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### Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs

Steven W. Bender

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# JOINT REFORM?: THE INTERPLAY OF STATE, FEDERAL, AND HEMISPHERIC REGULATION OF RECREATIONAL MARIJUANA AND THE FAILED WAR ON DRUGS

*Steven W. Bender\**

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## INTRODUCTION

In 2012, Washington and Colorado voters surprised the nation by authorizing the recreational use of marijuana.<sup>1</sup> The outcome sent state regulators scrambling to implement the directive and supply a product source, while the federal government faced its own dilemma of whether to tolerate or squelch these state initiatives contradicting longstanding federal law. Surely the Mexican drug cartels (and other illicit growers and suppliers from Canada and within the United States) weighed the prospect for wider reform and its consequences for their multi-billion dollar industry. Although few of these uncertainties have been resolved with any clarity at the time of this writing, below I aim to situate these just-enacted allowances of recreational use within the broader history of U.S. and hemispheric drug regulation, suggesting a framework for additional reform. Having advocated elsewhere for selective legalization of illicit drugs, starting with marijuana, here I address the process of that reform. I suggest the natural order is that states, having first vilified and criminalized marijuana, should lead the way toward rational drug policy. Additionally, informed by that history, I address the appropriate responsive role of the federal government that is busily conducting the failed War on Drugs. Given the interconnectedness of Mexico and the Mexican cartels in the illicit drug trade, and, for Mexico, in the racialized origins of U.S. marijuana prohibition in the first instance, I also situate both Mexican drug policy and the Mexican cartels within U.S. reform that steers us away from the present course of a bloody war on Mexican streets and mass incarceration of communities of color in the United States. Although dismissed by some as intended to launch a stoner jubilee, legalizing recreational use carries the potential to reverse these seemingly intractable trajectories of national and hemispheric violence and oppression. When the smoke clears, we may look back years from now on the moral courage and vision of voters that helped point the nation on a different path from its last 100 years' failed journey.

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<sup>1</sup> Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, at P15.

## I. DOMESTIC REGULATION OF MARIJUANA

*A. The History of U.S. Marijuana Regulation*

As I documented in my book *Run for the Border*,<sup>2</sup> U.S. marijuana regulation followed the same route as regulation of opiates and cocaine, each of them racially constructed as threatening public safety in the hands of users of color. In the late 1800s and early 1900s, over-the-counter medicines routinely included opiates, causing widespread addiction.<sup>3</sup> But it was hysteria over the predominantly male Chinese immigrant workers in Western U.S. Chinatowns smoking opium that led to the drug's prohibition.<sup>4</sup> Fears spread that Chinese men were seducing white women with opium, causing San Francisco to ban opium smoking in the 1870s and the federal government to join the regulatory bandwagon with the 1909 Opium Exclusion Act, banning the import of opium processed for smoking, and the 1914 Harrison Narcotics Act, taxing and restricting the distribution of morphine and other opiates (without mentioning marijuana) to just physicians, dentists, and veterinarians.<sup>5</sup> The federal Harrison Act encompassed cocaine as well, prompted by similar racialized hysteria—but situated in the South—of “black cocaine ‘fiends’ . . . raping white women or going on murderous sprees while they were high on the drug” that reputedly gave them “superhuman powers.”<sup>6</sup>

Prejudices against both blacks and Mexicans merged to ensure similar regulation of marijuana. Mexican laborers in the Southwest, already viewed in demeaning terms as lazy, criminally minded, and of lesser intellect,<sup>7</sup> became associated with marijuana smoking as a catalyst for their supposed bad behavior. As was contended on the floor of the Texas Senate in the early 1900s, “[a]ll Mexicans are crazy, and this stuff

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<sup>2</sup> STEVEN W. BENDER, *RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.-MEXICO BORDER CROSSINGS* (2012) [hereinafter *RUN FOR THE BORDER*].

<sup>3</sup> *Id.* at 96.

<sup>4</sup> See generally DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 70, 71 (2007).

<sup>5</sup> *Id.* at 71; Harrison Anti-Narcotic Act, ch. 1, 38 Stat. 785 (1914) (requiring registration and a special tax to produce or dispense opium or coca leaves or their derivatives).

<sup>6</sup> PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 44 (2009); see also PROVINE, *supra* note 4, at 76.

<sup>7</sup> STEVEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* 11 (2003) (detailing derogatory Latino/a stereotypes).

[marijuana] is what makes them crazy.”<sup>8</sup> Similarly, black marijuana smokers in the South, particularly residents of New Orleans,<sup>9</sup> ignited racialized fears of violent crime. Somehow marijuana was scapegoated as prompting murder, rape, and mayhem among blacks in the South, Mexican Americans in the Southwest, and disfavored white immigrants from laboring classes—with marijuana blamed for the seduction of white girls by black men and for violent crimes committed by these groups.<sup>10</sup> States and local governments were the first to react, with California prohibiting the sale or possession of marijuana in 1913<sup>11</sup> and the city of El Paso, Texas, doing so in 1914.<sup>12</sup> By 1931, all but two states west of the Mississippi outlawed marijuana, with every state prohibiting the drug by 1937.<sup>13</sup> Louisiana, for example, criminalized the possession or sale of marijuana in 1927 with a six-month prison sentence or a \$500 fine.<sup>14</sup> Between 1933 and 1937 nearly all the states enacted the enforcement-minded Uniform Narcotic Drug Act, encompassing marijuana, to further boost the uniformity and strength of state narcotics policing.<sup>15</sup>

With the states having taken the lead, federal prohibition soon followed, especially as Mexican laborers were further vilified during the economic woes of the Great Depression.<sup>16</sup> Congress had regulated dangerous drugs early on, for purposes of clear labeling of medicine, under the 1906 Pure Food and Drug Act. In 1915, the U.S. Secretary of Agriculture declared marijuana injurious to health under this law and denied its importation.<sup>17</sup>

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<sup>8</sup> BUTLER, *supra* note 6, at 45.

<sup>9</sup> JEROME L. HIMMELSTEIN, *THE STRANGE CAREER OF MARIHUANA: POLITICS AND IDEOLOGY OF DRUG CONTROL IN AMERICA* 52 (1983).

<sup>10</sup> See PROVINE, *supra* note 4, at 84.

<sup>11</sup> *Gonzales v. Raich*, 545 U.S. 1, 5 (2005); *but see* RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 39 (1974) (specifying 1915 as the year California passed anti-marijuana legislation, and noting that in the various state adoptions, “[p]ointed references were made to the drug’s Mexican origins, and sometimes to the criminal conduct which inevitably followed when Mexicans used the ‘killer weed’”).

<sup>12</sup> HIMMELSTEIN, *supra* note 9, at 23.

<sup>13</sup> *RUN FOR THE BORDER*, *supra* note 2, at 97.

<sup>14</sup> Kasey C. Phillips, Comment, *Drug War Madness: A Call for Consistency Amidst the Conflict*, 13 *CHAP. L. REV.* 645, 651 (2010).

<sup>15</sup> BONNIE & WHITEBREAD, *supra* note 11, at 80, 90 (describing how the Act’s marijuana prohibition, while supplemental to the main body of the uniform law, led to marijuana’s treatment as a narcotic, in the same way as opiates and cocaine, in every state).

<sup>16</sup> PROVINE, *supra* note 4, at 82.

<sup>17</sup> HIMMELSTEIN, *supra* note 9, at 23 (stating that based on a complaint from

But Congress first prohibited marijuana years later in 1937, on the heels of the exploitative film *Reefer Madness* (1936), originally released under the name *Tell Your Children* and now a cult favorite on college campuses, which depicted marijuana users as murderous fiends.<sup>18</sup> The Hearst newspaper empire fueled the frenzy with headlines warning that “Marihuana Makes Fiends of Boys in 30 Days,” and “Hasheesh Goads Users to Blood Lust.”<sup>19</sup> Appearing in 1936, one Hearst story published under the headline “Murders Due to “Killer Drug” Marihuana Sweeping the United States” claimed that “[m]urders, slaughterings, cruel mutilations, [and] maimings, done in cold blood [were increasing], as if some hideous monster was amok in the land[.]”<sup>20</sup> The story attributed “much of the violence” to the “roadside weed” of marijuana, alleging the addicted “become bestial demoniacs, filled with a mad lust to kill.”<sup>21</sup> Calling the drug a “ghastly menace” and an “unspeakable scourge” more vicious than heroin, the film *Reefer Madness* contended smoking marijuana was “destroying the youth of America” and causing “acts of shocking violence.”<sup>22</sup> Focusing on white users, the film invoked the then prevailing construction of marijuana as a menace to upwardly mobile white youth using a drug society negatively associated with subordinate users within black and Mexican communities.<sup>23</sup>

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the city of El Paso, which prohibited marijuana in 1914, the federal government, in 1915, banned import of marijuana for nonmedical purposes pursuant to the 1906 Food and Drug Act; still marijuana was readily grown domestically); see also BONNIE & WHITEBREAD, *supra* note 11, at 23 (describing how El Paso’s sheriff convinced the secretary of agriculture to declare cannabis injurious to health under this law when it is used for non-medicinal purposes, and how the U.S. treasury secretary therefore denied further importation of marijuana from Mexico). Congress, in section 8 of the 1906 Food and Drug Act, had included cannabis in the list of ingredients, along with such drugs as cocaine, heroin, and opium, that must be disclosed in product packaging.

<sup>18</sup> RUN FOR THE BORDER, *supra* note 2, at 97; Kevin Murphy & Dan Studney, *Reefer Madness History*, REEFER-MADNESS-MOVIE.COM, <http://www.reefermadness.org/writers/authors.html> (last visited May 3, 2013).

<sup>19</sup> JEFFREY MATTHEW LONDON, HOW THE USE OF MARIJUANA WAS CRIMINALIZED AND MEDICALIZED, 1906–2004: A FOUCAULTIAN HISTORY OF LEGISLATION IN AMERICA 66 (2009).

<sup>20</sup> JOHN GELUARDI, CANNABIZ: THE EXPLOSIVE RISE OF THE MEDICAL MARIJUANA INDUSTRY 27 (2010).

<sup>21</sup> *Id.*

<sup>22</sup> See *Reefer Madness* (Motion Picture Ventures 1936) (original title: *Tell Your Children*); see generally *Reefer Madness (1936): Review Summary*, N.Y. TIMES, <http://movies.nytimes.com/movie/40777/Reefer-Madness/overview> (last visited Apr. 3, 2013).

<sup>23</sup> See PROVINCE, *supra* note 4, at 86; see also HIMMELSTEIN, *supra* note 9, at 51–52, 54, 66 (tracking the evolution of negative perceptions of marijuana and

Bolstering its claim of menace with flimsy causal evidence of a marijuana smoker who killed his family of five with an axe,<sup>24</sup> the film embodied the hysteria of the moment that helped prompt federal legislation. Similarly, constructing marijuana during the same period as a peril to white youth, Harry Anslinger, the influential federal Narcotics Bureau commissioner, called the drug an “assassin of youth” that was “as hellish as heroin.”<sup>25</sup> Mexican laborers were nonetheless implicated by critics, seen by demagogues as the “carriers” and “seducers” of this looming “infection” of U.S. youth.<sup>26</sup>

Modeled after the Harrison Act, the federal Marihuana Tax Act of 1937 “banned unlicensed and nonmedical uses” of marijuana as a direct result from this demonization.<sup>27</sup> Yet doctors could prescribe and others could grow marijuana, so long as they paid a licensing fee.<sup>28</sup> Disdaining any doctor-patient confidentiality, the Act required licensed physicians to supply the federal government with each patient’s name and the nature of the medical condition justifying the marijuana prescription.<sup>29</sup> Overall, the cumbersome bureaucracy, described as a “maze of affidavits, depositions, sworn statements, and constant Treasury Department police inspection[s]”<sup>30</sup> of licensees, and the taxes imposed under the 1937 Act, stifled the lawful marijuana trade.<sup>31</sup> Later, the 1951

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their effect on federal regulation, from the initial stereotypes focused on its prompting of violence among black, Mexican, and poor white immigrant users, to its spread to white youth, while maintaining its reputation as a “killer weed”). Himmelstein suggests that because the perception of marijuana use became a “national menace[,]” “[t]he Marihuana Tax Act was passed not to punish Mexican users but to save youthful [white] ones.” *Id.* at 66.

<sup>24</sup> See GELUARDI, *supra* note 20, at 28 (describing the killer’s mental illness).

<sup>25</sup> PROVINE, *supra* note 4, at 96; ISAAC CAMPOS, HOME GROWN: MARIJUANA AND THE ORIGINS OF MEXICO’S WAR ON DRUGS 19 (2012) (describing the article Anslinger published titled “Marihuana: Assassin of Youth” that attributed more than two dozen cases of murder or sex attacks to marijuana, and discussing how in later years Anslinger retreated from his claims and began emphasizing the supposed role of marijuana as a gateway to harder drug use).

<sup>26</sup> HIMMELSTEIN, *supra* note 9, at 66–67.

<sup>27</sup> RUN FOR THE BORDER, *supra* note 2, at 97.

<sup>28</sup> Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (1937).

<sup>29</sup> KAYLA MORGAN, LEGALIZING MARIJUANA 35 (2011).

<sup>30</sup> ARTHUR BENAVIDE, DRUGS: AMERICA’S HOLY WAR 22 (2009).

<sup>31</sup> JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 25 (2d ed. 2012); *Gonzales v. Raich*, 545 U.S. 1, 11 (2005) (“[W]hile the Marihuana Tax Act did not declare the drug illegal *per se*, the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade.”).

Boggs Act and the 1956 Narcotics Control Act established and increased federal penalties for marijuana offenses,<sup>32</sup> the former prompting several states to increase their own penalties under existing marijuana and narcotic laws.<sup>33</sup> Today, by virtue of the federal Controlled Substances Act of 1970,<sup>34</sup> marijuana is a first-tier Schedule 1 controlled substance, classified with or above opiates, hallucinogens, and the most dangerous of illicit drugs.<sup>35</sup> Presumably believing the drug had no viable medical use and carried a high potential for abuse, Congress placed marijuana in this highest regulatory category,<sup>36</sup> while at the same time reducing the then-existing penalty for possession of small amounts of marijuana from a felony to a misdemeanor.<sup>37</sup>

### *B. The U.S. War on Drugs*

Given the racialized origins of our initial regulation of the core illicit drugs, it is not surprising that U.S. drug enforcement came to target communities of color.<sup>38</sup> Eventually, that enforcement would help define us in recent decades as a nation of mass incarceration that imprisons at the world's highest rate. Along with cocaine, marijuana plays an important role in our culture of

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<sup>32</sup> HIMMELSTEIN, *supra* note 9, at 23, 90.

<sup>33</sup> BONNIE & WHITEBREAD, *supra* note 11, at 204, 215.

<sup>34</sup> Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 et seq. (2006). Title II of the 1970 Drug Abuse Prevention and Control Act is known as the Controlled Substances Act. *Id.*

<sup>35</sup> *Id.* §§ 812(c)(1)(c)(10), 812(II)(a).

<sup>36</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1433 (2009); *Gonzales*, 545 U.S. at 14 (comparing Schedule II controlled substances that entail a high potential for abuse but have an accepted medical use); *see also* *Am. for Safe Access v. Drug Enforcement Admin.*, No. 11-1265, slip op. at 2, 4 (D.C. Cir. Jan. 22, 2013) (action by petitioners who unsuccessfully sought the rescheduling of marijuana by the Drug Enforcement Agency, as authorized under the Controlled Substances Act; court upheld the DEA's rejection of the petition, finding substantial evidence supported DEA conclusion that marijuana has no currently accepted medical use).

<sup>37</sup> HIMMELSTEIN, *supra* note 9, at 104. Under current federal law, possession is a misdemeanor carrying up to one year imprisonment and a minimum \$1000 fine, with greater sanctions for repeat offenders of a mandatory fifteen day jail term for a single prior conviction, with up to two years possible, and, for two prior convictions, a minimum jail term of ninety days, with a maximum of three years, along with increased minimum fines. 21 U.S.C. § 844(a) (2006).

<sup>38</sup> *Background and Current Data Collection Efforts: History of Racial Profiling Analysis*, RACIAL PROFILING DATA COLLECTION RESOURCE CTR., <http://www.racialprofilinganalysis.neu.edu/background/history.php> (last visited May 19, 2013).



incarceration that profiles black and Mexican users and dealers for punishment under the rallying cry of the War on Drugs. President Richard Nixon first invoked that military battle call in a 1971 press conference, naming drug use “public enemy number one.”<sup>39</sup> Yet it was President Ronald Reagan who most notably entered the fray by announcing he was “running up a battle flag”<sup>40</sup> on illicit drugs and by signing the federal Anti-Drug Abuse Act in 1986. Particularly targeting crack cocaine that poor urban black users favored over powder cocaine, the 1986 Act introduced a 100-to-1 sentencing disparity for crack over powder cocaine,<sup>41</sup> mandated draconian minimum drug sentences, and authorized more spending on enforcement. Police at all levels of government concentrated anti-drug initiatives in neighborhoods of color and along the U.S.-Mexico border, resulting in today’s staggeringly racialized prison population that Professor Michelle Alexander has labeled “The New Jim Crow.”<sup>42</sup>

Drug convictions play a decisive role in mass incarceration and the racialization of U.S. prisons. Most of the increase in the current U.S. prison population, which jumped from 300,000 to more than 2 million in less than thirty years, came from drug convictions.<sup>43</sup> For example, drug convictions “account[ed] for two-thirds of the rise in the federal inmate population and more than half of the [soaring state prison population] between 1985 and 2000.”<sup>44</sup> About one-half million U.S. residents today are imprisoned for drug offenses, representing an increase of 1,100%

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<sup>39</sup> *Thirty Years of America's Drug War: A Chronology*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited May 19, 2013).

<sup>40</sup> President Ronald Reagan, Remarks on Signing Executive Order 12368, Concerning Federal Drug Abuse Policy Functions (June 24, 1982) (available at THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=42671>).

<sup>41</sup> Press Release, Am. Civil Liberties Union, ACLU Releases Crack Cocaine Report, Anti-Drug Abuse Act of 1986 Deepened Racial Inequity in Sentencing (Oct. 26, 2006) (available at <http://www.aclu.org/drug-law-reform/aclu-releases-crack-cocaine-report-anti-drug-abuse-act-1986-deepened-racial-inequity>). The Fair Sentencing Act of 2010, signed by President Obama, reduced the disparity to 18:1. Press Release, Am. Civil Liberties Union, President Obama Signs Bill Reducing Cocaine Sentencing Disparity (Aug 3, 2010), <http://www.aclu.org/drug-law-reform/president-obama-signs-bill-reducing-cocaine-sentencing-disparity>.

<sup>42</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2, 4 (2010) (contending that the current mass imprisonment of African Americans is the next phase in the U.S. history of oppression, control, and subordination of African Americans, following slavery and Jim Crow laws).

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *Id.* at 59.

over the total in 1980 before Reagan took office.<sup>45</sup> Of the more than 31 million drug arrests since the inception of the War on Drugs, most were for mere possession rather than dealing drugs, and most involved marijuana—constituting almost 80% of the growth in 1990s drug arrests.<sup>46</sup> Marijuana alone accounts for about 750,000 annual U.S. arrests, most for possession; in 2007, for example, state and local police “arrested 872,721 people for marijuana offenses.”<sup>47</sup>

Despite studies confirming that white youth use marijuana to the same extent as black or Latino/a youth,<sup>48</sup> police long stand accused of targeting youth of color for traffic stops (known as Driving While Black or Driving While Hispanic), stop and frisk searches, and other encounters in their neighborhoods that lead to their disproportionate arrest. As reported by Human Rights Watch in 2000, African Americans constituted 80-to-90% of drug offenders imprisoned in seven states, and at least fifteen states imprisoned blacks on drug charges at rates of twenty to fifty-seven times greater than white men.<sup>49</sup> New York City notoriously targets blacks and Latinos/as who, despite constituting about half the city population, comprised 87.6% of the 40,383 arrested in 2008 for marijuana possession.<sup>50</sup> Police there focused disproportionately on young males of color with little or no criminal record, making most arrests in poor neighborhoods of color.<sup>51</sup>

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* For example, four of five drug arrests in 2005 concerned possession.

<sup>47</sup> MORGAN, *supra* note 29, at 72; *About Marijuana*, NORML, <http://norml.org/marijuana> (last visited May 19, 2013).

<sup>48</sup> BENDER, *supra* note 7, at 45.

<sup>49</sup> ALEXANDER, *supra* note 42, at 96.

<sup>50</sup> HARRY G. LEVINE, *NEW YORK CITY'S MARIJUANA ARREST CRUSADE . . . CONTINUES* 6 (2009).

<sup>51</sup> Robert Weisberg, *Approaches to Assessing the Effects of Marijuana Criminal Law Repeal in California*, 43 MCGEORGE L. REV. 1, 16 (2012). Ongoing efforts to challenge certain stop and frisk practices of New York City police targeting black and Latino/a residents resulted in a preliminary injunction. *Ligon v. City of New York*, No. 12 Civ. 2274 (S.D.N.Y. Jan. 8, 2013). Police in the state of Washington also arrested blacks and Latinos/as for marijuana possession at disproportionate rates. See HARRY G. LEVINE ET AL., 240,000 MARIJUANA ARRESTS: COSTS, CONSEQUENCES, AND RACIAL DISPARITIES OF POSSESSION ARRESTS IN WASHINGTON, 1986–2010, at 3 (2012) (finding that from 2001 to 2010, despite constituting just 14% of the state population and using marijuana at lower rates than white youth, blacks and Latinos/as comprised 25% of those arrested in Washington for marijuana possession); see also JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 44 (2012) (noting that in addition to the risk factor of race, most U.S.

Despite having been decriminalized or legalized by some states and cities,<sup>52</sup> marijuana possession remains a serious crime—a potential felony offense—in other states. In some, first-time possession is a felony while a few states elevate a second offense to a felony regardless of the amount possessed. Alabama’s second-strike law, for example, resulted in the plea bargain and imprisonment for five years of an African American Vietnam veteran, arrested on a second offense of possessing a few marijuana joints worth \$10.<sup>53</sup> Even for lesser offenses, the prospect of probation often results in imprisonment for such subsequent minor infractions as missing an appointment with a probation officer. Penalties in many states stiffen when marijuana is discovered near a school, which is more likely in crowded urban neighborhoods.<sup>54</sup> Possession of one ounce or more can bring felony charges—in Oregon, for example, the first state to decriminalize possessing a small quantity of marijuana, possession of an ounce or more is a felony punishable by up to ten years imprisonment.<sup>55</sup> Marijuana users, then, are no strangers to prison walls, although prison sentences tend to be rare for users possessing small amounts.<sup>56</sup>

### *C. Trends of State Decriminalization and Legalization*

As detailed above, the “Reefer Madness” era of criminalization by the states and the federal government coincided with fears of maniacal crime precipitated by Mexican and black marijuana smokers or enablers of white users. By the 1960s and 1970s, usage became more widespread among white U.S. residents,

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marijuana arrests are of males and youth).

<sup>52</sup> See *infra* part I.C. Here I refer to decriminalization primarily to address reductions in criminal penalties, typically removing the prospect of incarceration and levying only a criminal fine. Legalization, in contrast, refers to removal of all criminal or civil penalties, although use of marijuana may still be criminalized in some applications, such as when used by minors, in public places, or before driving.

<sup>53</sup> Steven W. Bender, *How Could We?: Regret and the Pursuit of Humanity* ch. 9 (unpublished manuscript).

<sup>54</sup> See, e.g., *Oregon Marijuana Law*, OR. ST. BAR, [http://www.osbar.org/public/legalinfo/1079\\_MarijuanaLaw.htm](http://www.osbar.org/public/legalinfo/1079_MarijuanaLaw.htm) (last updated Dec. 2011) (noting that in Oregon, while “[p]ossession of less than one ounce of marijuana is [only] a violation . . . if the possession is within 1000 feet of a school, the possession of less than one ounce is a Class C misdemeanor”).

<sup>55</sup> OR. REV. STAT. §§ 161.605, 475.864 (2011).

<sup>56</sup> CAULKINS ET AL., *supra* note 51, at 50.

especially on college campuses;<sup>57</sup> by 2009 “almost half of high school seniors, and 100 million current U.S. residents[,]” had smoked marijuana.<sup>58</sup> With this growth in usage both numerically and among middle-class whites, the societal image of marijuana users shifted away from Mexican laborers and other lower-class groups, fear of axe-wielding marijuana smokers faded, and pressure mounted to decriminalize marijuana possession.<sup>59</sup> As previously stated, the federal government did so in 1970, reducing possession of small amounts of marijuana from a felony to a misdemeanor, as well as authorizing “expunction of the criminal records of [any] first-time” offender.<sup>60</sup> One commentator labeled this federal decriminalization the “‘whitening’ of [the] marijuana use dilemma.”<sup>61</sup>

The first evident trend of state decriminalization/legalization found several states in the late 1960s and early 1970s reducing penalties for possession of small, user amounts of marijuana, typically from felonies down to misdemeanors.<sup>62</sup> Having prohibited marijuana in 1935, Oregon was the first state to more fully decriminalize possession of small amounts for recreational use, mandating punishment by fine rather than jail under 1973 legislation, unless possessed near a school. State and local decriminalization efforts continued into the 2000s, with examples such as Massachusetts voters approving a ballot initiative (the Sensible Marijuana Policy Initiative) in 2008 to replace criminal penalties with a \$100 fine for possession of an ounce or less, Colorado lowering penalties for possession in 2010, and then California Governor Arnold Schwarzenegger signing legislation in 2010 reducing possession of small amounts of marijuana from a misdemeanor to an infraction akin to a traffic ticket, coming just one month before a failed ballot initiative to legalize recreational

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<sup>57</sup> See Marc Mauer, Welcome Dinner: “The Drug War and Its Social Implications”, Address at the Chapman Law Review Symposium: Drug War Madness: Policies, Borders & Corruption (Jan. 28, 2010), in 13 CHAP. L. REV. 695, 701 (2010) (stating that “[w]e have marijuana being celebrated in popular culture”).

<sup>58</sup> RUN FOR THE BORDER, *supra* note 2, at 99.

<sup>59</sup> HIMMELSTEIN, *supra* note 9, at 142–43.

<sup>60</sup> *Id.* at 104.

<sup>61</sup> Thomas J. Moran, Note, *Just a Little Bit of History Repeating: The California Model of Marijuana Legalization and How it Might Affect Racial and Ethnic Minorities*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 557, 568 (2011).

<sup>62</sup> See BONNIE & WHITEBREAD, *supra* note 11, at 278–79 (supplying U.S. map charting dates of penalty reductions).

marijuana in the state.<sup>63</sup>

Relatedly, several localities either formally or informally deemphasized criminal enforcement of marijuana possession, at least for white users.<sup>64</sup> Long recognized in the practices of drug enforcement officers to concentrate policing in neighborhoods of color while allowing the so-called dorm room drug dealer, and his purchasers, free reign on college campuses,<sup>65</sup> officers might even more selectively target drivers of color for traffic stops, with relative impunity for their racial profiling.<sup>66</sup> Still, some jurisdictions formally deemphasized enforcing laws against marijuana possession by users of any background. For example, Denver voters approved an initiative in 2007 deeming marijuana the city's "lowest" police priority.<sup>67</sup> Before adoption of the Washington state legalization initiative in 2012, Seattle accorded marijuana possession the lowest local enforcement priority, with the Seattle city attorney announcing: "Enforcement of 'personal use' possession is the lowest priority for both the Seattle City Attorney's Office and the Seattle Police Department. I don't prosecute simple marijuana possession cases," while warning that "marijuana possession is still a crime, and people risk arrest and search incident to arrest for possession, especially people who choose to flaunt marijuana in the presence of law enforcement."<sup>68</sup> California ushered in the next phase of decriminalization/legalization addressing medicinal uses of

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<sup>63</sup> David Abel, *Voters Approve Marijuana Law Change*, BOS. GLOBE, Nov. 5, 2008, at B6; Jessica Fender, *More Rehab, Less Jail in Drug Reform*, Feb. 24, 2010, DENVER POST, at B01; RUN FOR THE BORDER, *supra* note 2, at 169.

<sup>64</sup> See, e.g., Michael Berkey, Note, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L., POL'Y & ETHICS J. 417, 428 (2011) (discussing the use of discretion in pursuing those who violate drug laws out of medical necessity).

<sup>65</sup> See generally A. RAFIK MOHAMED & ERIK D. FRITSVOLD, DORM ROOM DRUG DEALERS: DRUGS AND THE PRIVILEGES OF RACE AND CLASS 2, 7 (2010).

<sup>66</sup> BENDER, *supra* note 7, at 51, 52, 54–55 (detailing the leeway accorded to police by the Supreme Court to racially profile drivers when making traffic stops of those who have otherwise committed some traffic infraction).

<sup>67</sup> David B. Kopel & Trevor Burrus, *Reducing the Drug War's Damage to Government Budgets*, 35 HARV. J.L. & PUB. POL'Y 543, 545 (2012).

<sup>68</sup> *What Are Seattle's Marijuana Laws?*, SEATTLE 911 (Sept. 2, 2010), <http://blog.seattlepi.com/seattle911/2010/09/02/what-are-seattles-marijuana-laws/>. It is likely no coincidence that the largest cities of both Colorado and Washington deemphasized marijuana enforcement as a prelude to legalization. Whether Seattle police continued to target marijuana users of color, despite the low priority accorded possession crimes, is unclear, since the study discussed above, which found that Washington police disproportionately arrested users of color, only addressed a time period ending in 2010. LEVINE ET AL., *supra* note 51.

marijuana.<sup>69</sup> Before that, the federal government flirted with acknowledging marijuana's medical uses. Although its 1937 Marihuana Tax Act recognized the medicinal uses of marijuana in allowing doctors to prescribe it, eventually Congress was persuaded otherwise.<sup>70</sup> As discussed above, in designating marijuana as a Schedule I controlled substance in 1970, Congress apparently believed it offered no medicinal value.<sup>71</sup> Yet the federal government subsequently softened its view on the absence of medical benefits of cannabis based on reports the drug eased nausea of patients undergoing chemotherapy.<sup>72</sup> Notably, President Carter created a narrow compassionate use program that supplied marijuana grown at the University of Mississippi to a limited number of patients for therapeutic purposes.<sup>73</sup> Only thirty-six patients enrolled and the program terminated new applications for federal medical marijuana in 1992.<sup>74</sup> The federal government also supplies marijuana to the few participants in Food and Drug Administration-approved research studies.<sup>75</sup> These narrow allowances did nothing, however, to address the broader medical needs of U.S. residents. Recognizing the potential medical benefits of marijuana for patients suffering pain or nausea, California became the first state to legalize possession of marijuana for medicinal purposes.<sup>76</sup> In 1994, and again in 1995, the California legislature passed bills authorizing marijuana possession for medical purposes, in one case specifying only four eligible medical conditions of "AIDS, glaucoma, cancer, and multiple sclerosis[.]" but Republican Governor Pete Wilson vetoed them both.<sup>77</sup> Circumventing this legislative roadblock, California voters enacted Proposition 215, the Compassionate Use Act of 1996, the next year, with a majority vote of 56%, authorizing marijuana use for medicinal purposes.<sup>78</sup> Proposition

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<sup>69</sup> Mikos, *supra* note 36, at 1427–28; see also Michael Vitiello, *Why the Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 MCGEORGE L. REV. 63, 66–70 (2012).

<sup>70</sup> Deborah Garner, *Up In Smoke: The Medicinal Marijuana Debate*, 75 N.D. L. REV. 555, 558–59 (1999).

<sup>71</sup> Mikos, *supra* note 36, at 1433.

<sup>72</sup> Vitiello, *supra* note 69, at 65.

<sup>73</sup> Mikos, *supra* note 36, at 1433.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1433–34 (remarking on the limited number of such approved federal research projects).

<sup>76</sup> Berkey, *supra* note 64, at 428–29.

<sup>77</sup> Vitiello, *supra* note 69, at 66.

<sup>78</sup> Berkey, *supra* note 64, at 428–29.

215 was phrased broadly to reach a number of medical conditions—referring explicitly to “cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, [and] migraine” and specifying a catch-all for “any other illness for which marijuana provides relief.”<sup>79</sup> As the first foray into legalization, the initiative suffered from a number of drafting lapses, such as failing to specify from where patients could obtain the marijuana their doctor might recommend.<sup>80</sup> Moreover, although the initiative supplied a defense to charges of possessing and cultivating marijuana, it did not address the state crime of transporting marijuana. Although presumably a patient might grow her own and use it, without need for transport, California’s legislature eventually remedied this gap by supplying medical users a statutory defense to transporting marijuana.<sup>81</sup>

Following California’s lead, eighteen states and the District of Columbia have authorized medical marijuana, most of them by voter initiative rather than by legislation.<sup>82</sup> Most of these states allow home cultivation by patients,<sup>83</sup> with some supplying marijuana through private dispensaries. All the states require the medical user to obtain a physician’s recommendation of marijuana treatment, and tend to specify a list of qualifying medical conditions that produce pain, nausea, or seizures.<sup>84</sup> All the states except California restrict the quantity the patient may

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<sup>79</sup> CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (2007); Vitiello, *supra* note 69, at 67.

<sup>80</sup> Vitiello, *supra* note 69, at 67.

<sup>81</sup> *Id.* at 67–68.

<sup>82</sup> In order of adoption, California (1996), Oregon (1998), Washington (1998), Alaska (1998), Maine (1999), Colorado (2000), Hawaii (2000), Nevada (2000), Montana (2004), Vermont (2004), Rhode Island (2006), New Mexico (2007), Michigan (2008), New Jersey (2010), Arizona (2010), Delaware (2011), Connecticut (2012); and Massachusetts (2012). 18 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Feb. 22, 2013); *see also* GELUARDI, *supra* note 20, at 48 (noting Maine, New Jersey, New Mexico, Rhode Island, and Vermont adopted their medical marijuana laws by legislation).

<sup>83</sup> GELUARDI, *supra* note 20, at 48.

<sup>84</sup> Mikos, *supra* note 36, at 1428. The California courts have limited the protection of the medical marijuana law to public enforcement against users, thus allowing an employer to fire an employee who failed a drug test despite having qualified for medical marijuana. *Ross v. Ragingwire Telecomms.*, 174 P.3d 20, 2030 (Cal. 2008) (rejecting allegation that discharging the employee, who used medical marijuana for strain and muscle spasms in his back, violated the protection of disabilities under the California Fair Employment and Housing Act).

possess.<sup>85</sup> Some states, such as Oregon, do not place age restrictions on medical marijuana use.<sup>86</sup>

The final phase of state decriminalization/legalization, authorizing marijuana for recreational use without criminal sanction or even a fine, began with a 1975 ruling by the Alaska Supreme Court.<sup>87</sup> Relying on the state constitution's right to privacy, the court legalized the growing of personal quantities of marijuana in one's home.<sup>88</sup> Over the years, voters in a few states considered, but rejected, ballot initiatives legalizing recreational user quantities of marijuana, with California voters defeating a 2010 initiative that garnered 46% of the vote—the same percentage of U.S. residents polled in October 2010 who supported legalization to constitute the most support polled nationally to that date.<sup>89</sup> A late 2012 survey found support on the upswing, with 51% of U.S. residents favoring legalization, and 64% believing that states should dictate marijuana policy over the federal government.<sup>90</sup> Even greater public support underlies medical marijuana, with more than four out of five U.S. residents favoring legalization for medical use.<sup>91</sup> Not surprisingly, the first recreational authorizations came not from the federal government but the states, and not from timid legislators but from the direct democracy of the ballot initiative.<sup>92</sup>

Passed by voters in Colorado and Washington in the 2012 election, ballot initiatives in both states legalized recreational marijuana and garnered national attention.<sup>93</sup> Washington's

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<sup>85</sup> See *Gonzales v. Raich*, 545 U.S. 1, 31 n.41 (2005) (discussing how, under state law, a California medical marijuana patient may possess whatever quantity is necessary to satisfy his medical necessity).

<sup>86</sup> OR. REV. STAT. § 475.309(3) (2009).

<sup>87</sup> *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

<sup>88</sup> *Id.* at 511 (concluding that although there is no fundamental constitutional right to possess marijuana in Alaska, special protection attaches to privacy in the home as a situs of privacy, in contrast to the minimal privacy interest while driving; therefore adults have a constitutional right to possess marijuana in the privacy of their homes but not in public nor for purposes of sale); *CAULKINS ET AL.*, *supra* note 51, at 215. But see *State v. Kantner*, 493 P.2d 306, 308–10 (Haw. 1972) (rejecting the claim that the Hawaii statute criminalizing marijuana possession violated guarantees of equal protection, due process, and the fundamental right to privacy).

<sup>89</sup> RUN FOR THE BORDER, *supra* note 2, at 169.

<sup>90</sup> David Downs, *Is It California's Turn to Legalize Marijuana?*, ALTERNET (Dec. 29, 2012), <http://www.alternet.org/it-californias-turn-legalize-marijuana>.

<sup>91</sup> Berkey, *supra* note 64, at 418.

<sup>92</sup> Healy, *supra* note 1.

<sup>93</sup> See Steven Nelson, *Young Adults Left Behind by Marijuana Legalization in Colorado, Washington*, U.S. NEWS & WORLD REP. (Jan. 15, 2013), <http://www.us>



Initiative 502,<sup>94</sup> approved by 55.7% of voters, legalized up to one ounce of marijuana possession, 16 ounces of a solid product such as marijuana cookies or 72 ounces of marijuana infused liquid, for personal use by adults.<sup>95</sup> Minors under age twenty-one are denied possession, and adults cannot open or consume marijuana in view of the general public, nor drive under its influence.<sup>96</sup> The new Washington law requires purchase from a state-licensed retailer and disallows home cultivation.<sup>97</sup> Pending the licensing of producers and retailers, expected during the year 2013, and with growing unlicensed marijuana still a felony, a King County, Washington prosecutor suggested to prospective recreational users how they might lawfully acquire marijuana during the transition: “[i]f you stumble across some on the street or it falls from the sky, then you can have it.”<sup>98</sup> Washington’s medical marijuana law remains in effect, offering medical users the enhanced ability to possess up to 1.5 pounds as well as to grow their own marijuana.<sup>99</sup> At the same time, legalization of recreational use offers Washington medical marijuana patients

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news.com/news/articles/2013/01/15/young-adults-left-behind-by-marijuana-legalization-in-colorado-washington.

<sup>94</sup> Act effective Dec. 6, 2012, ch. 3, 2013 Wash. Sess. Laws 1, <http://www.leg.wa.gov/CodeReviser/documents/INITIATIVE502.SL.pdf>.

<sup>95</sup> *Id.* § 15, at 21; Paris Achen, *61 Local Pot Cases to Be Dismissed*, COLUMBIAN (Vancouver, Wash.), Dec. 6, 2012, at A1. As a practical matter, quantity limits are hard to enforce. Presumably they will apply most effectively at the point of sale, but there may not be any restriction on a purchaser returning at a different time to purchase more product. Can a recreational user effectively circumvent the legal limits if additional quantities are stored in different locations, or even at the same location if a shared residence with others who claim ownership of some of the marijuana?

<sup>96</sup> *Frequently Asked Questions About Implementing Initiative 502*, WASH. ST. LIQUOR CONTROL BOARD, [http://liq.wa.gov/marijuana/faqs\\_i-502](http://liq.wa.gov/marijuana/faqs_i-502) (last visited Apr. 10, 2013). In addition to constraints on use by employers, landlords may also enforce anti-smoking policies, and even broader prohibitions against any marijuana use may exist on any leased premises. See Bob Young, *Mercer Island Landlord Tries to Ban Pot in Apartment Building*, SEATTLE TIMES (Jan. 12, 2013, 8:16 PM), [http://seattletimes.com/html/localnews/2020120870\\_potban13m.html](http://seattletimes.com/html/localnews/2020120870_potban13m.html) (discussing how landlords have relied on federal law to ban tenant marijuana use, despite state legalization of medical and recreational marijuana).

<sup>97</sup> § 15, 2013 Wash. Sess. Laws, at 21.

<sup>98</sup> Alan Duke, *Pot Smokers Enter Legal Limbo in Washington, Colorado*, CNN, <http://www.cnn.com/2012/12/05/us/washington-marijuana-legalization/index.html> (last updated Dec. 7, 2012).

<sup>99</sup> *Frequently Asked Questions about Medical Marijuana (Cannabis) in Washington State*, WASH. ST. DEP’T OF HEALTH, <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/MedicalMarijuanaCannabis/GeneralFrequentlyAskedQuestions.aspx> (last visited Mar. 27, 2013).

protection against arrest in the first instance, assuming they fall below the quantity limits, in contrast to the affirmative defense for medical marijuana that may require the patient to hire a lawyer and defend herself in court.<sup>100</sup>

55% of Colorado voters approved its Amendment 64, The Regulate Marijuana Like Alcohol Act of 2012, authorizing possession by adults of up to one ounce and/or the cultivation of up to six cannabis plants in an enclosed, locked space.<sup>101</sup> Marijuana remains unlawful for those under age twenty-one, as does its open and public consumption.<sup>102</sup> The Colorado law explicitly leaves intact its prior allowance of medical marijuana use and distribution.<sup>103</sup>

The trend of state legalization is likely to continue, particularly if the federal government holds its fire against recreational suppliers and users. Youthful voters overwhelmingly support legalization.<sup>104</sup> Even the failed California legalization initiative of 2010 attracted 64% of voters aged 18 to 34.<sup>105</sup> A late 2012 national poll found support for legalization among those aged 18 to 29 ran 69% to just 29% opposed.<sup>106</sup> Surely, broader state legalization is assured as new youthful voters enter the ranks.

#### *D. The Interplay of Federal and State Regulation of Marijuana Use*

Legalization of recreational use by states collides with federal law in what has previously, and still mostly today, been a

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<sup>100</sup> David Bienenstock, *After Legalization, What's Next? Attorney Who Helped Free the Weed in Washington State Talks Strategy*, ALTERNET.ORG (Dec. 13, 2012), <http://www.alternet.org/drugs/after-legalization-whats-next-attorney-who-helped-free-weed-washington-state-talks-strategy>.

<sup>101</sup> COLO. CONST. art. 18, § 16(3)(a)–(b) (West 2012); *Ballot Measure: Colorado*, CNN POLITICS (Nov. 8, 2012), <http://www.cnn.com/election/2012/results/state/CO/ballot/01; Amendment 64: The Regulate Marijuana Like Alcohol Act of 2012, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL>, <http://www.regulatemarijuana.org/s/regulate-marijuana-alcohol-act-2012> (last visited Apr. 10, 2013).

<sup>102</sup> COLO. CONST. art. 18, §§ 16(1)(b)(II), (3)(d) (West 2012).

<sup>103</sup> *Id.* art. 18, § 16(7).

<sup>104</sup> Frank Newport, *Record-High 50% of Americans Favor Legalizing Marijuana Use*, GALLUP (Oct. 17, 2011), <http://www.gallup.com/poll/150149/record-high-americans-favor-legalizing-marijuana.aspx>.

<sup>105</sup> Martin D. Carcieri, *California's Proposition 19: Selective Prohibition and Equal Basic Liberties*, 46 U.S.F. L. REV. 689, 689–90, 692 (2012).

<sup>106</sup> Lucy Madison, *Voters Support Pot Legalization, Split on Same-Sex Marriage*, CBS NEWS (Dec. 5, 2012), [http://www.cbsnews.com/8301-34222\\_162-57557257-10391739/voters-support-pot-legalization-split-on-same-sex-marriage/](http://www.cbsnews.com/8301-34222_162-57557257-10391739/voters-support-pot-legalization-split-on-same-sex-marriage/).

longtime joint effort to interdict marijuana shipments and prosecute marijuana traffickers and users. The federal government concentrated on border crossings and interstate trafficking by major dealers, while states and local government caught both dealers and, mostly, users of illicit drugs.<sup>107</sup> California's legalization of medical marijuana in 1996 was the first rift in the federal-state anti-drug partnership.<sup>108</sup> A few months after the California vote, the Clinton Administration's drug czar announced a federal attack on medical marijuana on several fronts—by prosecuting suppliers of medical marijuana, threatening to revoke the federal prescription writing authority of any doctors recommending marijuana to their patients, and denying benefits such as federal licenses to medical marijuana users.<sup>109</sup> The Clinton Administration made good on its promise, filing lawsuits against six California medical marijuana suppliers in early 1998 contending their operation violated federal law.<sup>110</sup> Contradicting federal law, California allows medical marijuana patients and caregivers to grow marijuana collectively in cannabis cooperatives or clubs.<sup>111</sup> The Supreme Court ultimately weighed in to permit federal enforcement, ruling unanimously in 2001 that no defense of medical necessity existed under the federal Controlled Substances Act to protect these California cooperatives in their manufacture and distribution of

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<sup>107</sup> See *infra* text accompanying notes 138–43.

<sup>108</sup> Berkey, *supra* note 64, at 428–429.

<sup>109</sup> Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 637–38 (2011) [hereinafter *A Critical Appraisal*]; Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 567 (2010) (discussing how, by revoking the DEA registrations of physicians, the federal government could prevent them from prescribing other controlled substances with medical value). The Ninth Circuit Court of Appeals, however, found that revoking federal registration based on recommendations of marijuana for treatment would infringe on physicians' First Amendment rights, and it therefore upheld a permanent injunction against the federal government "revoking any physician class member's DEA registration [to prescribe controlled substances] merely because the doctor makes a recommendation for the use of medical marijuana based on a sincere medical judgment . . . ." *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002) (explaining the trial court's justification for granting the injunction as consistent with principles of federalism that leave the states as the primary regulators of professional conduct).

<sup>110</sup> Howard Mintz, *Clinton Administration Sues 6 Marijuana Clubs*, HEMP.NET (Jan. 9, 1998), <http://www.hemp.net/news/9801/980109ca.html>.

<sup>111</sup> Mikos, *supra* note 36, at 1432.

marijuana.<sup>112</sup>

By the time of the Court's decision, the Bush Administration had taken over the aggressive federal enforcement strategy against medical marijuana while other states continued to legalize medicinal use.<sup>113</sup> While running for the presidency, George W. Bush had cast medical marijuana as a state's rights issue, declaring "I believe each state can choose that decision as they so choose."<sup>114</sup> But as president, Bush's attorney general John Ashcroft raided medical marijuana cooperatives throughout California. In one example, armed federal Drug Enforcement Administration (DEA) agents stormed a Santa Cruz cooperative, holding patients at gunpoint while they destroyed the marijuana growing operation and arrested the operator.<sup>115</sup> The DEA raided almost two-hundred marijuana dispensaries in California, even warning landlords it would seize their real property if they did not evict dispensary tenants.<sup>116</sup> Attempting to stop these federal raids, two medical marijuana users filed suit against Ashcroft in 2002.<sup>117</sup> Angel Raich from Oakland, California, the named plaintiff, suffered from inoperable brain cancer and the other plaintiff, Diane Monson, used marijuana to treat her chronic pain.<sup>118</sup> Embraced by the federal Ninth Circuit, their argument looked to the localized nature of a plant grown and consumed entirely within California to challenge the federal government's reliance on interstate commerce to regulate marijuana.<sup>119</sup> But the Supreme Court, in a six-to-three decision, held in 2005 that Congress could prohibit local cultivation and use of marijuana, despite compliance with state law, because it nonetheless affects interstate commerce—the national black market for illicit drugs.<sup>120</sup> As the Court reasoned:

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<sup>112</sup> *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (lawsuit by federal government to enjoin distribution of medical marijuana by cooperative).

<sup>113</sup> BENAIE, *supra* note 30, at 53.

<sup>114</sup> *Id.* Conservative politicians and voters might also view marijuana as a matter of personal liberty beyond the reach of government, particularly when grown and used within the home, consistent with the privacy views of the Alaska Supreme Court discussed above. *Supra* note 87.

<sup>115</sup> BENAIE, *supra* note 30, at 53.

<sup>116</sup> *A Critical Appraisal*, *supra* note 109, at 638.

<sup>117</sup> BENAIE, *supra* note 30, at 53–54; Christine Trudeau, *US Supreme Court Says No to Medical Marijuana*, CANNABIS CULTURE (June 6, 2005), <http://www.cannabisculture.com/articles/4376.html>.

<sup>118</sup> BENAIE, *supra* note 30, at 53–54.

<sup>119</sup> *Gonzales v. Raich*, 545 U.S. 1, 8–9 (2005).

<sup>120</sup> *Id.* at 22.

[o]ne need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana . . . locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.<sup>121</sup>

Although early into the Obama Administration the Bush-appointed head of the DEA continued to raid medical marijuana facilities in California, which by 2009 had over 700 medical marijuana collectives,<sup>122</sup> newly confirmed Attorney General Eric Holder announced in March 2009 that the Department of Justice would not prosecute medical marijuana dispensaries conforming to state law.<sup>123</sup> Despite an accompanying lull in federal DEA raids, they resumed in August 2009, prompting Holder's office to instruct federal prosecutors to abandon pursuit of medical marijuana dealers operating in compliance with state law.<sup>124</sup> In a memorandum to U.S. attorneys, the federal deputy attorney general urged them to instead prosecute "significant traffickers of illegal drugs, including marijuana."<sup>125</sup> Consistent with this priority, the memorandum advised:

As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department [of Justice].<sup>126</sup>

But DEA raids of medicinal dispensaries continued.<sup>127</sup>

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<sup>121</sup> *Id.* at 28.

<sup>122</sup> Kreit, *supra* note 109, at 570.

<sup>123</sup> Phillips, *supra* note 14, at 671.

<sup>124</sup> *Id.* at 671–72.

<sup>125</sup> See Memorandum from David W. Ogden, Deputy Att'y Gen. to Selected U.S. Attorneys (Oct. 19, 2009), in *A Critical Appraisal*, *supra* note 109, at 667; see also *id.* at 643 (discussing the fragmentation of the Department of Justice, and the potential lack of influence over the decision-making of U.S. attorneys nationwide).

<sup>126</sup> *Id.* at 667–668.

<sup>127</sup> *Id.* at 646; Phillips, *supra* note 14, at 671–72.

Consistent with the widespread belief that many ostensibly medical users are gaming the system, proponents of these raids might reconcile the seeming federal schizophrenia by arguing that the federal government has remained resolute in pursuing what it believes are illegitimate fronts for recreational drug dealing that rely on the cover of medical marijuana dispensaries.<sup>128</sup> Additionally, even if the dispensaries cater to just medicinal users, they may catch the attention of federal prosecutors if they operate outside the bounds of state law authorizing only non-profit dispensaries. In California, for example, medical marijuana dispensaries may recoup only amounts “reasonably calculated to cover overhead costs and operating expenses[.]”<sup>129</sup> but many allegedly overreach, drawing a federal crackdown.<sup>130</sup>

The Obama Administration’s mixed record of alternatively tolerating and then pursuing medical marijuana dispensaries nonetheless accords state drug reform more leeway than enjoyed under the Bush and Clinton Administrations.<sup>131</sup> Yet legalization for recreational use may expose the limits of federal deference to state reform. As California voters were poised to vote on a 2010 initiative legalizing recreational use, that ultimately failed, Attorney General Holder warned that, if approved, the federal government would “vigorously enforce the [Controlled Substances Act] against those individuals and organizations that possess, manufacture or distribute marijuana for recreational use, even if such activities are permitted under state law[.]”<sup>132</sup>

Legalization of recreational marijuana use in Washington and Colorado drew the Obama Administration’s immediate attention. Speaking shortly after the election in 2012, Obama remarked on the need for a conversation on how to “reconcile a federal law

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<sup>128</sup> See Vitiello, *supra* note 69, at 81.

<sup>129</sup> EDMUND G. BROWN JR., ATT’Y GEN., CAL. DEPT’ OF JUSTICE, GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE 10 (Aug. 2008), [http://www.ag.ca.gov/cms\\_attachments/press/pdfs/n1601\\_medical\\_marijuanaguidelines.pdf](http://www.ag.ca.gov/cms_attachments/press/pdfs/n1601_medical_marijuanaguidelines.pdf).

<sup>130</sup> *Feds Target 71 Medical Marijuana Dispensaries in L.A. County*, L.A. TIMES (Sept. 25, 2012), <http://latimesblogs.latimes.com/lanow/2012/09/feds-target-71-medical-marijuana-dispensaries-in-la-county.html>. Arguably the aim of marijuana reform laws to deny or restrict profits is misplaced. Might allowing profits best incentivize local innovation in the growing and delivery of marijuana that may ultimately reduce competition from untaxed and unlawful sources?

<sup>131</sup> Phillips, *supra* note 14, at 665–72.

<sup>132</sup> Kopel & Burrus, *supra* note 67, at 562 (citation omitted).

that still says marijuana is a federal offense and state laws that say that it's legal[,]” while adding “[i]t would not make sense for us to see a top priority as going after recreational users in states that have determined that it's legal. . . . We've got bigger fish to fry.”<sup>133</sup>

In light of the above enforcement history and the leeway accorded Congress by the Supreme Court to proscribe marijuana, the discussion below addresses possible outcomes in the regulatory conflict over recreational use. First, in the hands of an executive so-inclined, the federal government could pursue and prosecute marijuana dispensaries whether they are state-owned or private, and whether they dispense medicinal or recreational marijuana. Both the Colorado and Washington recreational use laws contemplate the sale and taxation of marijuana through state licensed dispensaries.<sup>134</sup> Although this regulated private distribution avoids the direct involvement of the states in operating these dispensaries akin to state-run liquor stores, the federal government nonetheless could exert a variety of weapons over private distribution—either raiding, arresting, and prosecuting the proprietors, seizing all the proceeds of marijuana sales,<sup>135</sup> or threatening to withhold federal funding from states that authorize and license distribution centers, similar to how federal highway funds were used to coerce a uniform state drinking age. Moreover, the federal government might take the position that state involvement in licensing and taxing the production and sale of recreational marijuana constitutes trafficking under the federal Controlled Substances Act. In furtherance of that position, the federal government might threaten to prosecute individual state employees implementing the new allowances of recreational marijuana, or to seize the tax revenues the states generate.<sup>136</sup> Even the prospect of home-grown marijuana, allowed under the Colorado recreational initiative, does not escape the letter of federal law, which proscribes

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<sup>133</sup> Paul Armentano, *Will Obama Go After Legal Pot in Washington and Colorado?*, ALTERNET (Dec. 19, 2012), <http://www.alternet.org/print/drugs/will-obama-go-after-legal-pot-washington-and-colorado> (interview by Barbara Walters).

<sup>134</sup> *Id.*

<sup>135</sup> CAULKINS ET AL., *supra* note 51, at 186 (observing that thus far, the federal government has not seized the revenues of medical marijuana sales nor any of the tax revenues they generate).

<sup>136</sup> Tim Dickinson, *Obama's Pot Problem*, ROLLING STONE (Dec. 7, 2012), <http://www.rollingstone.com/politics/news/obamas-pot-problem-20121207>.

knowingly manufacturing marijuana or other controlled substances, such as by a methamphetamine lab, whether for product resale or personal use.<sup>137</sup>

Apart from pursuing the relatively small universe of marijuana distributors, presumably the federal government could target individual marijuana smokers, whether medicinal or recreational. This approach, however, is unrealistic. Despite the existence of hundreds of cannabis cooperatives in California alone, the number of medical marijuana users is staggering in comparison—by 2009 an estimated 300,000 to 400,000 qualified patients in California.<sup>138</sup> Moreover, the potential number of recreational marijuana smokers in Colorado and Washington might far exceed this figure. The federal government is practically unable to pursue individual users, concentrating on what Obama termed the “bigger fish” of drug traffickers, and leaving arrests for user possession to the states and local governments. Indeed, roughly 99% of U.S. marijuana arrests are at the hands of state and local officials, not the federal government.<sup>139</sup> Most of these arrests stem from searches in the course of routine traffic offenses, or from observations in public places, or stop and frisk searches on the street.<sup>140</sup> For these encounters, the federal manpower needed to duplicate state and local police forces is not realistic.

Small-scale home growing operations are equally infeasible for federal detection and enforcement. Although the DEA raided the home of co-plaintiff Diane Monson that prompted the *Gonzales* litigation discussed above, it did so in concert with county deputy sheriffs who presumably believed her grow operation violated state law.<sup>141</sup> Indeed, after their investigation, county officials determined her marijuana use was permissible under California law.<sup>142</sup> Therefore, should the federal government aggressively pursue state licensed dispensaries, the states might consider legalizing home growing of marijuana that is less visible and susceptible to federal enforcement and better protected by privacy

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<sup>137</sup> Mikos, *supra* note 36, at 1451.

<sup>138</sup> Kreit, *supra* note 109, at 570.

<sup>139</sup> Berkey, *supra* note 64, at 436–37.

<sup>140</sup> CAULKINS ET AL., *supra* note 51, at 43 (stating that most arrests are by uniformed police rather than by drug detectives, and arise from ordinary actions such as traffic stops, stop and frisks, and from other calls, such as domestic disturbances, that lead to discovery of marijuana and the charging of a drug offense when other charges don't materialize).

<sup>141</sup> *Gonzales v. Raich*, 545 U.S. 1, 7 (2005).

<sup>142</sup> *Id.*



arguments than purchasing from government-licensed dispensaries. The downside for states interested in revenue is that home-grown marijuana might escape taxation unless penalties for tax avoidance mirror current penalties for unlawful cultivation.<sup>143</sup>

Although the federal government may lack the means to prosecute recreational or medical users, other federal sanctions might apply. For example, "the Department of Housing and Urban Development (HUD) [might] deny federal housing subsidies to medical marijuana users[.]"<sup>144</sup> assuming it can somehow determine the identity of those individuals whether through state registration records, as in the case of some medical marijuana recipients, or drug tests for recreational users who would not be protected from such federal consequences. Similarly, federal employers could lawfully test prospective or current employees, and the federal government could condition licenses, such as those for pilots, on drug-free testing. Impacting dispensaries, the federal government also denies marijuana outlets the income tax deduction otherwise available to lawful businesses for ordinary business expenses such as operating and production costs.<sup>145</sup>

In the most thorough analysis of the marijuana enforcement relationship between the federal and state government, as examined through the lens of medical marijuana, Professor Robert Mikos posits that the federal government cannot permissibly force the states to criminalize marijuana.<sup>146</sup> Relying on the constraints of the anti-commandeering principle, Mikos contends states can refuse to punish behavior the federal government deems objectionable, letting the federal government fight its own battle.<sup>147</sup> Conversely, Congress could, should it choose, constitutionally prevent the states from prohibiting and criminalizing marijuana use, although the federal government appears completely disinterested in this outcome.<sup>148</sup> Mikos has

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<sup>143</sup> Query whether federal officials might obtain these taxation records as more pointed indications of unlawful cultivation violating federal law.

<sup>144</sup> *A Critical Appraisal*, *supra* note 109, at 634.

<sup>145</sup> Vitiello, *supra* note 69, at 71–72; *see also* CAULKINS ET AL., *supra* note 51, at 189 (discussing how the federal tax code denies deductions to businesses that traffic in Schedule I or II drugs).

<sup>146</sup> Mikos, *supra* note 36, at 1451, 1453.

<sup>147</sup> *Id.* at 1451.

<sup>148</sup> *Id.* One of the arguments against marijuana legalization the United States relies upon is its obligations under international treaties such as the

also opined on whether federal criminalization of marijuana somehow preempts states from legalizing and facilitating the sale of recreational marijuana in the manner of Colorado and Washington.<sup>149</sup> Suggesting that these state laws do not interfere with federal law, Mikos argued that legalization laws, by imposing age limits and restricting sales to state-licensed vendors, actually serve a kindred purpose with the federal law in limiting marijuana consumption.<sup>150</sup> Others may disagree and plausibly suggest that freedom from arrest at the hands of state and local police, ready supply sources, possibly cheaper prices, and the prospect of feathering the state's tax coffers may encourage a culture of consumption. The reality, then, is that the question of federal preemption of state-supervised sale and collection of tax revenues is a closer case that may invite litigation. As the head of the Drug Policy Institute at the University of Florida opined in 2012 on the prospect of a federal preemption lawsuit, "I would put money on it."<sup>151</sup> The potential exists for a federal lawsuit, filed in Colorado or Washington, to press for an injunction of state participation in distributing marijuana, and collecting tax revenues from that sale, contrary to federal law. A variety of dynamics could prompt such a lawsuit. For example, aggressive pursuit of state-licensed vendors of recreational marijuana by federal operatives (the DEA) might draw a federal preemption lawsuit to help hold those enforcers at bay while the courts consider what Congress intended for state regulation.

## II. HEMISPHERIC IMPLICATIONS OF LEGALIZING RECREATIONAL MARIJUANA USE

This section addresses the potential effect of legalization of recreational marijuana within the United States on the illicit drug trade from Mexico and the wrenching violence Mexico has

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1961 Single Convention on Narcotic Drugs. Yet international momentum appears to be gathering against marijuana enforcement, and the time may be ripe for a recasting of this treaty that the United States once championed.

<sup>149</sup> Armentano, *supra* note 133.

<sup>150</sup> *Id.* (also discussing a recent opinion of an Arizona superior court judge who suggested the existence of an additional aligned interest in that state legalization supports the federal aim of combatting the illegitimate trafficking of marijuana by cartels).

<sup>151</sup> Dickinson, *supra* note 136 (noting the remarks of Kevin Sabet, Director of the Drug Policy Institute at the University of Florida).

experienced over the last few years since its government essentially declared war on the Mexican cartels. Mexico's experience with regulating marijuana dates back over one-hundred years and reveals the interrelationship between the United States and Mexico on drug policy that consists lately of the U.S. government helping to wage a supply-side war in Mexico that is failing on both sides of the border.<sup>152</sup>

As documented by Isaac Campos, Mexico's prohibition of the marijuana trade dates to the vilification of marijuana users in Mexican society.<sup>153</sup> Campos details how as early as the late nineteenth century marijuana came to be seen in Mexico as the "hardest" of narcotics that could trigger maniacal violence among users.<sup>154</sup> Mexican newspapers sensationalized marijuana use, describing users as "furious madmen," and "as having degenerated into something akin to a wild beast."<sup>155</sup> Perhaps prompted by the association in Mexico of marijuana with users from the lower social class, these media reports depicted the alleged consequences of marijuana smoking in exaggerated detail.<sup>156</sup> Published by the *Mexican Herald*, an English-language newspaper based in Mexico City, and carried by several U.S. papers in the early twentieth-century, one influential story described the transformation of a smoker into a fiend with superhuman strength:

The dry leaves of marihuana . . . make the smoker wilder than a wild beast. It is said that immediately after the first three or four drafts of smoke smokers begin to feel a slight headache: then they see everything moving, and finally they lose all control of their mental faculties. Everything, the smokers say, takes the shape of a monster, and men look like devils. They begin to fight, and of course everything smashed is a monster "killed." . . . Not long ago a man who had smoked a marihuana cigarette attacked and killed a policeman and badly wounded three others. Six policemen were needed to disarm him and march him to the police station where he had to be put into a straightjacket. Such occurrences are frequent.<sup>157</sup>

Campos powerfully attributes this smear journalism within and emanating from Mexico as contributing to the drug's eventual

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<sup>152</sup> CAMPOS, *supra* note 25, at 193–94, 203, 230.

<sup>153</sup> *Id.* at 204–05.

<sup>154</sup> *Id.* at 5.

<sup>155</sup> *Id.* at 102.

<sup>156</sup> *Id.* at 204–05.

<sup>157</sup> *Id.* at 215.

reputation in the United States of causing “reefer” madness and violence, leading to U.S. regulation still effective today in most jurisdictions.<sup>158</sup>

As with these negative depictions originating in Mexico, Mexico’s prohibition of marijuana preceded the U.S. regulatory experience.<sup>159</sup> Similar to the history in the United States, Mexican states and local governments moved first against marijuana, prompting the federal government eventually to join the prohibition. As early as 1869, Mexico City banned the sale of marijuana, later increasing the penalty in 1908 to a mandatory jail term of thirty days.<sup>160</sup> After other Mexican cities and states prohibited marijuana, the federal government stepped in to ban its cultivation and sale in 1920, which Campos deemed “the true starting point of Mexico’s nationwide war on drugs.”<sup>161</sup> The Mexican government, therefore, beat the United States to the regulatory punch by more than a decade in restricting marijuana use on a national level.

Ironically, despite Mexico’s jumpstart in regulating marijuana, Mexicans ultimately came to supply much of today’s U.S. demand for marijuana (and many other illicit drugs).<sup>162</sup> As I detailed in *Run for the Border*, marijuana usage in Mexico remains considerably lower than in the United States—which consumes more than half of the world’s illegal narcotics.<sup>163</sup> The illicit production and transport of marijuana within Mexico emerged instead to feed the habit of the world’s largest drug addict residing next door.<sup>164</sup>

Existing together in a symbiotic relationship, Mexico has long supplied the United States with cheap labor and narcotics, and alcohol during the Prohibition era, with Mexico in return

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<sup>158</sup> *Id.* at 205.

<sup>159</sup> *Id.* at 4.

<sup>160</sup> *Id.* at 193–94.

<sup>161</sup> *Id.* at 181; but see MARÍA CELIA TORO, MEXICO’S “WAR” ON DRUGS: CAUSES AND CONSEQUENCES 8 (1995) (specifying 1927 as the year of a decree by Mexico’s president banning the export of marijuana, followed two years later by a penal code revision imposing penalties on growers).

<sup>162</sup> See RUN FOR THE BORDER, *supra* note 2, at 98 (stating that in 2010, a U.S. senator heading a Senate subcommittee on homeland security attributed half of the U.S. marijuana and methamphetamine supply, and 90% of cocaine used in the U.S. to sources in Mexico).

<sup>163</sup> *Id.* at 103.

<sup>164</sup> Nevertheless, unlike opium (used to produce heroin) and cocaine, which can only be grown in certain global regions, marijuana is viable in a number of climates, both natural and artificial. It is also grown in substantial quantities in Northern California and elsewhere within the United States.

receiving drug money and guns to fuel its cartels.<sup>165</sup> Embedded within deep corruption that reached all levels of government, Mexican drug cartels operated for decades more as businessmen than thugs.<sup>166</sup> Long maligned by U.S. officials as causing or contributing to the U.S. drug crisis by its failure to staunch the flow of illicit drugs across the border, Mexico took a new and bloody policy direction in the 2000s.<sup>167</sup> Calling it the “Mother of All Battles,” Mexican President Vicente Fox launched an assault within Mexico on drug cartels that his successor, Felipe Calderón, embraced.<sup>168</sup> Using military and federal police in place of corrupt local police, Calderón’s strategy sparked unprecedented violence from two directions—from the turf battle between cartels over resultant supply voids for various illicit drugs, and the firefight between the cartels and the military.<sup>169</sup> As I detailed in *Run for the Border*, tens of thousands of Mexicans were killed after December 2006 during Calderón’s tenure, many of them Mexican police and officials, along with other innocent victims targeted for execution in the battle for Mexico’s soul.<sup>170</sup> Through killing officials and innocents, especially children, the cartels hoped to pressure the Mexican people to abandon the federal war on drugs, but that war rages on with U.S. encouragement and aid. Under the Mérida Initiative, the United States has supplied over one-billion dollars to finance the current Mexican military campaign against the drug cartels, outfitting the battle with helicopters, surveillance airplanes, and other equipment.<sup>171</sup> As with the flawed drug war on U.S. streets that failed to suppress marijuana use while feeding our abusive system of mass imprisonment, the Mexican drug war thus far has proven an epic disaster that led even its instigator, Fox, to later recant and declare his support for legalization of all drugs.<sup>172</sup>

Driven by the desperation of poverty, the Mexican drug cartel

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<sup>165</sup> See *id.* at 86, 88.

<sup>166</sup> *Id.* at 113.

<sup>167</sup> *Id.* at 109.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Gabrielle D. Schneck, *A War on Civilians: Disaster Capitalism and the Drug War in Mexico*, 10 SEATTLE J. FOR SOC. JUST. 927, 931–932 (2011) (providing that under the Initiative, \$1.3 billion went to Mexico between 2008 and 2010); see also *id.* at 935 (describing the similar U.S. military aid program, Plan Colombia, that failed to decrease drug exports from Colombia).

<sup>172</sup> Ioan Grillo, *Mexico’s Ex-President Vicente Fox: Legalize Drugs*, TIME (Jan. 19, 2011), <http://www.time.com/time/world/article/0,8599,2040882,00.html>.

experience demonstrates that countless operatives are willing to fill the trafficking void for those arrested or killed in the Mexican drug war,<sup>173</sup> and that trafficking from Mexico of marijuana and other illicit drugs remains a viable, albeit bloody and battered, enterprise. Against that background, I consider next the potential effect on the cartels of broad scale legalization of marijuana within the United States.

Gauging the effect of U.S. legalization requires some sense of the economic importance of marijuana to the Mexican drug cartels. Unfortunately, the nature of the beast of an illegal enterprise with diffuse money laundering throughout the hemisphere is that estimates of revenues vary widely, both as to the dollar amount of overall revenues and the percentage role that marijuana plays in cartel proceeds from a variety of drugs. No doubt by any measure those revenues are enormous, with the swing in estimated annual revenue to Mexican cartels ranging from one estimate of \$80 billion to a U.S. government estimate of \$13.8 billion—with \$8.5 billion of that revenue coming from marijuana and the vast amount coming from U.S. sales.<sup>174</sup> According to this government estimate, marijuana comprises more than 60% of cartel revenue, with the remainder coming from cocaine and methamphetamine trafficking, as well as other illicit drugs and activities.<sup>175</sup> As I speculated in *Run for the Border*, if this estimate is accurate, legalization of marijuana should have a “cataclysmic effect” on the Mexican cartels,<sup>176</sup> allowing cross-border enforcement to better focus on remaining (and more dangerous) illicit drugs for which U.S. demand is less pervasive. Presumably, the south-of-the-border violence might ultimately ease as the cartels succumb to this economic squeeze. Yet there are many reasons to be less optimistic about the impact

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<sup>173</sup> RUN FOR THE BORDER, *supra* note 2, at 101–02.

<sup>174</sup> *Id.* at 102; see also Justin B. Shapiro, Note, *What Are They Smoking? Mexico's Decriminalization of Small-Scale Drug Possession In the Wake of a Law Enforcement Failure*, 42 U. MIAMI INTER-AM. L. REV. 115, 119 (2010) (citing estimates that between \$25 and \$30 billion of illicit drugs are smuggled annually from Mexico into the United States, and noting that the overwhelming majority of the 15,500 metric tons of marijuana produced annually in Mexico is exported here). In 2000, the U.S. government estimated that, overall, U.S. users spent \$10.5 billion in purchasing marijuana from various sources. *Gonzales v. Raich*, 545 U.S. 1, 21 n.31 (2005) (citing Office of Nat. Drug Control Policy, Marijuana Fact Sheet 5 (Feb. 2004), <http://www.whitehousedrugpolicy.gov/publications/factsht./marijuana/index.html>).

<sup>175</sup> RUN FOR THE BORDER, *supra* note 2, at 168.

<sup>176</sup> *Id.*

of state legalization on Mexican trafficking, even if that reform takes hold nationally. First, some commentators discount the estimate that marijuana plays such a key role in cartel revenues, with one commentator suggesting a more accurate figure falls in the range of 15-to-26%.<sup>177</sup> Having become the gateway for illicit drugs from South and Central America into the United States, Mexican cartels might also send their product elsewhere, such as Canada or within Mexico,<sup>178</sup> redouble their efforts to export drugs that remain illicit in the United States, such as cocaine and methamphetamine, or concentrate on expanding demand for these illicit drugs as cartels did within Mexico when enhanced U.S.-border enforcement prompted them at times to liquidate their inventory to Mexican users.<sup>179</sup> Presumably, legalization within the United States that leaves minors unable to purchase marijuana lawfully might reserve some of that illicit market to cartels, yet the likelihood is that, as with alcohol, this demand would be supplied through fake identification or by friends and relatives purchasing lawful marijuana for minors. Some commentators have looked to the tobacco market and speculated that should government tax legal marijuana too steeply, an illicit market might emerge,<sup>180</sup> perhaps to be supplied by the cartels

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<sup>177</sup> See CAULKINS ET AL., *supra* note 51, at 175–76, 203–204 (contesting the methodology of the 60% figure and stating that the Office of National Drug Control Policy has disavowed it, and citing a Research and Development Corporation (RAND) estimate of between 15 and 26%, which the authors adopt); see also Dickinson, *supra* note 136 (citing a nonpartisan think-tank study which posits that marijuana legalization in the United States would deprive drug cartels of nearly a quarter of their revenue stream should the federal government not interfere with state legalization). Still, the federal government estimate that Mexican cartels receive \$8.5 billion annually from marijuana, while perhaps high percentage-wise, numerically falls on the low side of some other estimates of revenue. For example, if cartels actually generated \$80 billion annually with just 10% of that coming from marijuana, the economic impact legalization would have on cartels would be the same as the government estimated. Similarly, some commentators discount the impact of legalization of marijuana on revenue streams produced by taxation or on the tragedy of mass incarceration. *E.g.*, Weisberg, *supra* note 51, at 21 (“The repeal of marijuana crimes will solve neither America’s nor California’s budget problems, nor will it solve the American mass-incarceration problem or play a great role in solving California’s prison overcrowding.”); on the effect of legalization on mass incarceration, see *infra* Part III.

<sup>178</sup> As detailed below, although Mexico decriminalized user amounts of drugs in 2009, their sale remains unlawful.

<sup>179</sup> RUN FOR THE BORDER, *supra* note 2, at 104.

<sup>180</sup> *E.g.*, Kevin A. Sabet, *The (Often Unheard) Case Against Marijuana Leniency*, in POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION 325, 342 (Mitch Earleywine ed., 2007) (citing the Canadian experience with steep taxes

rather than by licensed domestic producers operating outside the law. Still, given the history of spraying of illicit marijuana crops with toxic chemicals, the lesser environmental policing in Mexico, and the reality that some marijuana has been smuggled, while soaked in gasoline or perfume, in such unsanitary conveyances as the inside of a full septic tank truck,<sup>181</sup> presumably most U.S. users would be willing to pay extra for the assurance of some quality and safety control over the production of legalized marijuana. Surely, too, the cost of bribes that divert a fair share of cartel revenue is an expense that lawfully produced marijuana need not duplicate. Most alarmingly, however, Mexican drug cartels of late have augmented their drug profits with other enterprises for which their infrastructure of vast capital, weaponry, manpower, and graft is well suited. These sidelines include kidnapping the family members of the wealthy for ransom,<sup>182</sup> trafficking undocumented immigrants and sex workers into and within the United States,<sup>183</sup> and robbing undocumented immigrants, whether from Mexico or Central America, who aim to reach U.S. employers.<sup>184</sup> The most ominous scenario ahead is one in which the drug cartels expand these other ventures to replace marijuana revenues. Immigration is driven and limited by job opportunities available within the United States and thus depends on labor demand. Therefore, cartels searching for replacement revenue presumably would be drawn to expand their kidnappings or their role in illicit sex markets, such as those for underage prostitutes.<sup>185</sup> Overall, then, the impact of legalization on cartel revenues, and the surging violence within Mexico, is hard to predict.

During the throes of the current drug war in Mexico, the Mexican government in 2009 decriminalized marijuana and other drugs, eliminating jail for those with small, user quantities (for marijuana, no more than about four joints).<sup>186</sup> Of course,

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on cigarettes); CAULKINS ET AL., *supra* note 51, at 167–168.

<sup>181</sup> RUN FOR THE BORDER, *supra* note 2, at 105–106.

<sup>182</sup> See Damien Cave, *In Mexico, A Kidnapping Ignored as Crime Worsens*, N.Y. TIMES, Mar. 17, 2012, at A1.

<sup>183</sup> See Ian Lovett, *Land Routes Blocked, Smuggling Rises Sharply on California Coast*, N.Y. TIMES, Dec. 9, 2012, at A26; Anne-Marie O'Connor, *Mexico's 'Inferno' of Exploitation*, WASH. POST, July 28, 2011, at A10.

<sup>184</sup> See Josh Meyer, *Cartels Snatch Coyote Trade: As They Expand Their Enterprise from Drugs to Human Smuggling, A Bleak Situation Is Worsening, Experts Say*, L.A. TIMES, March 23, 2009, at A1.

<sup>185</sup> RUN FOR THE BORDER, *supra* note 2, at 76–77.

<sup>186</sup> See Shapiro, *supra* note 173, at 133–34 (discussing that the sale of even



decriminalization in Mexico will do little, if anything, to suppress the drug violence driven by U.S. demand for trafficking. Nevertheless, Mexican lawmakers felt that police were overtaxed dealing with petty drug use,<sup>187</sup> and the legislation reflected a desire to concentrate enforcement on, to borrow President Obama's terminology, the "bigger fish" of the Mexican cartels.<sup>188</sup> So far, this enforcement emphasis on cartels ostensibly gained through user decriminalization in Mexico has failed to staunch the bloodshed.<sup>189</sup>

Should the United States similarly enact broad scale legalization of the usage (and sale) of marijuana and other illicit drugs trafficked through Mexico (including marijuana, cocaine, heroin, and methamphetamine), presumably that might have a more dramatic impact on cartel operations. Rather than follow the Mexican model of across the board decriminalization, however, in *Run for the Border* I argued that the United States should more selectively decriminalize/legalize narcotics (assuming a legitimate supply source is feasible), based on a comparison to alcohol on the spectrum of external societal harm and damage to the user.<sup>190</sup> Those drugs not materially more

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legal user quantities of drugs remains a serious offense, and that under the decriminalization of user possession, those caught in possession are encouraged to seek drug treatment, with treatment being made mandatory for a third offense). Mexico's decriminalization mirrors judicial rulings elsewhere in Latin America, such as in Argentina whose Supreme Court held it unconstitutional to punish recreational users of marijuana. Doug Bandow, *Will Mexico Declare Peace in the War on Drugs, and Will Obama Let Them?*, FORBES (July 9, 2012, 10:43 AM), <http://www.forbes.com/sites/dougbandow/2012/07/09/will-mexico-declare-peace-in-the-war-on-drugs-and-will-obama-let-them/>.

<sup>187</sup> Shapiro, *supra* note 174, at 116, 136 (stating that prosecuting casual drug users and addicts squanders resources and promotes police corruption through extortion).

<sup>188</sup> *Id.* at 116, 135, 137; David Jackson, *Obama: Pot Users Not 'Top Priority,'* USA TODAY BLOG THE OVAL (Dec. 14, 2012, 10:46 PM), <http://www.usatoday.com/story/theoval/2012/12/14/obama-marijuana-pot-users-colorado-washington/1769013/>; Mark Stevenson, *Mexico Decriminalizes Small-Scale Drug Possession*, HUFF POST WORLD (Aug. 21, 2009, 8:49 AM), [http://www.huffingtonpost.com/2009/08/21/mexico-decriminalizes-sma\\_n\\_264904.html](http://www.huffingtonpost.com/2009/08/21/mexico-decriminalizes-sma_n_264904.html).

<sup>189</sup> See generally Dennis Wagner, *Drugs: New Law, Same Issues*, ARIZ. REPUBLIC (Phoenix), Jan. 10, 2010, at A1. Despite the legalization of user quantities, police still arrest Mexican drug users, and the flow of drugs and blood is unabated. Arrests occur because under the decriminalization law, a prosecutor must determine if the drug possession was for personal use rather than for illicit sale, and because most addicts purchase drugs in excess of the miniscule amounts permitted under the law, an infraction for which Mexico increased the criminal penalties. *Id.*

<sup>190</sup> RUN FOR THE BORDER, *supra* note 2, at 167–168.

harmful than alcohol (with marijuana the most obvious choice) should be decriminalized/legalized first,<sup>191</sup> on an experimental basis that gauges the ongoing impact on the viability and violence of the Mexican cartels, and on user health and crime within the United States, among other factors. Evidently, drug policy is a work in progress, and I urged the need for not merely national dialogue to address the chaos and violence of mass imprisonment in the U.S. drug war, and not just dialogue with Mexico toward a mutual drug policy that recognizes our connectedness, but a hemispheric dialogue given the resonance of the drug trade throughout Latin America.<sup>192</sup>

Failing broad scale U.S. legalization of marijuana and other trafficked drugs, Mexico should consider rebuffing U.S. efforts to coerce Mexico to fight a war on the supply, rather than the demand, side of drugs. Even a return to corrupt Mexican governments profiting from drug cartel bribes is an improvement over the continued slaughter of thousands of innocent victims. In a similar vein, since the Colorado and Washington initiatives passed, some Mexican lawmakers have floated the bold idea of legalizing the production of marijuana and its export to the United States, which would deter violence and avoid the immorality of corruption.<sup>193</sup> But despite the incessant drug violence, the Mexican public remains cool to the idea of such legalization, with a 2012 poll showing 79% opposed.<sup>194</sup>

### III. JOINT REFORM

Introduced by a Colorado Congresswoman, a bipartisan federal bill currently before Congress, titled the Respect States' and

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<sup>191</sup> Under this measure, I pointed out the dangers of methamphetamine, while still acknowledging the case for legalization based on the ability to better regulate the nasty chemical composition of this drug. *Id.* at 167.

<sup>192</sup> *Id.* at 170. Some Latin American leaders talked freely at the 2012 Summit of the Americas about a legalization strategy. Alma Guillermoprieto, *Drugs: The Rebellion in Cartagena*, N.Y. REV. BOOKS, June 7, 2012, at 39, available at <http://www.nybooks.com/articles/archives/2012/jun/07/drugs-rebellion-cartagena/?page=1>.

<sup>193</sup> Richard Fausset, *U.S. Votes Lead Mexico to Reconsider Pot Policy; Is War on Cartels Worth It as Legalization Grows?*, L.A. TIMES, Jan. 5, 2013, at A1; Phillip Smith, *Mexico Lawmaker Files Marijuana Legalization Bill*, STOPTHEDRUGWAR.ORG (Nov. 16, 2012), [http://stopthedrugwar.org/chronicle/2012/nov/16/mexico\\_lawmaker\\_files\\_marijuana](http://stopthedrugwar.org/chronicle/2012/nov/16/mexico_lawmaker_files_marijuana).

<sup>194</sup> Fausset, *supra* note 193 (noting further that legalization of production would jeopardize the huge sums the United States supplies the Mexican government to fight the drug war).

Citizens' Rights Act of 2012, would negate any possibility of federal preemption of state involvement in lawful marijuana sales.<sup>195</sup> Therefore, by enacting legalization laws, states effectively could opt out of the federal Controlled Substances Act's restrictions on marijuana production, sale, and possession, at least for purposes of federal action against the state.<sup>196</sup> I contend here that states are the appropriate situs for reform of marijuana laws, having first enacted restrictions on marijuana in the early twentieth century and being responsible for the vast majority of the 750,000 arrests annually for marijuana, most of them for possession.<sup>197</sup> As eighteen states have done by legalizing medical marijuana over the last seventeen years, it is likely that this reform process will take some time as states eye the experience of Colorado and Washington in collecting tax revenues from recreational marijuana while fending off the federal government. Still, additional states continued to legalize medical marijuana despite active intervention at times by the federal government in its production and distribution, so it is likely that additional states will enter the fray to legalize recreational marijuana despite the federal response. Federal reform may be a long time coming, as the seventeen year experience since California legalized medical marijuana in 1996 has seen no movement

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<sup>195</sup> H.R. 6606, 112th Cong. (2012).

<sup>196</sup> Dickinson, *supra* note 136. The measure stipulates:

In the case of any State law that pertains to marihuana, no provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of State law on the same subject matter, nor shall any provision of this title be construed as preempting any such State law.

H.R. 6606. Presumably this law only addresses the possibility of federal preemption that might otherwise result in the pursuit of state officials for participation in trafficking, or in justifying an injunction against such state involvement and facilitation. See discussion *supra* Part I.D. Query whether this proposed federal law would protect individual purchasers and the state-licensed dealers of legalized marijuana from federal enforcement. Equally unclear is the protection accorded to home-growers of legalized marijuana and the interplay of the proposed measure with the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005). See discussion *supra* Part I.D. Additional federal proposals being discussed include allowing states even greater leeway by legalizing, for federal purposes, the possession of up to one ounce of marijuana in states that have enacted legalization laws. Armentano, *supra* note 133. Yet federal proposals that address possession may not fully encompass the growing and distribution of marijuana for such use.

<sup>197</sup> See *supra* note 47.

toward federal recognition of marijuana's medical value.<sup>198</sup> Presumably it may take some tipping point of a majority of states authorizing medical marijuana before the federal government acts, and even then, the prospect of Congress addressing recreational marijuana may be additional decades away. The onus, then, is on the states to continue their march on medical marijuana, joined with recreational initiatives and laws. As evident in the legalizations of medical marijuana and the recent experience of Colorado and Washington, should state legislators fail to act, voters are well suited to shape reform in those states that permit citizen initiatives to enact laws or amend the state constitution.

Arguments offered for state legalization of recreational marijuana in the 2012 election cycle included the potential to earn tax revenues to fund schools instead of state residents contributing to cartel profiteering, the high cost of local law enforcement of drug possession laws, and the protections built into the Washington law against driving while intoxicated.<sup>199</sup> Additionally, the compelling aim of ending racialized mass incarceration both warrants reform and presents an opportunity for states to forge their own favorable civil rights identity. Mass incarceration on the basis of race, seen properly as a civil rights issue, lends itself well to state reform. In the 1960s, and before that with the Supreme Court's 1954 desegregation decision in *Brown v. Board of Education*,<sup>200</sup> the federal government took the lead in dismantling decades of legal segregation by the states that constrained the freedom, education, and movement of U.S. blacks, along with Mexican Americans and other disfavored groups. The image of Alabama Governor George Wallace, preaching "segregation forever" and barring the schoolhouse door at the University of Alabama from entry by black students mandated by the federal government marks the last cycle of civil rights reform, with states on the embarrassing end of history. Appropriately, to begin to reverse the "New Jim Crow" of mass incarceration of blacks and Latinos/as, states have the opportunity to cement a

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<sup>198</sup> *Medical Marijuana Policy in the United States*, HOPES, STANFORD U. (March 15, 2012), <http://www.stanford.edu/group/hopes/cgi-bin/wordpress/2012/05/medical-marijuana-policy-in-the-united-states/>.

<sup>199</sup> See Gene Johnson, *From 'No' to 'Yes,' How Colorado and Washington Legalized Marijuana*, CHRISTIAN SCI. MONITOR (Dec. 2, 2012, 3:01 PM), <http://www.csmonitor.com/USA/Latest-News-Wires/2012/1202/From-no-to-yes-how-Colorado-and-Washington-legalized-marijuana>.

<sup>200</sup> 347 U.S. 483 (1954).

new legacy as leaders rather than as reluctant followers and dissenters in racial justice.

Commentators have questioned whether legalization of marijuana will have much impact on mass incarceration, pointing out that most marijuana offenders escape incarceration for mere possession, or were caught with other drugs or while committing other non-drug crimes that would nonetheless require incarceration.<sup>201</sup> But even if harder drugs such as crack cocaine are the crux of mass incarceration, marijuana is the rational place to begin reform in a country that is not ready for across the board legalization of user amounts of drugs, despite progress from the days when, as the U.S. Surgeon General under President Clinton, Dr. Joyce Elders was soundly vilified for merely suggesting we explore legalizing drugs to reduce crime.<sup>202</sup> Marijuana reform can serve as an experiment to test whether user floodgates open,<sup>203</sup> or whether funding addiction treatment programs with tax revenues<sup>204</sup> outperforms incarceration to address and reduce drug addictions that pose undue societal or personal harm.

### CONCLUSION

By any account, Prohibition was a supreme error.<sup>205</sup> Spawning violence and illicit trafficking, Prohibition did little to stem abuse of alcohol. Although alcohol use was widespread and customary at the inception of Prohibition, marijuana use was less common when states and the federal government moved to restrict it

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<sup>201</sup> *E.g.*, Weisberg, *supra* note 51, at 21 (repeal of marijuana crimes will not “solve the American mass-incarceration problem or play a great role in solving California’s prison overcrowding”); CAULKINS ET AL., *supra* note 51, at 129–30, 159 (arguing that legalization of marijuana will have minimal impact on reducing drug incarcerations, nor would it eliminate arrests, given the remaining crimes of driving while intoxicated, and underage possession or sale to minors).

<sup>202</sup> RUN FOR THE BORDER, *supra* note 2, at 169.

<sup>203</sup> Although there has never been a recorded death from a marijuana overdose, other drugs can cause overdose, particularly heroin which varies widely in potency. “[A] 2009 study of Portugal’s 2001 decriminalization of drugs[, however,] found deaths from drug overdoses down, while drug use failed to increase.” *Id.* at 166.

<sup>204</sup> See Washington Initiative Measure No. 502 § 28(5)(a) (allocating portions of marijuana taxation revenues toward use prevention and abuse treatment programs).

<sup>205</sup> RUN FOR THE BORDER, *supra* note 2, at 163.

during the same era.<sup>206</sup> Nevertheless, marijuana use has since entered the cultural mainstream for all races as fears of reefer madness subsided. Its use is now widespread, presenting the same impossibility of addressing a health (and to some extent morals)<sup>207</sup> issue with criminal sanctions. Prohibitions of alcohol and marijuana also share the history of states moving first to restrict the alcohol supply, followed by federal Prohibition through the Eighteenth Amendment and the implementing Volstead Act.<sup>208</sup> The repeal of Prohibition began where it had started, with several states repealing their bans on alcohol and thus barring the cooperation of local authorities in the federal crusade.<sup>209</sup> Although a few states stayed dry when federal Prohibition ended with the ratification of the Twenty-First Amendment on December 5, 1933, by 1966 the last state repealed its statewide prohibition of alcohol.<sup>210</sup> On near the same day as the federal repeal, December 6, 2012, Washington's legalization of recreational marijuana usage took effect, followed in January 2013 by Colorado.<sup>211</sup> As with Prohibition, it soon will be the

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<sup>206</sup> Phillips, *supra* note 14, at 648, 652.

<sup>207</sup> On the morality of recreational marijuana use, consider the position of William Bennett, the drug czar under President George H.W. Bush, who claimed drug addicts were immoral and therefore undeserving of treatment. *Id.* at 664. In contrast, two professors have argued that prohibiting marijuana violates the moral right to exercise autonomy in personal matters. Eric Blumenson & Eva Nilsen, *Liberty Lost: The Moral Case for Marijuana Law Reform*, 85 IND. L.J. 279, 299 (2010). In my *Run for the Border* book, I argued for moral abstinence by U.S. residents in using illegal substances that are not legalized, in the interest of extinguishing the drug violence in Mexico through reduced demand. Yet I detailed the daunting challenges to any protocol of moral abstinence, including the fact that drug supply chains are not evident to users, which puts the impetus on legalization as the moral choice for voters and legislators who are trying to deter the immorality of vicious drug violence by the Mexican cartels. *RUN FOR THE BORDER*, *supra* note 2, at 171.

<sup>208</sup> BONNIE & WHITEBREAD, *supra* note 11, at 23–25 (detailing state prohibitory legislation preceding federal action).

<sup>209</sup> CAULKINS ET AL., *supra* note 51, at 185 (noting that by the time Prohibition was repealed, ten states had followed New York's lead from 1923 in repealing the state alcohol ban).

<sup>210</sup> Jeff Burkhart, *Something to Celebrate: Repeal of Prohibition*, MARIN INDEP. J. (Cal.), Dec. 6, 2007, available at [http://www.marinij.com/ci\\_7647949](http://www.marinij.com/ci_7647949).

<sup>211</sup> Mario Ledwith, *Senseless in Seattle: Hundreds of Pot Smokers Light Up Washington after Midnight Countdown to State Legalizing Marijuana*, MAILONLINE (Dec. 6, 2012, 8:30 AM), <http://www.dailymail.co.uk/news/article-2243954/Pot-smokers-light-Washington-Space-Needle-state-legalizes-marijuana-sex-marriage.html>; Stephen Webster, *Colorado Passes Laws for the Legal Sale of Marijuana Beginning Jan. 1*, RAW STORY (May 9, 2013, 8:46), <http://www.rawstory.com/rs/2013/05/09/colorado-passes-laws-for-the-legal-sale-of-marijuana-beginning-jan-1/>.

federal government's turn to declare the war on marijuana a failure. Reform and repeal of marijuana laws, inevitably, will and must be a joint effort.<sup>212</sup> The question is how much enforcement money will be squandered, how many more will be arrested, and how many will die, not from the drug itself but from its unlawful trafficking, before reform arrives.

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<sup>212</sup> For discussion of possible federal reform on the road to broad scale legalization, *see* discussion *supra* Part III.