitutional scrutiny, state laws legalizing medical use of marijuana not only remain in effect, they now constitute the de facto governing law in thirteen states."). Interestingly, federal officials in Colorado have stated an affirmative lack of interest in following the approach that their colleagues in California have taken, indicating that enforcement in this area may have been left largely to the discretion of local federal officers. Stern & DiFonzo, *supra* note 67, at 730.

75 Memorandum from David W. Ogden, U.S. Deputy Att'y Gen., on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf.

76 Mikos, *supra* note 34, at 1463–67. *See also supra* note 35 and accompanying text (noting that while there were 754,223 arrests for marijuana possession in the United States in 2008, there were only 626 federal prosecutions for marijuana possession that year).

77 *See* O'Hear, *supra* note 20, at 863 ("Without local cooperation, tough federal policies have more bark than bite.").

78 Mikos, *supra* note 34, at 1469–79.

Congress does not have the authority to tell a state what activity to make criminal—indeed, doing so would violate the anti-commandeering principle.[79] As a result, a state's decision to remove its own sanctions for medical marijuana-related activity cannot be preempted by the federal government.[80]

B. The Collateral Consequences of Interference

Though the federal government has not succeeded in preventing states from legalizing marijuana for medicinal use, its effort to do so has not been entirely without effect. First, federal enforcement efforts have resulted in rifts between state and federal officials that, in at least some cases, have undermined existing drug enforcement partnerships focused on issues that all would agree are far more pressing than medical marijuana. Second, every federal enforcement dollar that has been put toward interfering with state medical marijuana laws is one less dollar available for other uses. Finally, to the extent that federal arrests and prosecutions of individuals in compliance with state medical marijuana laws has had an influence on state policy, it has been to make the laws *less* controlled than they might otherwise be.[81]

Federal interference with California's medical marijuana law has needlessly strained relationships between state and federal law enforcement officials. Throughout the past decade, cities across the state have lodged complaints with DEA offices about medical marijuana raids, and the California Senate even went so far as to vote twenty-three to fifteen in favor of a resolution urging the federal government to stop arresting and prosecuting individuals in compliance with the state's law.[82] And, in at least a handful of instances, local displeasure with federal actions went beyond strongly worded letters and resulted in concrete action. In 2002, following a handful of high profile raids—including one in which thirty DEA agents burst into a medical marijuana hospice with guns drawn and arrested a wheelchair-bound patient disabled by polio—four California cities adopted "anti-DEA resolutions" to remove their police officers from DEA

79 Printz v. United States, 521 U.S. 898, 935 (1997).

80 Mikos, *supra* note 34, at 1445–60. *See also* County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 468 (Cal. Ct. App. 2008) (holding that federal law does not preempt California's medical marijuana law).

81 Because our concern here is policy effects, this list does not include what is, of course, the most direct impact of the federal government's efforts: the impact on the individuals who have been arrested and prosecuted.

82 *California Senate Passes Medical Marijuana Resolution*, Salem-News.com, Sept. 2, 2009, http://www.salem-news.com/articles/september022009/cal_mj_passage_9-2-09.php.

joint-task forces in protest. San Jose Police Chief William Lansdowne, for example, pulled out his officers who had been assigned to the DEA's High Intensity Drug Trafficking Area task force, saying it was "unfair to put our officers in a position of deciding how they're going to enforce a law that's in conflict with local law."[83] It is not surprising that state and local officials would respond negatively when the DEA undertakes investigations that are intended to obstruct state and local laws. Because local and federal law enforcement partner on far weightier problems than medical marijuana,[84] damaging that relationship in order to conduct medical marijuana arrests and prosecutions is a short-sighted approach likely to do more harm than good.

Along the same lines, in light of the fact that the federal government is unable to stop state medical marijuana laws, it is difficult to view its effort to do so as anything other than a waste of law enforcement resources. Of course, some would argue that arresting and prosecuting medical marijuana patients and providers is a poor use of law enforcement resources under any circumstance. My point here, however, is different, and should hold regardless of one's personal views on the wisdom of state laws that permit the medical use of marijuana. Unless the federal government is prepared to marshal enough resources to block, or at least *significantly* weaken, state medical marijuana laws, it makes little sense to engage in a scattershot series of raids and prosecutions. Because medical marijuana collectives already operate openly and without fear of state prosecution in the states where they are legal, the remote possibility that they will face federal prosecution likely has at best an insignificant impact on the price of the marijuana that they dispense. Joseph Russoniello, the United States Attorney for the Northern District of California, announced in 2008 (prior to the Obama Administration's memo) that even though he was personally opposed to medical marijuana his office would not be targeting medical marijuana providers for this very reason. "We could spend a lifetime closing dispensaries," he said, but "[i]t would be terribly unproductive and probably not an efficient use of precious federal resources[.]"[85] Indeed, this is also the rationale

83 Mark Simon, *San Jose Cops off DEA Squad: Chief Doesn't Want Them Raiding Pot Clubs*, S.F. CHRON., Oct. 10, 2002, at A17. *See also* Kreit, *supra* note 46, at 1788.

84 It is important to note that these task forces have themselves been the subject of well grounded criticism. *See, e.g.*, Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995).

85 Vic Lee, *Russoniello Outlines Top Priorities*, ABCNews.com (San Francisco), Jan. 31, 2008, http://abclocal.go.com/kgo/story?section=news/local&id=5928173.

that the Obama Administration relied on in crafting its new policy.[86]

Finally, to the extent that federal interference with state medical marijuana laws has created uncertainty and risk, it has only made the state laws harder to control and easier to abuse. For example, states and localities are likely to refrain from physically inspecting collectives to make sure they are run properly, or testing medical marijuana to guard against adulterants and provide dosage and potency information, out of concern that doing so would run afoul of federal law.[87] Since the federal government is unable to stop the implementation of state medical marijuana laws, maintaining barriers to state controls only serves to make it easier for black market profiteers and recreational users to abuse the system.

States and cities that have considered adopting government-run medical marijuana programs provide an especially illuminating example here. New Mexico, Maine, and San Francisco have all publicly discussed the idea of adopting a government-run medical marijuana cultivation and distribution model, though none of them have done so.[88] In the case of Maine, at least, the fear that the state officials who implemented the program could be federally prosecuted and the potential loss of federal grant money was central to the decision not to adopt a state-run system.[89] While a state-run medical marijuana program might be a tough pill for medical marijuana opponents to swallow, it would seem to be preferable to the alternative system of privately run collectives. A state-run system would be much more closely supervised and monitored than a private system. It could provide certainty that the medical marijuana used in the program was grown by state officials and was not lining the pockets of black-market producers. A state-run system would also likely be much more effective at guarding against diversion of marijuana to recreational users. Though medical marijuana opponents would surely prefer not to have medical marijuana collectives at all, in light of the federal government's inability to stop the implementation of state medical marijuana laws, that does not appear to be an option. And, if the choice is between a state-run system or a private system, a state-run

86 Memorandum from David W. Ogden, *supra* note 75.

87 For example, most jurisdictions hold that holding a controlled substance in one's hand, even for a brief moment, is sufficient to sustain a conviction for possession. *See, e.g.*, Hawaii v. Hogue, 486 P.2d 403, 406 (1971).

88 Mikos, *supra* note 34, at 1432 n.46 and accompanying text.

89 *Id.* at 1459 n.135.

system would appear to be far better from the perspective of those who favor the strictest possible control.[90]

In sum, the federal effort to block state medical marijuana laws has strained relationships between state and federal officials, drained federal drug enforcement resources from other priorities, and made it more difficult for state and local governments to strictly control medical marijuana operations. If the federal government is unable to stop or seriously disrupt state medical marijuana programs, opponents of medical marijuana should want to incentivize states to enact stricter controls. A system of minimal enforcement, however, produces the opposite result. Absent a Machiavellian hope that poorly regulated state medical marijuana laws will make them less appealing and result in their repeal, it is difficult to see the benefit of putting roadblocks in the way of strict state regulation, particularly from the prohibitionist perspective.

I want to emphasize that my chief goal here is not to persuade the reader that the federal government should not interfere with state medical marijuana laws per se. This discussion is meant to demonstrate why, when thinking about federal responses to state reforms, we must be careful not to view federal drug law as a simple referendum on the state's law. Reducing the problem of how federal law should approach state medical marijuana laws to whether or not one personally supports medical marijuana only makes sense if the federal government is able to block the state laws. And, as the federal response to medical marijuana shows us, the federal government may actually have very little ability to prevent states from implementing laws that are at-odds with federal policy.

IV. THE WAY FORWARD: FOCUS ON CONTROLLING, NOT BLOCKING, STATE POLICY INNOVATIONS

Up until this point, this article has focused primarily on advancing the argument that debates about whether to legalize marijuana or allow the use of medical marijuana do not reflect the considerations that should guide decisions about federal drug laws. This is because the federal government does not have the resources or ability to control state policy when it comes to drug

90 Similarly, while the threat of federal prosecution is too improbable to keep medical marijuana dispensaries from operating openly in storefronts throughout California, it may be sufficiently strong to dissuade some risk-averse and law-abiding people from operating a collective, thereby leaving room for risk-seeking individuals to step in. Of course, this may be counter-balanced by the fact that the collective operators themselves may be patients who are willing to risk prosecution based on their belief in the cause of medical marijuana.

laws. This is true both for proposals to ease the drug laws, such as Barney Frank's decriminalization bill, and for efforts to block states from reforming their own laws, like the federal effort to undermine California's medical marijuana law. In this section, I will briefly explore what this insight might mean for how the federal government should approach drug enforcement, and in particular, respond to state reforms. I will argue that the dynamic discussed above counsels in favor of enacting federal laws that respect states' autonomy to enact their own drug laws—even where state laws conflict with federal preferences—but also provide important controls and incentives to prevent against negative externalities in the form of spillover effects in neighboring states. This outlook is similar to the "competitive alternative" model advanced by Michael O'Hear in *Federalism and Drug Control*.[91] The insights above, however, provide even greater support for such a model, particularly for those who may be opposed to state reforms on their own merits.

As an initial matter, even if we were to put the limitations of federal power in this area aside, the results of the last four decades weigh strongly in favor of encouraging states to innovate and try new approaches. With more teens reporting that it is easier for them to buy marijuana than alcohol[92] and nearly three times as many American teens having tried the drug than in the Netherlands where it is openly bought and sold, there is every reason to believe that we could be achieving the same, and likely better, results than we are now, at a lower human and financial cost. While this much seems clear, opinions vary widely as to exactly what the best alternative might be.[93] Accordingly, allowing for the maximum possible amount of local and state innovation and diversity in the field of drug laws would better enable us to explore various policy alternatives in the service of achieving a more rational and cost-effective set of drug policies.[94] After all, with seventy-five percent of Americans in agreement

91 O'Hear *supra* note 20, at 873–81 (proposing a "competitive alternative" model of federal and state interaction in the area of drug enforcement).

92 NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE, NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE XIII: TEENS AND PARENTS 17 Fig.3.P, *available at* http://www.casacolumbia.org/ articlefiles/380-2008%20Teen%20Survey%20Report.pdf (showing that twenty-three percent of teens say marijuana is the easiest drug for them to buy, while only fifteen percent say beer is the easiest).

93 *See, e.g.*, O'Hear, *supra* note 20, at 873 ("Given this diversity of options and the localized nature of the harms flowing from drug use, there seems to be little reason to deny different communities the opportunity to select their own policy responses.").

94 *Id.* ("Decentralized policymaking . . . carries the ancillary benefit of promoting the sort of policy innovation and real-world testing that may contribute to resolving some of the longstanding theoretical and empirical disputes in the field.").

that the war on drugs strategy has failed,[95] and a wide range of policy options for reform, drug policy would appear to be a particularly appropriate area for maximizing the benefits of our federal system.

Even for those who would prefer not to allow states to enact reforms such as legalizing medical marijuana, however, there is much to be said in favor of a decentralized approach. This is because the experience of state medical marijuana laws reveals that the federal government simply may not be able to prevent states from implementing drug laws that are at-odds with federal policy. By coming to terms with the limits of its authority, the federal government could actually achieve greater influence over state reforms than it has now.[96] For example, instead of preventing states from directly cultivating and distributing medical marijuana as federal law does now,[97] federal elected officials might consider providing an incentive for states that implement medical marijuana laws to make them state-run. This change could be easily achieved by expanding a provision of the Controlled Substances Act that grants immunity to state and local officials who are "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances."[98] Courts have interpreted the provision to grant immunity from federal prosecution to officers who violate the drug laws while working undercover, but not to officials who are engaged in the implementation of state and local medical marijuana laws.[99] If the provision were extended, however, to explicitly include state and local government officials implementing their own laws, even where they otherwise conflict with federal law, then states and localities that enact reforms would have a strong incentive to adopt a government-run model. This would likely result in reforms that are more limited and strictly controlled than those arising in a private system. As a result, state reforms would be better controlled and less likely to

95 *See supra* note 19 and accompanying text.

96 For a discussion of the potential for state reforms to result in spillover effects in neighboring states, see O'Hear, *supra* note 20, at 868–72.

97 *See* Mikos, *supra* note 34, at 1458 (discussing this aspect of federal law).

98 For a discussion of the current interpretation of this provision, see *id.* at 1457–59.

99 *See, e.g., id.*; United States v. Rosenthal, 454 F.3d 943, 948 (9th Cir. 2006) (holding that an Oakland immunity statute could not shield a defendant from prosecution for ensuring legal distribution of marijuana). For an argument that the plain language of the provision as-written should provide immunity to individuals engaged in implementing medical marijuana laws, see, for example, Reply Brief of Appellant at 2–6, United States v. Oakland Cannabis Buyers' Coop., 259 Fed. App'x 936 (9th Cir. 2007) (No. 05-16466) (arguing that the plain meaning of "enforce" extends beyond compelling compliance with a law and includes giving effect to a law).

result in spillover effects in neighboring states. Similarly, the federal government might consider adopting a policy permitting state and local governments to implement laws that are at odds with the federal prohibitionist preference if they pay a fee from their revenues to a fund that would help defray such spillover costs. One can easily imagine a range of other possible changes to federal law along these lines, and my aim here is not to advocate for any one proposal specifically. Instead, my claim is that by abandoning a futile effort to stop states from implementing their own reforms entirely, the federal government could enact policies that might result in more constrained and limited state reforms.

To be sure, this approach would not fully satisfy those who think that the federal government should dictate state policy or who believe the federal government has a moral imperative to maintain a strict prohibitionist approach regardless of its actual impact. But I would urge those who find these ideas hard to stomach to give serious consideration to whether it would be wise, or even feasible, for the federal government to devote the amount of resources that would be necessary to have even a realistic chance of actually blocking state reforms. The experience to date with state medical marijuana laws indicates that the federal government would need to expend significant amounts of money and law enforcement energy to have even a remote chance of preventing the implementation of state reforms. If a state sought to legalize, say, methamphetamine, then perhaps the argument for marshalling the necessary resources would be compelling. But, when it comes to medical marijuana, or even state proposals to legalize marijuana outright, it seems much more difficult to justify the costs that would be required for the federal government to have even a remote chance of blocking the state reform.

To state the issue somewhat differently, once a state has enacted a law legalizing medical marijuana, the law's opponents have nothing but second-best options. Short of repealing the state's law, the only recourse for the law's opponents is federal law. But at this stage, the calculus is much more complex than whether or not one agrees with the state's law on its own terms. If the federal government is capable of blocking implementation of the state's law, then opponents of the law should naturally and logically see that as the best strategy. But what if the federal government is simply unable to block or even to significantly interfere with the state's law? Would opponents of the law be better served by a haphazard series of federal prosecutions, or by

changing federal law to explicitly permit the state reform but strictly control it?

These are the sorts of questions that federal drug policy will need to address in era of state reform. To date, however, this nuanced view of federal drug law has been almost completely overlooked in favor of a stale and increasingly irrelevant debate. On a related note, the dynamics of state reform also weigh in favor of a broader re-examination of the federal role in drug enforcement, with an eye toward targeting specialized federal resources in areas where they can have the greatest impact. Arguably, many federal trafficking prosecutions today do not fall into the category of offenses that truly require federal attention. A 2007 U.S. Sentencing Commission report, for example, found that 61.5 percent of crack offenders and 53.1 percent of powder cocaine offenders could be classified as low or mid-level offenders—such as couriers, street dealers, or lookouts.[100] These numbers raise serious questions about the current allocation of federal resources in drug enforcement. Even assuming that going after lookouts and other street level offenders is an efficient use of federal dollars, however, it is very difficult to formulate a good justification for the federal government to concern itself with the simple possession of personal-use amounts of a controlled substance. Indeed, the Office of National Drug Control Policy has made it a point to emphasize that the federal government rarely targets drug *users*, especially marijuana users.[101] Statistics that indicate only about 1,000 drug possession cases were disposed of at the federal level in 2008 confirm that the federal government is simply not well positioned to directly respond to such a localized problem. Since that is the case, there is a strong argument for doing away with federal laws against simple possession of small quantities for all drugs, not because drug decriminalization is necessarily a better policy than prohibition, but because there is little upside and much potential downside to having a federal law that is so rarely enforced and duplicative of state and local efforts. Doing so would have the added benefit of allowing states to implement reforms in areas that might involve simple possession—such as state medical marijuana laws—outside of the shadow of conflicting federal law.

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100 U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 19 Fig. 2-4 (2007). Similarly, a 1994 Department of Justice report found that 36.1 percent of all federal drug offenders were "low-level" offenders under the Department's own criteria and that these offenders received an average prison sentence of 85.1 months. The 1994 report did not include mid-level offenders. U.S. DEP'T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES 2–3 (1994).

101 *See* OFFICE OF NAT'L DRUG CONTROL POLICY, *supra* note 36 and accompanying text.

This brief discussion is intended only as an overview of the types of reforms that the federal government might examine in an environment where states are adopting laws that are at-odds with federal preferences. These are, of course, only a few of the many possible options that the federal government might consider implementing.[102] My purpose here is not to endorse one specific proposal or another, but to argue that, as states adopt new drug policies, and as support for alternatives to the drug war strategy increases at the federal level, the federal government should carefully consider the merits of policies that respect state policy choices but also provide incentives for states to closely regulate and control any reforms they might enact.

CONCLUSION

This essay considers the question of how to think about federal drug laws in a post-drug war era—one in which states are enacting reforms that are at odds with stated federal policy. My approach here has been, by design, limited and focused. I have, for example, omitted some of the most important proposals for reforming federal drug laws, such as reforms that would reduce the severity of federal sentences for low-level drug offenders. Instead, this essay seeks to examine possible reforms that relate to the role of federal law in shaping and enforcing our drug policies.

The discussion reveals the importance of cutting through the debate about prohibition and legalization when thinking about federal drug laws. By looking at a proposal in Congress to "decriminalize" marijuana, we find that the federal government could not unilaterally legalize or decriminalize a drug even if it wanted to. As a practical matter, if the federal government were to remove federal penalties for possession of small amounts of marijuana, the result would not be nationwide decriminalization but a shift in at most 600-odd defendants from federal to state courts. This is in large part because, even in an age of unprecedented federal involvement in criminal law enforcement, states still arrest and prosecute far more offenders than the federal government. For this same reason, the federal government may be unable to stop states from enacting reforms like the legalization of medical marijuana, even though they are inconsistent with federal policy.

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102 For some additional proposals along these lines, see O'Hear, *supra* note 20, at 873–81.

The federal government cannot legalize marijuana on its own, but it also cannot stop a state from doing so.[103] As a result, if we approach proposals to reform federal drug laws from the prohibition/legalization framework, we will be asking the wrong questions. Instead, we would be much better served by thinking about these issues in terms of the role of federal government in light of state laws. This is not only a more accurate way to look at issues like how the federal government should respond to state medical marijuana laws, but it also has the potential to help begin to bridge the divide in what is often a polarizing debate.

103 *See* O'Hear, *supra* note 34, at 788 ("Rather than acting as a dictator of state policy, the federal government exercises, at most, a loose control over the general direction taken by lower levels of government.").