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Michael M. O'Hear

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Federalism and Drug Control

Michael M. O'Hear*

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The American “war on drugs” has given rise to a voluminous body of scholarly literature.¹ Commentators have addressed such important topics as the legality of particular drug enforcement practices,² the effects of the drug war on families³ and minority communities,⁴ the “rebellion” of skeptical judges and prosecutors,⁵ and, more fundamentally, the relative merits of punishment, treatment, and legalization.⁶

Comparatively little work has been done, however, on what would seem a threshold question of utmost importance: which level of government—federal, state, or local—ought to have primacy in making and enforcing drug control policy? Which should have the

1. President Nixon first declared a “war on drugs” in 1969. DAVID F. MUSTO & PAMELA KORSMEYER, *THE QUEST FOR DRUG CONTROL: POLITICS AND FEDERAL POLICY IN A PERIOD OF INCREASING SUBSTANCE ABUSE, 1963-1981*, at 60 (2002). His successors have continued to use militaristic rhetoric in characterizing federal drug policy. See *infra* Parts II.B-D (describing evolution of federal drug policy).

2. See, e.g., Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 57-76, 84-93 (1998) (arguing that self-financing of drug enforcement through asset forfeiture violates due process and separation of powers doctrines); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 744 (2002) (arguing that use of racial profiling in drug interdiction on the highway violates the Equal Protection Clause, but noting uncertainty surrounding remedy); see also David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999) (discussing negative effects of racial profiling in drug enforcement).

3. See, e.g., Nora V. Demleitner, “Collateral Damage”: *No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1043-45 (2002) (describing consequences of drug conviction for parents of minor children); Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 346-88 (1996) (describing punishment of innocent family members through application of drug asset forfeiture laws); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1015-20 (2001) (discussing effect of racially disproportionate incarceration of African-Americans on African-American families).

4. See MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 81-123 (1995) (describing and criticizing racially disparate effects of war on drugs); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798-99 (1998) (attributing racially disparate effects not to racism, but to class-based paternalism).

5. See Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 554 (2002) (interpreting data to indicate that “front-line actors” have used their discretion to reduce sentences for federal drug crimes).

6. For a sampling of the range of views in this debate, see DOUGLAS HUSAK, *LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS* 125-78 (2002) (arguing that drug prohibition is both unjust and fails cost-benefit analysis); WILLIAM J. BENNETT ET AL., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* 137-90 (1996) (arguing that drug use is immoral and responding to arguments for legalization); Philip B. Heymann, *Introduction: Drug Policy with a New Focus*, in *DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE* 1, 11 (Philip B. Heymann & William N. Brownsberger eds., 2001) (arguing that drug enforcement should be continued, but tailored so as to reduce social costs).

authority to choose, for instance, whether punishment or treatment of drug users will be emphasized in a particular locale? And what role should the other levels of government play in implementing such a choice?

Within the otherwise abundant drug policy literature, sustained treatments of federal-state-local relations are rare and increasingly dated.⁷ More than a decade ago, two distinguished commentators offered a critical observation that might apply equally well today: “[L]ittle attention has been paid to level-of-government issues in current drug policy discussions, and the allocations of responsibilities that take place seem haphazardly determined.”⁸ The purpose of this Article is to address these neglected federalism issues in drug policy. A number of recent developments lend a new urgency to sorting out the current “haphazard” allocation of responsibilities. Not only has the Supreme Court revived the specter of constitutional constraints on federal regulatory power,⁹ but several states have adopted new drug laws that deviate markedly from enforcement-

7. For the most thorough treatment of federal-state relations in drug policy, see DANIEL K. BENJAMIN & ROGER LEROY MILLER, UNDOING DRUGS: BEYOND LEGALIZATION 186-249 (1991). For other notable contributions, see FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SEARCH FOR RATIONAL DRUG CONTROL 158-76 (1992); Paul D. Carrington, *The Twenty-First Wisdom*, 52 WASH. & LEE L. REV. 333, 337-56 (1995); John G. Haaga & Peter Reuter, *The Limits of the Czar's Ukase: Drug Policy at the Local Level*, 8 YALE L. & POL'Y REV. 36 (1990). All published in the early to mid-1990s, these works are dated in several respects. They do not consider a series of important state ballot initiatives on drug policy beginning in 1996. For an account of these initiatives and the federal-state conflicts they have generated, see *infra* Part III.B.2.b. They devote little attention to the critical role played by asset forfeiture in drug enforcement, a topic that began to receive significant scholarly attention only in the later 1990s. See, e.g., Blumenson & Nilsen, *supra* note 2. They were written before the Supreme Court revised the constitutional framework for federalism in *United States v. Lopez*, 514 U.S. 549 (1995). Finally, they were written before the flowering of an important body of scholarly literature criticizing the scope of federal criminal jurisdiction. For a summary of the debate on the so-called “federalization of criminal law,” see Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 726-29 (2002). A recent contribution to the literature on federalism and drug control is David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679 (2003). Professors Rasmussen and Benson, two economists, helpfully address at least one of the gaps in the earlier literature by focusing on the role of asset forfeiture in federal-state relations. *Id.* at 715-21.

8. ZIMRING & HAWKINS, *supra* note 7, at 159.

9. See *Lopez*, 514 U.S. at 568 (invalidating the Gun-Free School Zones Act as beyond Congress’s Commerce Clause authority). Demonstrating the potential significance of *Lopez* to drug policy, the Ninth Circuit has preliminarily enjoined the enforcement of federal drug laws against the intrastate, noncommercial cultivation, possession, and use of marijuana for medical purposes on the advice of a physician. *Raich v. Ashcroft*, 352 F.3d 1222, 1235 (9th Cir. 2003). The court held that the plaintiff users and growers of marijuana had demonstrated a strong likelihood of success on the merits of their claim that federal drug laws, as applied to them, exceeded Congress’s authority under the Commerce Clause. *Id.* at 1229-34.

oriented federal norms.¹⁰ The resulting federal-state conflicts threaten the integrity of national drug policies, generate unnecessary public confusion, and present a risk of real injustice to individuals caught in the middle.

Consider, for instance, the case of Ed Rosenthal. The federal government brought marijuana cultivation charges against Rosenthal in early 2003.¹¹ Rosenthal was, in fact, authorized by the City of Oakland to distribute marijuana for medicinal purposes pursuant to California state law.¹² Rosenthal was not, however, permitted to present this information as a defense at trial because federal law—unlike California law—does not recognize any valid medical uses of the drug.¹³ A jury convicted Rosenthal of a federal drug offense that, with few exceptions, carries a mandatory minimum prison term of five years.¹⁴ Surprisingly, the district court judge imposed a sentence of only one day based on the “unique circumstances” of the case, but an appeal by the government is still pending.¹⁵

Whatever the outcome of *Rosenthal*, the case highlights growing tensions between state and federal drug control policies. These tensions encompass not only the “medical marijuana” debate, but also disputes over the role of court-supervised treatment of drug users in sentencing and the use of asset forfeiture in enforcement. In light of these points of disagreement, Congress has begun to take an interest in the federalism aspects of drug policy,¹⁶ indicating that the time is ripe for a fresh consideration of the subject.

With this objective in mind, the present Article addresses two related questions, one empirical and the other normative. First, the Article considers how best to characterize the *current* federal role in national drug policy. Prior commentators have emphasized federal dominance, and have gone so far as to claim that the federal government has a “monopoly” on drug policy.¹⁷ These commentators,

10. For a description of these recent state innovations, see *infra* Part III.B.2.

11. Dean E. Murphy, *A California Cultivator of Medical Marijuana Is Convicted on Federal Charges*, N.Y. TIMES, Feb. 1, 2003, at A12.

12. *Id.*

13. *Id.*

14. *Id.*

15. Bob Egelko, *U.S. Will Appeal Pot Decision; Judge Refused to Jail Marijuana Grower*, S.F. CHRON., July 8, 2003, at A14. For the judge’s complete sentencing analysis, see *United States v. Rosenthal*, 266 F. Supp. 2d 1091, 1099 (N.D. Cal. 2003).

16. For instance, the pending Truth in Trials Act would offer federal drug defendants a new affirmative defense based on compliance with applicable state medical marijuana laws. H.R. 1717, 108th Cong. (2003). Congress has also recently considered, and rejected, a proposal to increase funding for federal enforcement against medical marijuana distribution. See *infra* Part III.B.2.b.vi.

17. BENJAMIN & MILLER, *supra* note 7, at 6.

however, have not taken into account several remarkable developments over the course of the past decade, such as the success of state-level reformers in using the ballot initiative to modify state drug laws and the emergence of a grass-roots “drug court” movement that has won the enthusiastic support of Washington.¹⁸ In light of recent developments, the “federal monopoly” theory is no longer viable, if indeed it ever was. Rather than acting as a dictator of state policy, the federal government exercises, at most, a loose control over the general direction taken by lower levels of government. The result is a set of drug policies that do not exhibit true uniformity from state to state, but instead display a sort of constrained diversity.

Turning from the empirical to the normative, the Article next considers how federal-state relations *ought* to be structured. It will be assumed here that a legislature could reasonably choose any of a range of policies, from mandatory treatment for addicts to legalization to more intensive enforcement and heavier penalties.¹⁹ The question here is not *which* substantive policy should be adopted, but *who* should get to choose.

Under a leading reform proposal (the so-called “Constitutional Alternative”), the federal government would essentially get out of the drug policy business, leaving the basic regulatory decisions to the states.²⁰ This proposal promises to enhance the accountability of state governments, promote innovation, and bring important policy decisions closer to the people. Yet, the Constitutional Alternative has several important drawbacks, particularly in its effects on states and localities that would like to continue (or even expand) the war on drugs within their borders.²¹ In particular, proponents have not fully appreciated the importance of the federal government’s broad criminal jurisdiction as a form of in-kind aid to state and local law enforcement.

This Article suggests a different reform agenda, termed here the “Competitive Alternative.” Like the Constitutional Alternative,

18. Some of these developments have received considerable scholarly attention, such as the drug treatment courts. See *infra* note 250 (discussing recent scholarship on drug courts). Others, like the drug treatment and asset forfeiture initiatives, have received virtually no sustained attention. This Article canvasses the full range of state drug policy innovations, comparing and contrasting different reforms and placing them for the first time into a single, coherent analytical framework.

19. See, e.g., Bruce Bullington, *America’s Drug War: Fact or Fiction?*, in *THE CONTROL OF DRUGS AND DRUG USERS: REASON OR REACTION?* 107, 108 (Ross Coomber ed., 1998) (discussing arguments that drug war should be escalated); Stephen D. Easton, *Everybody Knows It, But Is It True? A Challenge to the Conventional Wisdom that the War on Drugs Is Ineffective*, 14 *FED. SENTENCING REP.* 132, 132 (2001-2002) (“[E]vidence suggests that escalation of the war on drugs does, in fact, reduce the rates of drug use in America.”).

20. BENJAMIN & MILLER, *supra* note 7, at 194.

21. See *infra* Part IV.C.

this agenda would seek to decentralize drug control policy, but would focus not on the *states*, but on *local* units of government. Localities that wished to continue fighting the federally led war on drugs with federal support could continue to do so, but localities that wished to develop and implement alternative drug control strategies would have more freedom to go their own way. The proposal is termed “competitive” to emphasize a key difference from the Constitutional Alternative: while the Constitutional Alternative would create a state monopoly in drug policy, the Competitive Alternative would, in effect, give local communities a choice between state and federal policies. Put differently, state and federal approaches would compete for the allegiance of local communities. Achieving reform along these lines requires several distinct changes to federal law, including (1) reducing the federal distortion of drug policy debates at the state and local level; (2) subjecting federal drug enforcement decisions to a greater degree of local political control; and (3) increasing the accountability of local law enforcement to local political institutions.

This Article proceeds as follows. Part I briefly surveys the conceptual terrain of drug policy, summarizing four competing policy paradigms that are embodied either in current federal law or in state reform efforts. Part II describes the evolution of federal drug policy, emphasizing the century-long competition between treatment- and punishment-oriented approaches. Part III considers whether there is a federal monopoly on drug policy: it asks, first, what tools are used by Washington to induce state and local compliance with federal norms, and, second, how effective are those tools in practice? Using public choice theory, Part III also attempts to explain why the current pattern of constrained diversity has developed. Part IV presents the case for decentralized drug policy and critiques the Constitutional Alternative. Part V describes the Competitive Alternative.

I. A SURVEY OF THE CONCEPTUAL TERRAIN

A. *Four Leading Paradigms of Drug Control Policy*

Four competing paradigms of drug control policy have emerged in recent years as especially influential: public-health generalism, legalism, cost-benefit specifism, and rights-based.²² The public-health

22. In labeling the first three paradigms, I am borrowing the terminology suggested by Professors Zimring and Hawkins in ZIMRING & HAWKINS, *supra* note 7, at 8-10. The rights-based approach is described by Professor Husak in Douglas N. Husak, *Two Rationales for Drug Policy*:

approach regards drug abuse as a disease and seeks to reduce the social harms (overdoses, births of addicted babies, and so forth) caused by that disease.²³ Under this paradigm, all abusable substances, whether currently lawful (alcohol, tobacco) or not (cocaine, heroin), should be handled in much the same manner.²⁴ For those who abuse such substances, the public-health viewpoint emphasizes treatment and eschews moralism.²⁵ Proponents of this approach do not necessarily reject criminalization as one component of a broader harm-reduction strategy—a strategy that would also include significant public education and treatment components—but, by and large, they tend to be skeptical of the effectiveness of the criminal justice system in reducing the incidence of substance abuse.²⁶ The public-health approach is embodied in the mandatory treatment laws that have been adopted recently in Arizona and California.²⁷

The legalist approach, by contrast, has been the dominant paradigm in federal drug policy.²⁸ This approach focuses on

the threat that illegal drugs represent to the established order and political authority structure. In this view, it is the consumption of the prohibited substance rather than any secondary consequences that might ensue that is the heart of the matter. The taking of drugs prohibited by the government is an act of rebellion, of defiance of lawful authority, that threatens the social fabric.²⁹

Thus, for the legalist, the distinction between lawful and unlawful substances carries great weight; people who consume unlawful substances make a morally wrong decision regardless of whether any tangible harm results. The legalist is skeptical of treatment, preferring law enforcement approaches that are intended to reduce supply.³⁰ For purposes of public education, the message is simple and straightforward: “illegal drugs are a bad thing and . . . drug takers are bad people.”³¹ Decriminalization is unthinkable: “The central inflexibility is that there is no way to change the terms of the criminal

How They Shape the Content of Reform, in HOW TO LEGALIZE DRUGS 29, 38 (Jefferson M. Fish ed., 1998).

23. ZIMRING & HAWKINS, *supra* note 7, at 8. For a more detailed elaboration of the public-health paradigm, see EVA BERTRAM ET AL., DRUG WAR POLITICS: THE PRICE OF DENIAL 198-227 (1996).

24. ZIMRING & HAWKINS, *supra* note 7, at 8. For an argument that tobacco use, in fact, constitutes our “most serious drug problem,” see STEVEN B. DUKE & ALBERT C. GROSS, AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 22-32 (1993).

25. ZIMRING & HAWKINS, *supra* note 7, at 12.

26. *Id.* at 12-14.

27. *See infra* Part III.B.2.b.ii.

28. *See infra* Part II.E.1.

29. ZIMRING & HAWKINS, *supra* note 7, at 8-9.

30. *Id.* at 11.

31. *Id.* at 13.

law regarding drugs without admitting defeat in the power struggle between good and evil that is the essence of this account of drug use and abuse."³²

Much like public-health generalism, cost-benefit specificism rejects moral absolutism and questions the established boundaries between licit and illicit substances.³³ Under the cost-benefit paradigm, however, not all abusable substances are created equal.³⁴ Proponents of this approach "see drug policy as requiring a balance between the costs of abuse and the likelihood of reducing them by means of legal prohibition, and the manifold costs of enforcing those prohibitive laws."³⁵ This balancing process must be made on a drug-by-drug basis, with careful attention to social context.³⁶ Thus, while the public-health generalist might regard treatment as the public policy response of first resort with respect to any type of substance abuse problem, the cost-benefit specificist might, for instance, favor tough criminal sanctions for heroin, public education for cocaine, decriminalization for marijuana, and treatment for all juvenile users. The cost-benefit approach has been embodied in state laws and proposed initiatives that would narrowly decriminalize a particular drug or particular uses of a drug, such as the medical marijuana laws.³⁷

Finally, the rights-based paradigm is premised on the existence of a moral or legal right to recreational drug use.³⁸ This fundamental right might be an adjunct of the right to privacy,³⁹ or based more broadly on each person's right to be treated by the state as a "responsible moral agent."⁴⁰ Like the public-health and cost-benefit

32. *Id.* at 14. While any liberalizing of drug laws is thus anathema to the legalist mindset, if any illicit drug were ever legalized, the true legalist would presumably drop his or her opposition to use of the drug. Thus, for instance, despite the enduring influence of legalism in federal drug policy, *see infra* Part II, the nation has never come close to recriminalizing alcohol since the end of Prohibition.

33. ZIMRING & HAWKINS, *supra* note 7, at 13-14.

34. *Id.* at 9.

35. *Id.* For examples of attempts to develop a policy agenda along these lines, see DUKE & GROSS, *supra* note 24, at 279-306; ZIMRING & HAWKINS, *supra* note 7, at 177-92.

36. ZIMRING & HAWKINS, *supra* note 7, at 9.

37. *See infra* Part III.B.2.b.i.

38. For a leading statement of this position, see THOMAS SZASZ, *OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET* (1992). *See also* HUSAK, *supra* note 6, at 125-65.

39. Husak, *supra* note 22, at 43-45. For a judicial decision finding such a privacy-based right to recreational drug use in the home, see *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

40. Husak, *supra* note 22, at 46; *see also* DUKE & GROSS, *supra* note 24, at 151-54 (discussing "moral objections to drug prohibition"); STEVEN WISOTSKY, *BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY* 198 (1990) (urging "a new paradigm of individual responsibility and accountability for drug taking").

perspectives, the rights-based perspective calls into question the existing legal framework of drug control at the federal level, but on different grounds. It rejects the purported moral neutrality of the public-health and cost-benefit perspectives, and finds hidden (and perhaps dubious) moral judgments in their counting and weighing of social harms.⁴¹ Proponents tend to favor legalization, but are not necessarily opposed to all drug regulation. After all, in our legal system, we are accustomed to the notion of state infringement on fundamental rights, so long as the infringement is sufficiently limited in scope and justified by a compelling state interest.⁴² A broad criminal prohibition on drug use, however, is unlikely to be justifiable from the rights-based point of view.⁴³ Of the four paradigms, this approach has been the least influential in making policy in recent years, although federal officials have persistently seen a hidden rights-based agenda in state-level reform efforts.⁴⁴

B. A Note on Terminology

As should be clear by now, participants in drug policy debates disagree on even the most fundamental premises of the debate. While a legalist, for instance, might assume that the appropriate target of a "drug" policy is limited to illicit substances, a public-health generalist would want to include alcohol and tobacco in the discussion. While a public-health generalist might view addiction as the fundamental harm to be addressed by drug policy, a critic from the legalist or rights-based perspectives might question whether there is even such a phenomenon as "drug addiction," at least insofar as the term connotes a diminished degree of moral responsibility.⁴⁵

Resolving such disputes lies beyond the scope of this Article, but their existence cannot be disregarded. Among other things, the current state of the drug policy debate requires that anyone writing in the field make some particular effort to define the terms used.⁴⁶ Thus, for clarity's sake, a few definitions follow:

41. Husak, *supra* note 22, at 34-37.

42. *Id.* at 51.

43. *Id.* at 52.

44. *Infra* Part III.B.2.b.v.

45. See, e.g., MICHAEL MASSING, THE FIX 11 (1998) (criticizing proponents of the medical model for offering false characterization of addicts as lacking any control over their behavior); see also SZASZ, *supra* note 38, at ix-x (arguing against legitimacy of terms "addict," "drug abuse," and "drug abuse treatment").

46. See, e.g., ZIMRING & HAWKINS, *supra* note 7, at 31-35 (defining "drug," "drug addiction," "drug abuse," and "drug problem").

Drugs will be used here to connote psychoactive substances the possession of which is currently illegal under federal law (with limited exceptions for medical and scientific use).

Drug abuse refers to types or patterns of drug use that carry substantial risks of harm to the user or to others (e.g., risks of overdosing, risks of exposing a fetus to dangerous drugs, risks of developing drug dependency).

Drug addict refers to a chronic, heavy user of drugs. The term does not make a judgment as to whether such a person suffers from a disease or a moral defect, or has a demonstrable form of mental or physical dependence on drugs.

Drug enforcement refers to the apprehension, prosecution, and punishment of those who use, possess, produce, or distribute drugs.

Drug policy refers broadly to the full set of governmental decisions (both legislative and executive) dealing with the regulation of drugs, including not only penal laws, but also resource allocation decisions (e.g., how much money will go to enforcement and how much to treatment).

Legalization refers to legalization of the use, possession manufacture, and distribution of drugs; note, however, that a legalization policy may include significant taxation and regulation of drugs, much as alcohol and tobacco, though legalized, are subject to taxation and regulation.

Decriminalization refers to a policy that preserves the illegal status of drugs, but reduces penalties for simple possession to a misdemeanor level or less.

II. THE EVOLUTION OF FEDERAL DRUG POLICY

Since its origins nearly a century ago, federal drug policy has emphasized enforcement and reflected strong legalist tendencies. Yet, also from the beginning, influential voices have characterized drug abuse as a medical problem that is suitable for treatment, either to supplement or supplant criminal justice responses. Thus, the history of federal drug policy has been marked by a series of successive enforcement and treatment initiatives, some originating from within the federal policymaking establishment and some from states and local communities.

In detailing these dynamics, this Part will lay a necessary foundation for the subsequent analysis of federalism issues in drug policy. Understanding the traditional federal drug control agenda provides a baseline from which we can assess the federal government's capacity to impose its preferences on lower levels of government.

Additionally, this Part will demonstrate that, despite the claims of the federal monopoly theory, there is a long history of state and local innovation in drug policy.

A. 1914-1968: The Other Prohibition

Like the nation's well-known, unsuccessful experiment with alcohol prohibition, federal antidrug policies emerged from the Progressive Era of the early twentieth century. After a few preliminary statutes of more modest scope,⁴⁷ in 1914 Congress enacted its most ambitious early drug law, the Harrison Act, which banned the distribution of opiates (including morphine and heroin) and cocaine outside medical channels.⁴⁸ This law followed earlier state and local efforts to regulate such drugs,⁴⁹ and represented, in part, an effort by the medical profession to gain greater control over the distribution of pharmaceuticals at a time when opiate-based patent medicines were widely available without prescription.⁵⁰

Although medical professionals supported passage of the Harrison Act, conflicts soon developed between drug enforcement agents and many of the doctors who treated drug addicts.⁵¹ The

47. The Pure Food and Drug Act of 1906 required disclosure of the narcotics commonly used in patent medicines at the time, while the Smoking Opium Exclusion Act of 1909 banned importation of opium for smoking purposes. CAROLINE JEAN ACKER, *CREATING THE AMERICAN JUNKIE: ADDICTION RESEARCH IN THE CLASSIC ERA OF NARCOTIC CONTROL* 13 (2002).

48. ZIMRING & HAWKINS, *supra* note 7, at 57. The text of the Harrison Act is reprinted in *DRUGS IN AMERICA: A DOCUMENTARY HISTORY* 253-55 (David F. Musto ed., 2002) [hereinafter *DOCUMENTARY HISTORY*]. For a history of narcotics use and regulation in the United States prior to the Harrison Act, see DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 1-24 (expanded ed. 1987).

49. ACKER, *supra* note 47, at 33. Pennsylvania, for instance, enacted an antimorphine law as early as 1860. MUSTO, *supra* note 48, at 91. State laws, however, varied considerably. A leading expert on drug policy at the time put the matter this way:

There are few if any subjects regarding which legislation is in a more chaotic condition than the laws designed to minimize the drug-habit evil. . . . In many of the states anti-narcotic laws are so comprehensive that practically every retail druggist would be subject to fine or imprisonment were an attempt made to enforce the legislation ostensibly in force, while in other states the laws are so burdened with exceptions and provisos as practically to nullify every effort to control the traffic in narcotic drugs.

Id. at 96 (quoting Martin Wilbert).

50. ZIMRING & HAWKINS, *supra* note 7, at 57. Thus, for instance, the legislation received the support of the American Medical Association. ACKER, *supra* note 47, at 36. Congressional hearings on the bill, however, focused on foreign policy considerations; the Departments of State and War lobbied heavily in support of the law in order to bring the United States into line with broader international efforts to regulate the opium trade. *Id.* at 33-34. For a full account of the foreign policy considerations and diplomatic maneuvering that underlay the Harrison Act, see MUSTO, *supra* note 48, at 24-65.

51. The medical community was itself deeply divided over the extent to which drug abuse was a genuine medical problem. For instance, in a 1918 survey of health officials, 425 reported

Treasury Department, charged with enforcing the Harrison Act, concluded that physicians could not legally employ maintenance therapies as part of a treatment regimen.⁵² The Department equated maintenance, which involves the continued administration of drugs in order to help addicts avoid withdrawal symptoms, with drug trafficking, and began to prosecute physicians employing maintenance therapies for Harrison Act violations.⁵³ While some lower courts initially rejected the Department's broad interpretation of the Act,⁵⁴ the Supreme Court endorsed the prohibition on maintenance in 1919.⁵⁵ Subsequent federal prosecutions resulted in the incarceration of some physicians and the closure of all public drug treatment clinics established by states and cities.⁵⁶ Consequently, community-based treatment options for addicts essentially dried up during the interwar years.⁵⁷

Some federal officials, however, retained an interest in other forms of treatment, in part to deal with the large proportion of federal prison inmates who were addicts.⁵⁸ Growing sensitivity to the

that physicians viewed addiction as a disease, while 542 stated that addiction was instead viewed as a vice. ACKER, *supra* note 47, at 38.

52. *Id.* at 34.

53. *Id.* at 34-35. Maintenance was specifically approved and regulated under the laws of various jurisdictions at the time. For an account of the history of such regulatory programs in Jacksonville, Florida, and the state of Tennessee, see MUSTO, *supra* note 48, at 97-102. For an argument that the Treasury Department, in attacking such regulatory schemes, misconstrued Congress's intent in passing the Harrison Act, see DUKE & GROSS, *supra* note 24, at 85. Duke and Gross contend that the Harrison Act was not intended to be a prohibition law but, rather, a law providing for the "orderly marketing" of regulated opiates. *Id.* (quoting Edward Brecher).

54. MUSTO, *supra* note 48, at 124-26. In particular, federal courts doubted the constitutional authority for the federal government to regulate the medical profession. *Id.* at 125. The Supreme Court was itself initially skeptical of the government's broad interpretation of the Harrison Act. See *United States v. Moy*, 241 U.S. 394, 401-02 (1916) (holding that Harrison Act indictment was properly quashed when indictment charged drug user with unlawful possession of opiates; Harrison Act applied only to producers, importers, and distributors of regulated substances).

55. *Webb v. United States*, 249 U.S. 96, 97-100 (1919). In a separate case decided the same day, the Court upheld the constitutionality of the Harrison Act. *United States v. Doremus*, 249 U.S. 86, 94-95 (1919).

56. ACKER, *supra* note 47, at 34-36. Professor Musto notes that the crackdown on narcotics began at about the same time as the Red Scare of 1919; he places the crackdown within the context of an "intensely fearful period in American history." MUSTO, *supra* note 48, at 132-34. For an account of the federal crackdown on state-sanctioned maintenance in New York City, see *id.* at 140-41, 156-59. For a listing of known public narcotic clinics in the 1919-1920 time period, see *id.* at 151-52.

57. ACKER, *supra* note 47, at 7. At the same time that the American government was moving decisively against maintenance, the British government took precisely the opposite stance, with some apparent success in reducing addiction rates and the incidence of related public health problems. BENJAMIN & MILLER, *supra* note 7, at 164-65. The British subsequently reversed course in the late 1960s. *Id.* at 166.

58. ACKER, *supra* note 47, at 156.

problem culminated in passage of the Porter Act of 1929, which authorized the creation of two new federal narcotics hospitals.⁵⁹ These facilities, which were intended to serve simultaneously as prisons and hospitals, housed federal prisoners and probationers, as well as voluntary patients.⁶⁰ Upon admission, patient-inmates received individualized medical assessments and treatment plans reflecting the latest developments in addiction research.⁶¹

The narcotics hospitals offer an intriguing precedent for the sort of coerced treatment that is now exemplified by drug courts.⁶² Indeed, hospital officials sought legal authority to retain even the voluntary patients against their will until treatment was complete, but they were rebuffed by the courts.⁶³ Despite the hospitals' initial confidence in the efficacy of their treatment methods, relapse and recidivism proved to be the norm.⁶⁴ Officials increasingly came to view addiction as a pathological condition that could not be cured.⁶⁵ As an historian of the narcotics hospitals explains, "In the absence of new ideas regarding treatment, the institution became more custodial Within a few years of its opening, [its] character as a prison dominated its hospital functions."⁶⁶

Meanwhile, despite the national abandonment of alcohol prohibition, Congress not only maintained, but actually expanded the drug prohibition laws with passage of the Marihuana Tax Act of 1937.⁶⁷ As with opiates, the federal government did not develop an interest in marijuana regulation until *after* earlier efforts at the state and local level. Reacting to lurid stories associating marijuana with violence and sex crimes, El Paso, Texas adopted the nation's first marijuana ban in 1914.⁶⁸ Twenty-nine states followed suit over the next 17 years, and one (Louisiana) formally petitioned the federal government for a nationwide ban.⁶⁹ The federal law enforcement

59. *Id.* at 77.

60. *Id.* at 156.

61. *Id.* at 167-68.

62. For a more complete discussion of the contemporary drug courts, see *infra* Part III.B.2.a.

63. ACKER, *supra* note 47, at 175.

64. *Id.* at 181.

65. *Id.*

66. *Id.*

67. For an account of the development and passage of the legislation, see MUSTO, *supra* note 48, at 224-28. The text of the law is reprinted in DOCUMENTARY HISTORY, *supra* note 48, at 430-32.

68. ERIC SCHLOSSER, REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 19-20 (2003).

69. *Id.* at 20.

establishment reacted coolly to the proposal at first, but, for reasons that have been the subject of some debate, later lobbied vigorously and successfully for federal legislation.⁷⁰

Overall, the period from the 1930s to the 1960s was marked both by a pronounced emphasis on criminal punishment as the preferred response to drug use⁷¹ and by relatively low levels of middle-class drug use, especially outside of urban areas.⁷² Proposals for more treatment-oriented drug policies were met with “vitriolic” attacks from federal officials.⁷³

B. 1969-1980: Making War on Drugs

Despite the enactment of important criminalization statutes in 1914 and 1937, drug enforcement generally had limited political salience (and budgetary resources) before the 1960s, when drug use first became prevalent among middle-class young people.⁷⁴ Reacting to this development, Richard Nixon elevated the status of drug abuse as a national political issue in 1968, arguing on the campaign trail that drugs were “decimating a generation of Americans.”⁷⁵ Building on this rhetoric, in 1969, shortly after taking office, Nixon declared a national “war on drugs.”⁷⁶ His administration launched high-profile

70. *Id.* For a summary and assessment of the debate, see DUKE & GROSS, *supra* note 24, at 91-93. Some scholars, for instance, have suggested a desire by federal narcotics officials to increase their budgets. *See id.* at 91 (discussing “bureaucratic aggrandizement” theory set forth in HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963)).

71. MUSTO & KORSMEYER, *supra* note 1, at x-xi. The high point for this punitive tendency may have occurred in the 1950s, when Congress enacted mandatory minimum sentences for drug offenses and even authorized capital punishment for the sale of heroin to minors. MUSTO, *supra* note 48, at 231. The principal statutes of that era, the 1951 Boggs Act and the Narcotic Control Act of 1956, are reprinted in DOCUMENTARY HISTORY, *supra* note 48, at 276-81.

72. MUSTO & KORSMEYER, *supra* note 1, at xxii, 2.

73. *Id.* at 4-6. For an account of the Federal Bureau of Narcotics’ harassment campaign directed against the noted treatment advocate Alfred Lindesmith during this time period, see generally John F. Galliher et al., *Lindesmith v. Anslinger: An Early Government Victory in the Failed War on Drugs*, 88 J. CRIM. L. & CRIMINOLOGY 661 (1998).

74. *See* MUSTO & KORSMEYER, *supra* note 1, at 2-3 (discussing public perceptions of drug issue in 1950s and 1960s); *see also* ACKER, *supra* note 47, at 216 (noting “upsurge of drug use by white middle-class youth in the 1960’s and 1970’s”); DUKE & GROSS, *supra* note 24, at 100 (citing surveys indicating that, by 1979, 68.2 percent of eighteen-to-twenty-five-year-olds admitted to at least one use of marijuana or hashish). Professor Musto dates the emergence of drug use as a national policy issue back to at least 1965. MUSTO & KORSMEYER, *supra* note 1, at 2. For instance, the number of articles about illicit drugs in the *New York Times* grew from 56 in 1963, to 109 in 1964, and then to 200 in 1965. *Id.* at 3.

75. TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 110 (2001). Nixon was in part concerned about the prospect of heroin-addicted Vietnam veterans returning home. ACKER, *supra* note 47, at 217.

76. MUSTO & KORSMEYER, *supra* note 1, at 60. Professor Demleitner has thoughtfully critiqued the “war” metaphor, noting the problems of defining the “enemy” and determining what

enforcement initiatives, particularly targeting the heroin trade,⁷⁷ and increased federal antidrug expenditures from \$86 million in 1969 to nearly \$800 million in 1974.⁷⁸ His administration also oversaw the creation of the federal Drug Enforcement Administration (“DEA”) in 1973.⁷⁹

Despite Nixon’s strong rhetoric and emphasis on law enforcement, the legalist paradigm did not necessarily dominate federal drug policy in the 1970s. The nation’s most notoriously strict drug laws, which included long mandatory minimum sentences for drug offenders, were not adopted by Congress, but by the state of New York.⁸⁰ Moreover, inspired by the success of pioneering treatment programs in New York City and Illinois, the Nixon Administration supported major drug treatment initiatives, including methadone maintenance programs for heroin addicts.⁸¹ With financial assistance from a Nixon-created agency, the National Institute on Drug Abuse, many cities witnessed the return of the sorts of community-based drug treatment clinics that the federal government had stamped out in the 1920s.⁸² Federal support of treatment continued through the

it really means to “win” or “lose” a war on drugs. Demleitner, *supra* note 3, at 1028-31. She further suggests that the war on drugs has become the template for an equally “amorphous and ambiguous” war on terrorism. *Id.*

77. GEST, *supra* note 75, at 110.

78. SAM STALEY, DRUG POLICY AND THE DECLINE OF AMERICAN CITIES 188 (1992).

79. GEST, *supra* note 75, at 111. The DEA is the federal government’s chief drug “police” force, although the Federal Bureau of Investigation (“FBI”) also plays an important role, particularly with respect to drug dealing by gangs and other organized crime groups. WISOTSKY, *supra* note 40, at 66-67.

80. GEST, *supra* note 75, at 111. The minimum penalties ranged from one year to life, depending on the offense. *Id.* at 199. The so-called “Rockefeller Drug Laws,” which took effect in 1973, proved to be more than New York’s criminal justice system could handle and were substantially repealed in 1976. MICHAEL TONRY, SENTENCING MATTERS 152-54 (1996). Still, New York’s drug laws continue to be among the toughest in the nation and have recently become the target of concerted—albeit as yet unsuccessful—reform efforts by Governor Pataki. JAMES WILSON ET AL., VERA INST. OF JUSTICE, THE CHALLENGES OF REPLACING PRISON WITH DRUG TREATMENT: IMPLEMENTATION OF NEW YORK STATE’S EXTENDED WILLARD PROGRAM 2 (2003).

81. ACKER, *supra* note 47, at 217-18; MASSING, *supra* note 45, at 98, 102-03. Nixon, however, was adamantly opposed to decriminalization of marijuana. DOCUMENTARY HISTORY, *supra* note 48, at 460.

82. ACKER, *supra* note 47, at 218. In this regard, the Nixon Administration’s efforts represented the culmination of a resurgence in interest in treatment among federal policymakers that began in the Kennedy and Johnson Administrations. MUSTO & KORSMEYER, *supra* note 1, at 7. For instance, in 1963, the presidential Advisory Commission on Narcotic and Drug Abuse (the “Prettyman Commission”) promoted rehabilitation of abusers along with increased law enforcement, making several specific treatment-related recommendations. *Id.* at 7-8.

administration of Jimmy Carter, who also publicly endorsed the decriminalization of marijuana.⁸³

C. 1981-2000: Escalating the War—The Triumph of Enforcement

Soaring drug use by middle class teenagers prompted a backlash by angry parents.⁸⁴ A grassroots “parents’ movement” in the late 1970s exerted pressure on Washington for tougher policies.⁸⁵ These efforts ultimately led to an unprecedented escalation of the war on drugs in the 1980s. During this time period, as drug control became entrenched as a preeminent domestic policy issue, federal interest in treatment and receptivity to the public health paradigm diminished considerably.

Ronald Reagan, who emphasized the drug issue during the 1980 election,⁸⁶ received the enthusiastic support of the parents’ movement.⁸⁷ Once in office, he declared a renewed “war on drugs.”⁸⁸ The federal antidrug budget accordingly grew to nearly \$6 billion by 1987.⁸⁹ The Reagan Administration’s position on drug policy received its most familiar articulation in First Lady Nancy Reagan’s “just say no” campaign of the mid-1980s⁹⁰—a blunt articulation of the legalist view that drug use is a morally wrong choice, not a manifestation of a disease.⁹¹ With the emphasis on law enforcement, antidrug publicity, and new international interdiction programs, treatment received little consistent support from Washington.⁹²

The defining moment in the federal war on drugs may have come with enactment of the Anti-Drug Abuse Act of 1986.⁹³

83. GEST, *supra* note 75, at 111. Carter justified this position based on the relatively low “medical damage” caused by marijuana, the levels of use of the drug, and the inability to control its production. MUSTO & KORSMEYER, *supra* note 1, at 205-06.

84. SCHLOSSER, *supra* note 68, at 23-25.

85. MASSING, *supra* note 45, at 143-54; SCHLOSSER, *supra* note 68, at 23-25. Among other things, the parents’ movement rejected the Carter Administration’s leanings towards a cost-benefit specificity paradigm, the “overly sophisticated hairsplitting about the relative safety of this or that drug.” MUSTO & KORSMEYER, *supra* note 1, at 230.

86. GEST, *supra* note 75, at 113.

87. SCHLOSSER, *supra* note 68, at 24.

88. GEST, *supra* note 75, at 129.

89. *Id.* at 115.

90. *Id.* at 114.

91. For a discussion of the legalist view, see *supra* Part I.A.

92. GEST, *supra* note 75, at 115-16; see also ACKER, *supra* note 47, at 218 (noting that the Reagan Administration reduced federal funding of treatment at the same time that it intensified enforcement against drug users and traffickers); MASSING, *supra* note 45, at 161 (“In real terms, federal spending on treatment was less than one-fourth what it had been in 1974.”).

93. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

Responding to the public furor over the cocaine-related death of college basketball star Len Bias, Congress adopted new mandatory minimum sentences of five and ten years for dealing crack cocaine (also known as "cocaine base"), depending on the quantity of crack involved.⁹⁴ The law resulted in substantially greater penalties for crack offenses than for powder cocaine offenses. For instance, convictions involving 50 grams of crack result in the same ten-year minimum as convictions involving 5000 grams of powder cocaine,⁹⁵ a ratio that has led commentators to refer to the crack provisions as the 100:1 law.⁹⁶ A 1988 amendment made crack penalties even tougher, broadening the applicability of the five-year minimum from trafficking to mere possession.⁹⁷

These crack penalties are difficult to justify under any paradigm other than legalism.⁹⁸ The mandatory minimum sentences impose substantial costs, not just on the convicted offenders, but also on society more generally in the form of incarceration costs, the fragmentation of families and communities, the difficulty of reintegrating long-time inmates back into the community, and demoralization of the judiciary.⁹⁹ Demonstrable benefits are few.¹⁰⁰

94. GEST, *supra* note 75, at 119-21. These penalty provisions are codified at 21 U.S.C. § 841(b)(1)(A)-(B) (2000). The 1986 law was not Washington's first attempt to deal with drug abuse through harsh sentencing policies; the Boggs Act of 1951, reflecting prevailing pessimism about treatment after the failure of the narcotics hospitals, also imposed mandatory minimum sentences on some drug traffickers. ACKER, *supra* note 47, at 182; see also *supra* note 71 (discussing mandatory minimum statutes in 1950s).

95. 21 U.S.C. § 841(b)(1)(A).

96. See, e.g., GEST, *supra* note 75, at 126.

97. 21 U.S.C. § 844(a).

98. As two commentators have observed, "The minimum time served for a federal conviction for distributing 50 grams of crack cocaine (less than one-millionth of annual United States consumption) is 10 years, which is also about the average time served for murder or non-negligent manslaughter." Jonathan P. Caulkins & Philip B. Heymann, *How Should Low-Level Drug Dealers Be Punished?*, in DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE 206, 209 (Philip B. Heymann & William N. Brownsberger eds., 2001).

99. For a summary of the criticisms of the 100:1 ratio, see William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1275-84 (1996). For a recent survey of the literature on the collateral costs of imprisonment generally, see John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in PRISONS 121, 123-31 (Michael Tonry & Joan Petersilia eds., 1999). The negative effects of imprisonment on both the short-term and long-term employment prospects of inmates have been well documented. *Id.* at 136-37. For instance, one study indicates that half of state inmates were employed prior to incarceration, but only about one-fifth obtain work while on parole after incarceration. *Id.* at 137 (citing JOHN IRWIN & JAMES AUSTIN, *IT'S ABOUT TIME* (1994)). Other studies suggest that incarceration primarily impacts low-income minority communities. See *id.* at 135. For such communities, the removal of large numbers of working-age males to prison may cause substantial social and economic instability, including "churning" in local labor markets that may make the communities unattractive to business. *Id.* The effects of incarceration on families are less well documented, *sec id.* at 144, although theory

Yet, the penalties have been retained because any decrease in sentences would, in the words of a Senate Republican leader, “send[] the wrong signal to young people”¹⁰¹—hearkening back to what Professors Zimring and Hawkins referred to as the “central inflexibility” of the legalist paradigm.¹⁰² The boundaries between licit and illicit substances, once demarcated, must be vigorously enforced, and those who choose to step on the wrong side of that border merit strict punishment.

By some measures, the war on drugs reached its peak in the mid- to late-1980s.¹⁰³ Drugs remained salient on the national political stage throughout the 1990s,¹⁰⁴ however, and the federal antidrug budget continued its growth to nearly \$20 billion by 1998—more than 200 times greater than when Richard Nixon began his campaign against drugs.¹⁰⁵

With the change from a Republican to a Democratic Administration in 1993, reform proponents saw an opportunity for new directions in drug policy, but, after launching a half-hearted and unsuccessful treatment-oriented initiative, the Clinton Administration returned to the dominant policies of the 1980s.¹⁰⁶ The Administration did support a modest reduction in crack penalties, but also proposed countervailing *increases* in the penalties for powder cocaine.¹⁰⁷ A Republican-dominated Congress nonetheless rejected the Clinton proposal out of a desire to hold the line on crack sentences.¹⁰⁸ New laws reflecting the legalist perspective included the 1998 Drug Free Student Loans Act, which denies aid to college students who have so

suggests a variety of potential costs, particularly as to the children of incarcerated parents, *see id.* at 123-29.

100. For a critical review of the American experience with mandatory minimums, see TONRY, *supra* note 80, at 134-59. Professor Tonry concludes, “Evaluated in terms of their stated substantive objectives, mandatory penalties do not work.” *Id.* at 135.

101. GEST, *supra* note 75, at 127 (quoting Senator Spencer Abraham).

102. *See supra* text accompanying note 32.

103. DAVID W. RASMUSSEN & BRUCE L. BENSON, *THE ECONOMIC ANATOMY OF A DRUG WAR: CRIMINAL JUSTICE IN THE COMMONS* 6-7 (1994). For an attempt to explain the end of the drug war’s expansion in the early 1990s, *see id.* at 146-49.

104. *See* GEST, *supra* note 75, at 124-26 (describing political skirmishes between the Clinton Administration and congressional Republicans over whether the Administration was sufficiently tough on drugs).

105. *Id.* at 115; STALEY, *supra* note 78, at 188.

106. MASSING, *supra* note 45, at 216-20. One commentator argues that Clinton’s first term represented a more significant break from prior policies, but that his second term brought a return to the war on drugs. Easton, *supra* note 19, at 138 (“[P]erhaps the most accurate description of the second Clinton term is that it stopped the de-escalation of the Clinton first term, without fully re-escalating the drug war.”).

107. GEST, *supra* note 75, at 127.

108. *Id.*

much as a misdemeanor conviction “under any Federal or State law involving the possession or sale of a controlled substance.”¹⁰⁹

D. Federal Policy in the Twenty-First Century

In February 2003, the Bush Administration promulgated the latest version of the *National Drug Control Strategy*, a comprehensive, congressionally mandated statement of the federal government's drug policies and plans.¹¹⁰ Taking the *Strategy* at face value, a reader might conclude that Washington has moved a considerable distance away from the staunch legalism of the 1980s and towards the public-health paradigm. The *Strategy* identifies “healing America's drug users” as one of its three “national priorities.” To that end, it discusses at length the “key lessons” offered by the “public health model.”¹¹¹ The *Strategy* takes pains to contradict characterizations of federal drug policy as “punitive,” and purports to demonstrate that America, in contrast to decriminalizing European nations, has the “genuine public health approach.”¹¹² The *Strategy* touts President Bush's proposal to increase federal funding for treatment by \$600 million over the next three years.¹¹³ Enforcement receives comparatively muted treatment.¹¹⁴

Despite the *Strategy's* emphasis on the public-health model, in most respects federal drug policy has remained very much on the

109. 20 U.S.C. § 1091(r) (2000). For a description and critique of the law, see Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER, RACE & JUST. 61, 68-71 (2002). For an argument that the law has been implemented in a manner that goes beyond what the original drafters had in mind, see Demleitner, *supra* note 3, at 1040.

110. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY (2003) [hereinafter DRUG STRATEGY].

111. *Id.* at 17-18.

112. *See id.* at 40-41.

113. *Id.* at 16. The *Strategy* also urges treatment and counseling for students identified as drug users through random testing programs. *Id.* at 12-13. In all, the Administration requested more than \$3.2 billion from Congress for treatment, as compared to only about \$2.9 billion for domestic drug law enforcement. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY FY 2004 BUDGET SUMMARY 7 (2003). Cynics might note that the *Strategy* would make federal treatment dollars available to faith-based organizations, DRUG STRATEGY, *supra* note 110, at 20; Administration support for treatment may have less to do with drug policy per se than with a broader Administration agenda of increasing public financial support for such organizations.

114. In addressing law enforcement issues, the *Strategy* discusses new initiatives designed to promote interagency cooperation and more focused targeting of specific aspects of the drug trafficking business, DRUG STRATEGY, *supra* note 110, at 26-30, but says nothing about broader law enforcement objectives, such as more arrests, more convictions, and longer sentences. The *Strategy* covers prevention and treatment prior to enforcement and interdiction, and one is left with the impression that the former sections were imbued with considerably more ambition than the latter.

legalist course set in the 1980s. The federal drug control budget, including the law enforcement component, continues to grow.¹¹⁵ Federal mandatory minimum sentences remain in place. After a brief downward trend in the early 1990s, the annual number of arrests for drug violations has increased, ultimately setting a record in 2001 (the most recent year for which data is available).¹¹⁶

Indeed, upon closer inspection, the *Strategy* itself seems far less committed to the public-health model than it might appear at first blush. First, the *Strategy* does not encompass alcohol or tobacco; instead, it targets only illicit substances.¹¹⁷ Second, the *Strategy* defines its goals exclusively in terms of reduced drug usage,¹¹⁸ without regard to more conventional public-health objectives such as reducing the number of drug overdose deaths and babies born addicted to drugs.¹¹⁹ The *Strategy's* purpose thus seems to be reduction of drug

115. *Id.* at 5. After steady increases since FY 1996, the President did request a slightly reduced enforcement budget for FY 2003, but then requested another increase for FY 2004. *Id.*

116. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY DATA SUPPLEMENT 47 (2003) [hereinafter DATA SUPPLEMENT]. Drug arrests have also been increasing as a percentage of all arrests, growing from 7.1 percent in 1991 to 11.5 percent in 2001. *Id.* The estimated number of federal prisoners incarcerated for drug crimes grew from 25,300 in 1989 to a record 73,389 in 2001. *Id.* at 48. It is unclear what effect the "war on terror" will have on the war on drugs; data on arrests in 2002 and 2003 may provide some insight when they become available. The F.B.I. is moving 400 agents from drug cases to terrorism, Eric Lichtblau, *White House Report Stings Drug Agency on Abilities*, N.Y. TIMES, Feb. 5, 2003, at A16, which seems likely have some effect on the intensity of federal drug enforcement.

117. See DRUG STRATEGY, *supra* note 110, at 4. As Professors Zimring and Hawkins noted with respect to an earlier version of the *Strategy*, this focus on illicit drugs alone constitutes a tell-tale sign of legalism. See ZIMRING & HAWKINS, *supra* note 7, at 15. In the same vein, it is perhaps notable that the *Strategy* speaks positively of Nancy Reagan's "Just Say No" campaign. DRUG STRATEGY, *supra* note 110, at 10.

118. See DRUG STRATEGY, *supra* note 110, at 4.

119. Professors Zimring and Hawkins make a similar point about an earlier version of the *Strategy*. ZIMRING & HAWKINS, *supra* note 7, at 15. This aspect of the *Strategy* exemplifies a particular variant of the public health paradigm that might be termed the "epidemic model." As the *Strategy* puts it:

Medical research has established a clear fact about drug use: once started, it can develop into a devastating disease of the brain, with consequences that are anything but enticing. No young person watching an addict stumbling on the street looks at the loss of human potential and decides to seek the same end.

And yet the disease spreads. It spreads because the vectors of contagion are not addicts in the street but users who do not yet show the consequences of their drug habit. Last year, some 16 million Americans used an illegal drug on at least a monthly basis, while 6.1 million Americans were in need of treatment. The rest, still in the "honeymoon" phase of their drug-using careers, are "carriers" who transmit the disease to others who see only the surface of the fraud. Treatment practitioners report that new users in particular are prone to encouraging their peers to join them in their new behavior.

DRUG STRATEGY, *supra* note 110, at 17. In the epidemic model, the "disease" of drug abuse possesses three particularly salient characteristics: (1) it is highly contagious; (2) it initially takes a mild form, then progresses into the "devastating disease of the brain," *id.* at 17; and (3)

use per se (the legalist goal), rather than reduction of the harms resulting from drug use (the public-health goal). Third, as a model for treatment, the *Strategy* touts drug courts as “one of the most promising innovations in recent memory.”¹²⁰ “Drug courts,” observes the *Strategy*, “use the *coercive* authority of a judge to require abstinence and alter behavior through a combination of *graduated sanctions, mandatory drug testing, case management, supervised treatment, and aftercare programs.*”¹²¹ Drug courts will be discussed in more detail below,¹²² but it should be clear already that they have a “treatment-as-punishment” character that makes them palatable to the legalist mindset.¹²³

E. Lessons

1. Federal Preferences

Surveying nearly a century of federal drug policy, two overlapping characteristics emerge as dominant: (1) the centrality of legalism in shaping the objectives of drug policy; and (2) the reliance on enforcement as the dominant tool in achieving those objectives. Once criminalized, none of the major psychoactive drugs has ever been decriminalized at the federal level. Federal enforcement budgets have climbed steadily since 1969, as have drug-related arrest and incarceration rates. Since the 1980s, Congress has enacted a series of mandatory minimum penalties for drug crimes that stand out as among the toughest in the western world.¹²⁴

its most dangerous carriers are those who do not yet exhibit visible symptoms. The particular characteristics of the drug epidemic may justify many of the policies that would also be associated with the legalist paradigm: aggressive identification and isolation of users (“carriers”), *id.* at 17; moral condemnation of users who do not voluntarily come forward for treatment before “infecting” others; and coerced treatment for those who would not otherwise undergo treatment.

120. DRUG STRATEGY, *supra* note 110, at 23.

121. *Id.* (emphasis added).

122. *See infra* Part III.B.2.a.

123. ZIMRING & HAWKINS, *supra* note 7, at 17.

124. *See, e.g.,* Caulkins & Heymann, *supra* note 98, at 210 (“The expert consensus is that the United States today is highly punitive toward drug sellers when compared to other Western industrialized countries . . . or to ourselves 15 years ago . . .”). *Why* federal drug policy displays such harshness is a question that largely lies beyond the scope of this Article. Some of the public-choice dynamics are suggested below in Part III.C.1, which attempts to explain why the federal government was responsive to the demands of some states for a national drug prohibition. But federal policies have also been influenced by many other considerations, including the dynamics of national party politics and the sway of a burgeoning “[n]arco-[e]nforcement [c]omplex.” BERTRAM ET AL., *supra* note 23, at 102. For a nuanced account of these considerations, see *id.* at 102-50. Similarly curious is why federal policies treat some

To be sure, the federal government has from time to time dallied with treatment and the public-health paradigm. The best examples include the Porter Act of 1929 and the Nixon-era National Institute for Drug Abuse. If its rhetoric is to be believed, the current *National Drug Control Strategy* may even suggest that a new period of interest in treatment has begun. Notwithstanding such dalliances, however, treatment has at no time replaced enforcement as the dominant focus of federal policy; at most, treatment and enforcement have coexisted as equal points of emphasis for brief periods of time. In short, there is no reason to doubt a continued federal preference for enforcement and legalism in the foreseeable future.¹²⁵

2. Federal-State Relations

Over the course of the past century, important policy innovations have come from the federal, state, and local levels of government; policymaking has not been a one-way street from the center to the periphery. The criminalization of both opiates and marijuana was pioneered at the state and local level decades before the Harrison and the Marijuana Tax Acts. Treatment initiatives in

psychoactive drugs (opiates, cocaine, marijuana) harshly and others (alcohol, nicotine, caffeine) not. Courtwright argues that the changing needs of a “rationalized, bureaucratized, and mechanized” social environment contributed to the worldwide shift from taxation to prohibition of psychoactive substances in the twentieth century, but that alcohol and tobacco were largely insulated from these pressures, due, in part, to their particularly widespread use and to the size and importance of the industries that produced them. DAVID T. COURTWRIGHT, *FORCES OF HABIT: DRUGS AND THE MAKING OF THE MODERN WORLD* 178, 190-92 (2001).

125. These federal tendencies have been the subject of considerable criticism, much of it claiming that federal policies do not “work.” The criticism typically goes something like this. There is no evidence that federal interdiction and enforcement measures have resulted in any meaningful reduction in the supply of drugs in this country. DUKE & GROSS, *supra* note 24, at 200-30 (arguing that “[t]he [d]rug [w]ar [c]annot [s]ucceed”); Michael Levine, *Fight Back: A Solution Between Prohibition and Legalization*, in *AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21st CENTURY* 91, 95-97 (Timothy Lynch ed., 2000) (arguing that current levels of enforcement resources cannot effectively reduce drug supplies); Timothy Lynch, *Tabula Rasa for Drug Policy*, in *AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21st CENTURY*, *supra*, at 3, 7 (citing conclusion of the Office of National Drug Control Policy). Driving the drug business underground has enriched criminal organizations and promoted gang violence. Lynch, *supra*, at 8. The war on drugs has not only resulted in the waste of billions of taxpayer dollars, but has also encouraged the development of ever more aggressive policing practices that erode civil liberties. See *id.* The concentration of law enforcement resources on drugs has diverted scarce resources from more pressing issues, such as violent crime. *Id.* at 9. Finally, the costs of the war on drugs have been borne disproportionately by racial minorities. See, e.g., DUKE & GROSS, *supra* note 24, at 168-71 (discussing loss of civil liberties in minority communities and disproportionately high rates of incarceration of black males); Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER RACE & JUST. 183, 222 (2002) (discussing data on racial disparity in targets of narcotics search warrants in San Diego County).

the 1970s were inspired by innovative programs adopted in Illinois and New York City. Mandatory minimums in the 1980s were foreshadowed by the earlier Rockefeller drug laws in New York State. The historical record, in short, suggests a dynamic form of federalism in which the states have led as well as followed.

At the same time, Washington has been receptive to state innovation, but generally only enforcement-oriented innovation. Most dramatic was the federal government's rejection of treatment in the 1920s, as prosecutors stamped out the community-based drug treatment clinics set up by state and local agencies. More generally, criminalization and mandatory minimums have had a more durable influence on federal policy than, say, methadone maintenance. This pattern may be repeating itself now as the federal government widens its support of drug courts, a particularly enforcement-friendly approach to treatment, while attempting to prevent state adoption of less enforcement-oriented innovations.¹²⁶ The historical record thus suggests that the federal-state dynamic tends, over the long run, to dovetail with the federal preferences for enforcement and legalism.

III. IS THERE A FEDERAL MONOPOLY ON DRUG POLICY?

Whatever the historical record may reflect about state innovation prior to the escalation of the drug war in the 1980s, commentators have suggested that current federal policy stifles further innovation. Thus, some have referred to a federal "monopoly" over drug policy.¹²⁷ More bluntly, another commentator asserts, "In the fight against drugs . . . the federal government is effectively the only government."¹²⁸ The federal government does indeed possess an impressive array of tools to influence policymaking at lower levels of government.¹²⁹

At the same time, recent evidence demonstrates that innovation and diversity may still be found at the state level. Rather than a federal monopoly, national drug policy is more suggestive of a ubiquitous mode of ordering federal-state relations: cooperative federalism. Under this model, as commonly implemented in other policy fields ranging from welfare to education to the environment, the federal government first establishes broad regulatory objectives and then utilizes grants and other incentives in an effort to encourage (but

126. See *infra* Parts III.B.2.a, b.vi.

127. BENJAMIN & MILLER, *supra* note 7, at 6.

128. Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1192 (1995).

129. See *infra* Part III.A.2.

does not, strictly speaking, *require*) state cooperation in achieving those objectives.¹³⁰ The states maintain formal policymaking autonomy; thus, while states may face significant pressures to conform to federal preferences, there is always the possibility that some will choose to deviate.

This Part describes the current state of federal-state-local relations as follows. First, this Part describes the various tools of federal influence. Second, this Part surveys the recent record of state innovation, demonstrating clear deviation from the legalist paradigm. While the federal government has opposed such developments, it has chosen not to use its most powerful tool (preemption) to prevent innovation,¹³¹ indicating at least a grudging acceptance of policy diversity. Third, this Part contends that federal-state relations in this area exemplify cooperative federalism. Indeed, the state of federal-state relations is precisely what public choice theory would predict for drug policy. Finally, this Part identifies and explains one particularly noteworthy aspect of federalism in drug policy: federal reliance on “in-kind” aid, instead of outright grants, in order to induce state cooperation.

A. Federal Tools of Influence

1. What Exactly Does Washington Want?

Assuming, as argued above,¹³² that the federal government prefers legalist and enforcement-oriented approaches to drug policy, what would the federal government want state and local governments to do to help implement these preferences? Washington’s agenda would presumably focus on two distinct aspects of drug policy: substantive penal laws and drug enforcement effort. Below the federal level, these two aspects of policymaking are typically handled by different units of government.¹³³ Penal laws are made at the statewide level, most often the state legislatures, but sometimes through other mechanisms, such as the ballot initiative.¹³⁴ Federal

130. Michael S. Greve, *Against Cooperative Federalism*, 70 *MISS. L.J.* 557, 558 (2000).

131. See 21 U.S.C. § 903 (2000) (indicating that Congress does not intend “occupy the field” with Comprehensive Drug Abuse Prevention and Control Act of 1970).

132. See *supra* Part II.E.1.

133. For a discussion of the conventional allocation of law enforcement responsibilities among federal, state, and local governments, see ZIMRING & HAWKINS, *supra* note 7, at 160-62.

134. See *id.* at 160. For a discussion of the state ballot initiative mechanism, see *infra* Part III.B.2.b.

attempts to influence the content of penal laws must therefore target state political and lawmaking functions.

Enforcement effort—how many resources are devoted to the apprehension and prosecution of drug offenders—is determined in a far more diffuse manner. The state legislature, through mechanisms such as budget making, exercises some control over enforcement intensity, as does the state-level law enforcement bureaucracy.¹³⁵ Yet, the vast majority of police resources in this country—more than three-quarters—are employed not by the states, but by local units of government, principally counties and municipalities.¹³⁶ The character of enforcement efforts, unlike penal laws, are therefore determined primarily at the local level, requiring the federal government to target a second distinct set of institutions.¹³⁷

What, then, does Washington want? In essence, Washington wants states to retain (and perhaps enhance) criminal penalties for drug offenses, *and* Washington wants local law enforcement bureaucracies to prioritize drug enforcement when making resource allocation decisions. Both objectives must be kept in mind when assessing the efficacy of the federal tools of influence.

2. How Does Washington Try To Get What It Wants?

a. The Bully Pulpit

The federal government has uniquely powerful ways of selling its drug policy preferences to the American people. This is, in part, a function of the visibility and prestige of the President (and, significantly in this context, the First Lady). Thus, for instance, Nancy Reagan's bluntly legalist "just say no" campaign of the 1980s is credited with shifting young people's attitudes towards drugs.¹³⁸ In addition to the President and First Lady, however, the federal government also advances its agenda through the nation's single most visible drug control official, the "drug czar," who coordinates the nation's drug control efforts from a cabinet-level position.¹³⁹ Among

135. See ZIMRING & HAWKINS, *supra* note 7, at 160 (noting that about 15 percent of police officers nationally are state police).

136. *Id.*

137. More than 90 percent of local police departments regularly provide drug enforcement. MATTHEW J. HICKMAN & BRIAN A. REAVES, UNITED STATES DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS 2000, at 11 (2003).

138. See GEST, *supra* note 75, at 116; DRUG STRATEGY, *supra* note 110, at 10.

139. GEST, *supra* note 75, at 47, 124-25. Formally, the drug czar is head of the Office of National Drug Control Policy ("ONDCP"). DOCUMENTARY HISTORY, *supra* note 48, at 534.

other things, the drug czar controls an enormous media budget (the Administration requested \$170 million for fiscal year 2004), much of which is used for national advertising in support of the federal drug control agenda.¹⁴⁰ Underscoring its legalist orientation, the current federal media campaign particularly targets the use of marijuana (as opposed to harder drugs),¹⁴¹ while another recent campaign linked drug use to terrorism.¹⁴²

The federal “bully pulpit” has at least a three-fold significance in furthering federal control over drug policy. First, to the extent that the bully pulpit increases public support for the legalist paradigm, it serves to discourage, or to contribute to the defeat of, state-level legislative proposals reflecting alternative paradigms. Indeed, few state-level reformers will be able to match the media budget of the drug czar. Second, as the bully pulpit continually emphasizes the urgency of the drug problem, it builds public support for significant allocations of resources to drug enforcement at the local level.¹⁴³

Third, the visibility of federal anti-drug efforts may contribute to a public belief that the responsibility for drug policy lies with the federal government, not with state or local governments. State legislators and other officials can “pass the buck” to Washington.¹⁴⁴ Diminished accountability reduces the pressure on policymakers to innovate or otherwise accommodate public interest in alternative drug policy paradigms. One state judge puts it this way:

[T]he incursion of the national government subverts the authority of and the regard for the local and state governments, making it increasingly difficult for those governments to effectively and imaginatively respond to the needs of their constituents. A political culture that comes to regard the federal government as its guardian relegates the local and state governments to secondary status. The premise—articulated or not—is that these lesser governments are not capable of handling important matters. Public confidence and commitment are diminished. Ultimately, federalization obscures the boundaries of political responsibility and accountability, undermines the confidence constituents have in their officials, and erodes the authority of the local and state institutions.¹⁴⁵

140. See DRUG STRATEGY, *supra* note 110, at 8.

141. *Id.*

142. Sandra Guerra Thompson, *Did the War on Drugs Die with the Birth of the War on Terrorism?: A Closer Look at Civil Forfeiture and Racial Profiling After 9/11*, 14 FED. SENTENCING REP. 147, 147 (2001-2002).

143. For a similar point, see ZIMRING & HAWKINS, *supra* note 7, at 168 (arguing that “crisis appeals by the U.S. president and the drug czar to the general public to regard drugs as a problem” can be seen as a stratagem to maintain state and local funding levels for drug enforcement).

144. BENJAMIN & MILLER, *supra* note 7, at 197.

145. Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 838 (2000).

This tendency may also help to ensure that the federally preferred legalist approaches continue to predominate at the lower levels of government.

b. Direct Enforcement

The federal government also advances its policy agenda by directly enforcing (i.e., through its own agents) the federal drug laws. Direct enforcement is arguably the least important, albeit perhaps the most visible, mechanism of federal policy control. Due to resource constraints, the federal government can only investigate, prosecute, and incarcerate a small percentage of drug offenders. In 2000, for instance, state institutions held more than 250,000 prisoners convicted of drug crimes, while federal institutions held just over 73,000.¹⁴⁶ To be sure, federal enforcement resources have been growing rapidly, leading to a more than doubling of the number of federally incarcerated drug offenders between 1990 and 2000.¹⁴⁷ Yet, the true significance of direct enforcement as a tool of federal control rests not simply in the volume of cases prosecuted, but in the way that the limited federal enforcement resources are targeted.

First, the federal government has targeted conduct that is permissible under state law, with the objective of preventing states from implementing policies that contravene federal preferences. An early precedent was the federal prosecution of public treatment clinics

146. UNITED STATES DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2001, at 13-14 (2002).

147. *Id.* at 14. The expansion of the federal government's enforcement efforts against even low-level drug offenders should be viewed in the context of a general broadening of federal effort against routine, traditionally local criminal activity. This trend, referred to as the "federalization of criminal law," has been the subject of a growing body of academic literature, mostly rather critical. See, e.g., TASK FORCE ON FEDERALIZATION OF CRIM. LAW, AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIM. LAW (1998); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 85 (1996); Ehrlich, *supra* note 145; Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing With Violent Street Crime: Principles, Questions, and Cautions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 103 (1996); Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127 (1997); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 907-19 (2000); Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15 (1996). For relatively more sanguine views of recent federalization trends, see generally Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997).

in the 1920s.¹⁴⁸ A contemporary example is the prosecution of medical marijuana cases, such as the *Rosenthal* case.¹⁴⁹

In the same vein, when a state does criminalize conduct that is prohibited under federal law, but imposes more lenient penalties, federal agents overcome this lenience by prosecuting drug offenders in federal court. Indeed, federal prosecutors have systematically done so at various times in New York City and Washington, D.C.¹⁵⁰ Moreover, under prevailing interpretations of the Double Jeopardy Clause, when there is a state prosecution, federal agents can wait to see if the sentence imposed in state court is satisfactorily punitive before deciding whether to bring federal charges for the same conduct.¹⁵¹ In short, federal officials often focus their resources on those sorts of cases in those particular locales that would likely produce little or no punishment in state court, thereby bringing those locales into greater alignment with the more punitive federal preferences. Though federal enforcement resources are limited, federal control is advanced by strategically targeting the most significant deviations from federal norms.

Second, federal enforcement resources are leveraged through cooperation with state and local law enforcement agencies.¹⁵² While the nature of these cooperative arrangements is detailed below,¹⁵³ the basic functioning of the “cooperation multiplier” bears particular note in this context. In general, one of the great weaknesses of federal law enforcement lies in the lack of personnel at the street level; federal

148. See *supra* Part II.A.

149. See *supra* text accompanying notes 11-15.

150. See O’Hear, *supra* note 7, at 733 (New York City); Garry Sturgess, *Judges Rap Stephens on Drug Cases*, LEGAL TIMES, Feb. 11, 1991, at 7; Tracy Thompson, *Stop Complaining, Stephens Tells Judges; Federal Jurists Bristle When U.S. Attorney Suggests They Don’t Work Very Hard*, WASH. POST, June 8, 1991, at B1.

151. See Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 2-7 (1992) (discussing historical development of successive prosecutions doctrine). Schlosser provides an example:

In 1985 Donald Clark . . . was arrested for growing marijuana, convicted under state law, and sentenced to probation. Five years later, the local U.S. attorney decided that Clark had not been punished enough. Clark was indicted under federal law for exactly the same crime, found guilty, and sentenced to life in prison without parole.

SCHLOSSER, *supra* note 68, at 54.

152. As Professor Richman observes:

The federal resources devoted to street crime, drug crimes, and even organized crime and corruption may themselves be limited, but they can be strategically invested—in such expensive tools as electronic surveillance, witness protection, and prosecutorial support for investigations—because federal agencies are largely excused from the political obligation to patrol an expansive beat in these areas.

Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 783 (1999).

153. See *infra* Part III.A.2.d.

agents do not, as a rule, walk a beat.¹⁵⁴ Instead, federal agencies like the FBI and DEA traditionally specialize in the most technically sophisticated law enforcement techniques, such as electronic surveillance, sting operations, and following a convoluted money trail.¹⁵⁵ Cooperative arrangements with local police help federal agencies compensate for their traditional limitations, effectively providing the federal government with a street-level presence. Important leads uncovered by state and local agents can be relayed to federal agents for joint or federal-only investigation. Drug offenders nabbed by state and local agents can be referred to federal prosecutors. In sum, the federal government gets to have it both ways: federal law enforcement agencies remain small, elite, and specialized, and federal prosecutors are referred a more than ample supply of drug cases.

Third, given an ample supply of referrals but significant budgetary limitations their offices, federal prosecutors can selectively prosecute only those cases that maximize the impact of federal law. This may mean, as noted above, prosecution of cases in which state law deviates most from federal, such as the medicinal marijuana cases. Additionally, federal prosecutors may try to take only the highest-profile cases. State prosecutors have long been suspicious of federal prosecutorial tendencies in this direction,¹⁵⁶ and recent empirical work supports these suspicions.¹⁵⁷ A comparison of state and federal prison inmates convicted of drug crimes finds that the federal inmates tend to have more "human capital": they are older, more successful in the aboveground economy, and are more likely to have the resources required to hire a private attorney.¹⁵⁸ This evidence is consistent with the view that federal prosecutors target high-profile cases.¹⁵⁹

154. See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 403 (2001) ("At the end of the day, federal enforcers are well aware that only local authorities can provide the corner-by-corner informational network needed to pursue the kinds of crime for which local police have always been responsible.").

155. For a general discussion of the comparative advantages of state and local law enforcement agencies, see Heymann & Moore, *supra* note 147, at 108.

156. See GEST, *supra* note 75, at 49.

157. See Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 269-73 (2000).

158. See *id.* at 288.

159. See *id.* Why federal prosecutors choose to target "high-human-capital" defendants is uncertain; explanations may include a greater tendency of such defendants' criminal activities to be multijurisdictional in nature, as well as the self-interested professional advancement objectives of individual federal prosecutors. *Id.*

Federal emphasis on high-profile drug cases likely magnifies the bully-pulpit phenomenon discussed above.¹⁶⁰ Media attention provides a public forum for the articulation and judicial validation of federal drug policy preferences. High-profile federal cases also reinforce the view that the federal government is responsible for handling drug issues, thereby diminishing state and local accountability.

Fourth, federal preferences for tougher drug penalties are even felt in cases prosecuted in state court. Most criminal cases, wherever prosecuted, are resolved by way of plea bargaining, not trial.¹⁶¹ In order to gain more leverage in plea bargaining, state prosecutors may use the threat of referral to federal authorities for prosecution under harsher federal law. To the extent that such threats may be credibly made (which probably varies from jurisdiction to jurisdiction), the “market rate” for bargained drug pleas in state court should rise considerably.¹⁶²

A defendant who refuses to comply with prosecutorial expectations may suffer draconian consequences. Thus, for instance, in a Pennsylvania case, a drug defendant rejected a state plea offer requiring a four-year prison term.¹⁶³ Following his plea rejection, federal prosecutors agreed to prosecute him in federal court, where he ultimately received a life sentence.¹⁶⁴ Such cases serve as an example to other state defendants and thus help to extend the influence of federal law.

c. Targeted and Conditional Monetary Grants

The federal government also “purchases” some measure of control over state and local drug policy through conditional monetary

160. See *supra* Part III.A.2.a.

161. For instance, more than 96 percent of federal cases were resolved by way of a guilty plea in 2000. Bowman & Heise, *supra* note 5, at 514.

162. As one long-time defense lawyer observes, “Criminal defendants and their lawyers often are faced with the potential for dual [state-federal] prosecutions or federal prosecution. They must always [bargain] in the shadow of the law.’ Moreover, once threatened with actual federal prosecution, defendants face prosecutors who possess awesome power.” Curtis, *supra* note 147, at 89 (quoting Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979)); see United States v. Beede, 974 F.2d 948, 951-52 (8th Cir. 1992) (discussing defendant’s claim that he was subjected to federal prosecution as retribution for refusing state plea offer); United States v. Williams, 746 F. Supp. 1076, 1080 n.6 (D. Utah 1990) (discussing evidence that state prosecutors used threats of federal prosecution during plea negotiations), *aff’d*, 963 F.2d 1337 (10th Cir. 1992).

163. Beale, *supra* note 147, at 1000-01.

164. Curtis, *supra* note 147, at 96 (citing Jim Smith, *Petty Pusher Goes Out Big Time: U.S. Verdict Means Life Term for Dealer*, PHILA. DAILY NEWS, July 17, 1992, at Local 7).

grants. In 1986, Congress created the most important grant program, the Edward Byrne Memorial State and Local Law Enforcement Assistance Program (named after a deceased New York City police officer).¹⁶⁵ The Byrne Program intends

to assist States and units of local government in carrying out specific programs which offer a high probability of improving the functioning of the criminal justice system, *with special emphasis on a nationwide and multilevel drug control strategy* by developing programs and projects to assist multijurisdictional and multi-State organizations in the drug control problem and *to support national drug control priorities*.¹⁶⁶

Congress thus made clear its desire to use the Byrne Program to advance the federal agenda. Indeed, Congress further specified that grants made to state and local governments under the Byrne Program were “for the purpose of enforcing State and local laws that establish offenses similar to offenses established in the Controlled Substances Act,”¹⁶⁷ thereby giving states an incentive to establish, retain, and enforce such offenses.

As other commentators have noted, the Byrne grants, amounting to \$580 million in fiscal year 2002,¹⁶⁸ “have altered the law enforcement landscape in numerous ways.”¹⁶⁹ One of the most important recipients of grants has been multi-jurisdictional task forces.¹⁷⁰ As discussed in more detail below,¹⁷¹ such task forces have played a crucial role in the enlistment of state and local law enforcement resources in the federal war on drugs.

In addition to the Byrne Program, Congress and the Department of Justice have also adopted more narrowly targeted measures in order to induce state and local compliance with the federal drug control agenda. For instance, states now lose 10 percent of their federal highway funds if they do not enact and enforce a law providing for the suspension or revocation of the drivers’ licenses of convicted drug offenders.¹⁷² Likewise, federal funds have been

165. Blumenson & Nilsen, *supra* note 2, at 42. This program replaced more open-ended federal block grants previously given to states by the Law Enforcement Assistance Administration, which is now defunct. *Id.*

166. 42 U.S.C. § 3751(a) (2000) (emphasis added).

167. 42 U.S.C. § 3751(b).

168. This total includes \$94 million for discretionary grants and \$486 million for formula grants. UNITED STATES DEPT’ OF JUSTICE BUREAU OF JUSTICE ASSISTANCE, PROGRAM BRIEF: EDWARD BYRNE MEMORIAL STATE AND LOCAL LAW ENFORCEMENT ASSISTANCE PROGRAM 2-3 (2002) [hereinafter BYRNE BRIEF].

169. Blumenson & Nilsen, *supra* note 2, at 43.

170. *Id.*

171. See *infra* Part III.A.2.d.ii.

172. 23 U.S.C. § 159(a) (2000). The Supreme Court upheld the constitutionality of a similar condition for federal highway funds in *South Dakota v. Dole*, 483 U.S. 203 (1987). Grant conditions have proven effective in inducing changes to state law in a variety of contexts. For

conditioned on state adoption of comprehensive drug testing within the state's criminal justice system.¹⁷³ Also, as discussed in more detail below, Congress has successfully used grants to promote the development of drug courts by state and local judicial officials.¹⁷⁴

d. Co-opting State and Local Law Enforcement Agencies

The federal government could not wage its war on drugs at current levels of intensity without substantial cooperation from state and local law enforcement.¹⁷⁵ State and local law enforcement, however, are agents of the state or local government, not the federal government. How then are they enlisted in support of the federal agenda? In addition to the grant programs discussed above,¹⁷⁶ two federal practices, in particular, ensure that drug enforcement remains a high priority of state and local agencies and that state and local agencies contribute information and resources to federal agencies: the "equitable sharing" of forfeited property and the formation of multi-jurisdictional drug task forces ("MJDTFs").

i. Forfeiture and Equitable Sharing

Forfeiture laws, one of the more controversial features of federal drug policy, permit federal agents to seize not only illegal drugs, but also the proceeds of drug transactions and any property used to facilitate the commission of drug offenses.¹⁷⁷ Congress enacted these laws in order to strike at the "economic roots" of the drug business by depriving producers and traffickers of money, equipment, and other necessary forms of capital.¹⁷⁸ Prosecutors may effect a seizure through civil proceedings, which generally makes forfeiture easy and attractive since prosecutors need not obtain a criminal conviction and are not otherwise subject to the constitutional

instance, many states adopted "truth-in-sentencing" reforms in the 1990s at least in part as a result of a conditional federal grant program requiring such reforms. U.S. GEN. ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES (1998), reprinted in 11 FED. SENTENCING REP. 163, 163-64 (1998).

173. GEST, *supra* note 75, at 257-58; Guerra, *supra* note 128, at 1189.

174. See *infra* Part III.B.2.a; see also 42 U.S.C. § 3797(a) (2000) (authorizing drug court grants). The President has requested \$68 million for the drug courts program in fiscal year 2003.

175. See *supra* Part III.A.2.b.

176. See *supra* Part III.A.2.c.

177. 21 U.S.C. §§ 853, 881 (2000). For a history of forfeiture law, see JIMMY GURULÉ & SANDRA GUERRA, THE LAW OF ASSET FORFEITURE §§ 1-1 to -4 (1998).

178. Blumenson & Nilsen, *supra* note 2, at 44.

constraints of a criminal proceeding.¹⁷⁹ A vast range of property has been subject to forfeiture, including “cash, bank accounts, jewelry, cars, boats, airplanes, businesses, houses, and land.”¹⁸⁰ In fiscal year 2002, net deposits into the federal forfeiture fund exceeded \$453 million.¹⁸¹

While modern drug forfeiture law dates back to 1970, law enforcement did not begin to make widespread use of its new authority until Congress enacted two critical amendments in the 1980s. First, Congress authorized federal agencies to retain forfeiture proceeds, rather than depositing them into the government’s general fund,¹⁸² which increased the institutional incentives of law enforcement to pursue forfeiture. Second, Congress authorized federal agencies to share proceeds with state and local agencies based on state and local contributions to the forfeiture effort.¹⁸³ This “equitable sharing” program includes a “federal adoption” component, whereby state and local authorities may turn seized assets over to federal agents for forfeiture proceedings under federal law and then receive back as much as 80 percent of the seized assets’ value.¹⁸⁴ In fiscal year 2002, the federal government paid more than \$188 million to state and local agencies through the equitable sharing program.¹⁸⁵ Coupled with grant aid, the total amount of money transferred to state and local law enforcement since 1988 has been conservatively estimated at \$3 billion, and may well be much higher.¹⁸⁶

As a result of equitable sharing, drug enforcement has become a money-making endeavor for many state and local law enforcement agencies. This advances federal control of drug policy in several respects. First, like the Byrne Program, equitable sharing helps to underwrite enforcement-oriented drug policies at the state and local level. Consider, for instance, a state legislature deciding whether to spend a marginal dollar on drug treatment or enforcement: to the extent that the enforcement option may generate net proceeds for the state, enforcement may appear far more attractive than treatment. Similarly, a local police department deciding whether to allocate a

179. GURULÉ & GUERRA, *supra* note 177, § 1-5, at 21.

180. Blumenson & Nilsen, *supra* note 2, at 45.

181. UNITED STATES DEP’T OF JUSTICE, 2002 ASSET FORFEITURE FUND REPORTS (2002) [hereinafter 2002 ASSET FORFEITURE], <http://www.usdoj.gov/jmd/atp/02fundreport/22002affr/report1.htm>.

182. 28 U.S.C. § 524(c) (2000).

183. 28 U.S.C. § 524(c)(1)(III); 21 U.S.C. § 881(e)(1)(A) (2000).

184. Blumenson & Nilsen, *supra* note 2, at 51.

185. 2002 ASSET FORFEITURE FUND REPORTS, *supra* note 181.

186. Thompson, *supra* note 142, at 148.

marginal officer between a drug enforcement unit and a property crimes unit might be inclined to select drug enforcement in light of the prospect of obtaining additional federal disbursements.¹⁸⁷

Second, the program provides a substantial financial incentive for state and local law enforcement to participate in multi-jurisdictional task forces under federal leadership and otherwise to share information and resources with federal law enforcement—all in order to maximize the state and local equitable share.¹⁸⁸

Third, equitable sharing helps to ensure that state and local law enforcement will lobby state legislatures vigorously to retain enforcement-oriented drug policies.¹⁸⁹ Decriminalization, for instance, might spell disaster for a police unit that relies on drug enforcement for its funding. As other commentators have put it, in cash-strapped times, equitable sharing may mean “the difference between a paycheck and pink slip” for some officers.¹⁹⁰ Given its financial stake

187. Indeed, going down to the level of enforcement decisions by individual officers, as a result of equitable sharing there are important incentives in many jurisdictions for officers to focus their efforts on drug investigations. Not only are the jobs of some officers dependent on equitable sharing, but, in a few jurisdictions, performance evaluations are based on asset seizures. See Blumenson & Nilsen, *supra* note 2, at 65. And at least one city (Helper, Utah) gives officers an individual share of seized assets. *Id.* For an argument that, in light of such considerations, forfeiture laws have created conflicts of interest for law enforcement agencies that are of constitutional magnitude, see *id.* at 66.

In an attempt to quantify the responsiveness of law enforcement agencies to the incentives created by forfeiture laws, Professors Rasmussen and Benson compared the rate of drug arrests in states that have favorable forfeiture laws with those that do not. RASMUSSEN & BENSON, *supra* note 103, at 140. In states without favorable forfeiture laws, state and local agents must rely on federal adoption and thereby lose at least 20 percent of the forfeiture proceeds to the federal government. Rasmussen and Benson found that the enhanced financial incentives for drug enforcement in the states with more favorable forfeiture laws was associated with an increase in the ratio of drug arrests to total arrests of between 35 and 50 percent. *Id.*

188. While this incentive is lessened in states that have their own forfeiture laws, state forfeiture laws are often less favorable to law enforcement than federal. For instance, state laws generally require that forfeiture proceeds be used, at least in part, for purposes other than law enforcement. Blumenson & Nilsen, *supra* note 2, at 52. In short, proceeding under state law will often be less profitable for a state agency than proceeding under federal law, even taking into account the subtraction of a federal share. *Id.* Indeed, the Department of Justice attempts to ensure this competitive advantage by providing larger shares to agencies that could have forfeited property under state law but chose federal adoption instead. *Id.* at 54.

Incentives might also be diminished if state and local budget-setting authorities reduced law enforcement funding from general revenue based on the availability of equitable sharing income, effectively reallocating shared income to non-law-enforcement purposes. At least one study, however, suggests that such reallocation does not occur. See RASMUSSEN & BENSON, *supra* note 103, at 138 (providing analysis of Florida data).

189. Among other things, the prospective loss of forfeiture revenue makes it less attractive than might be expected for cash-strapped states to legalize and tax drugs.

190. See Blumenson & Nilsen, *supra* note 2, at 65. Underscoring this view of the motives of law enforcement agents, a former DEA officer recalls,

in current drug policy, it should be no surprise that law enforcement has proven to be a potent lobbying force in resisting changes to drug laws.¹⁹¹

ii. Multi-jurisdictional Drug Task Forces

While equitable sharing provides an incentive for state and local law enforcement to cooperate with federal law enforcement, MJDTF programs offer a formal, systematic structure for that cooperation. The DEA began to promote MJDTFs in the 1970s, but these task forces did not become widespread until the expansion of the government's asset forfeiture powers in the 1980s.¹⁹² Most MJDTFs are set up under the auspices of the Byrne program, "but once created they may achieve an independent life of their own."¹⁹³ As critics have noted, if forfeiture proceeds are great enough, Byrne money can be phased out, and "the task force may become a self-financing, self-perpetuating, and independent entity."¹⁹⁴

The two chief MJDTF programs are the DEA State and Local Task Forces (DEA-SL Task Forces) and the Organized Crime Drug Enforcement Task Forces (OCDETFs).¹⁹⁵ More than 100 MJDTFs have been set up in forty states under the DEA-SL program.¹⁹⁶ The OCDETF program, which targets high-level drug traffickers, has supported the creation of MJDTFs in thirteen cities.¹⁹⁷ A third program, administered by the drug czar, funds federal-state-local collaborative efforts in so-called High Intensity Drug Trafficking

DEA agents would joke whenever mainstream media would headline some new statistic showing that we were winning: "Please! Not yet," someone would cry. "I've got a mortgage to pay"

The point is that none of these bureaucracies even consider the possibility of successfully completing their goals. On the contrary they all vie with each other for bigger cases, better headlines, and more media exposure, which translate to a bigger cut of the budget, more money, more authority, and more power.

Levine, *supra* note 125, at 98. In all, drug asset forfeiture proceeds for local police departments amounted to \$703 per officer in 1999. HICKMAN & REAVES, *supra* note 137, at 12.

191. See Blumenson & Nilsen, *supra* note 2, at 80-81. Law enforcement, for instance, successfully lobbied for repeal of a law enacted by Congress in 1988 that required equitable sharing disbursements to be made in accordance with state laws earmarking some forfeited assets for non-law-enforcement purposes. See *id.* at 107-08.

192. Guerra, *supra* note 128, at 1183.

193. Blumenson & Nilsen, *supra* note 2, at 94.

194. *Id.* For an argument that the independence of forfeiture-funded MJDTFs raises concerns under the Nondelegation Doctrine, see *id.* at 91-92.

195. GURULÉ & GUERRA, *supra* note 177, § 2-2, at 26.

196. *Id.*

197. *Id.* at 27.

Areas (HIDTAs).¹⁹⁸ Tellingly, nearly the entire United States is now encompassed by at least one of the fifteen designated HIDTAs.¹⁹⁹ In all, more than 20 percent of local police agencies participate in at least one MJDTF, including more than 80 percent of police departments in cities with a population of at least 100,000.²⁰⁰

While Byrne grants and equitable sharing have played a central role in the creation and maintenance of MJDTFs, state and local participation is motivated by more than just money. State and local agents, for instance, may welcome improved access to specialized federal law enforcement resources. They may also desire easier access to federal law and federal courts, which tend to be less hospitable to criminal defendants than their state counterparts.²⁰¹ They may benefit from “on-the-job training in advanced investigative techniques” during service on an MJDTF, which makes them “more valuable assets to their home departments.”²⁰² Finally, they may appreciate the enhanced status that is said to come from working on equal terms with federal agents.²⁰³

Whatever the motivation for participation, MJDTFs help to advance the federal drug agenda. MJDTFs channel drug offenders into federal courts, where they will be subject to strict federal drug laws. More generally, MJDTFs draw state and local resources into the

198. *Id.* at 28.

199. *Id.* In addition to such centrally administered MJDTFs, numerous other task forces have been developed at a local level, usually directed by an individual United States Attorney's Office. Guerra, *supra* note 128, at 1184; see also GURULÉ & GUERRA, *supra* note 177, § 2-2, at 28 (describing U.S. Attorney office programs to promote intergovernmental cooperation).

200. Hickman & Reaves, *supra* note 137, at 12.

201. For a survey of the various disadvantages to federal defendants, see Clymer, *supra* note 147, at 668-75. When designated under federal law, state and local agents participating in a task force are given the authority to conduct searches and seizures and to make arrests pursuant to federal law. 21 U.S.C. § 878(a) (2000).

202. See William A. Geller & Norval Morris, *Relations Between Federal and Local Police, in* MODERN POLICING, 15 CRIME & JUSTICE: A REVIEW OF RESEARCH 231, 254 (Michael Tonry & Norval Morris eds., 1992). The federal government has also long promoted cooperative relationships by offering formal training to local law enforcement.

The provision of federal training to local police on a tuition-free basis (not the universal practice but a common one) always has been a significant element in the federal side's courtship of local police support and cooperation, and this inducement to interaction assumes a larger importance in recessionary times, when advanced training is often one of the first items to be jettisoned from local budgets.

Id. at 288.

203. *Id.* at 254-55; Guerra, *supra* note 128, at 1185-86. In considering incentives for federal-state cooperation, Geller and Morris also note that some traditional impediments to cooperation (e.g., FBI responsibility for investigating local police corruption and local recalcitrance in enforcing civil rights laws in the civil rights era) have dissipated in recent years. Geller & Morris, *supra* note 202, at 262-64.

federal war on drugs,²⁰⁴ but have little ongoing accountability to state and local electorates.²⁰⁵ Indeed, federal officials often make the final decisions about priorities and policies.²⁰⁶

e. Summary

The federal government exercises influence over state and local policymaking through a complicated and diffuse set of tools. These tools seem particularly designed to advance the federal agenda by: (1) building public support for drug criminalization and enforcement; (2) signaling federal leadership on drug policy, thereby diminishing the accountability of state and local officials; and (3) providing aid, financial and otherwise, to local law enforcement agencies for drug enforcement purposes, thereby encouraging local drug enforcement activities and building a politically powerful constituency for pro-federal policies.

B. State Innovation and Diversity

This Section presents the evidence that state innovation and diversity continue to flourish, notwithstanding the federal tools of influence described in the previous Section. Continued diversity does not, however, mean that federal influence is wholly ineffective: diversity, in fact, might be considerably more pronounced in the absence of federal influence—a point that will be developed more in the next Section. Diversity is demonstrated in two ways: (1) by persistent and dramatic variations in state sentencing laws; and (2) by the recent experiments with more fundamental reforms, largely as a result of successful ballot initiative campaigns.²⁰⁷

204. DEA-led task forces have been said to “represent the high-water mark thus far in American history in genuine, federal-local police teamwork.” Geller & Morris, *supra* note 202, at 304.

205. MJDTFs have been subject to persistent charges of abuse of power. Indeed, in highly publicized incidents, dozens of people arrested by MJDTF officers have been released in recent years in response to evidence of dishonest police practices and racism. See, e.g., Ross E. Milloy, *Arrests by a Drug Task Force in Texas Come Under Fire*, N.Y. TIMES, Apr. 4, 2001, at A14; Simon Romero & Adam Liptak, *Texas Court Acts to Clear 38 in Town-Splitting Drug Case*, N.Y. TIMES, Apr. 2, 2003, at A1.

206. Guerra, *supra* note 128, at 1183-84.

207. This Section focuses on diversity in state laws. Diversity in drug enforcement effort is harder to demonstrate, but is suggested statistically and anecdotally. For instance, among forty large urban counties analyzed in a recent Department of Justice study, the number of drug defendants as a percentage of total felony defendants ranged from 14 percent (Westchester County, New York) to 65 percent (Cook County, Illinois). UNITED STATES DEP'T OF JUSTICE, BUREAU JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000, at 40 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf>. In all, five counties were above 45

1. Penalty Variation

Most states have adopted a version of the Uniform Controlled Substances Act, which was first promulgated in 1970 both to bring greater uniformity among the states and to complement federal drug policies.²⁰⁸ Yet, within just a few years, states began to adopt dramatically different penalty schemes for drug offenses. On the one hand, the 1973 Rockefeller drug laws in New York included harsh mandatory minimums that shocked even prosecutors and the police.²⁰⁹ On the other hand, between 1973 and 1978, eleven states decriminalized marijuana possession, typically providing only a maximum \$100 fine for a first offense.²¹⁰

While only one state (Nevada) has decriminalized since 1978,²¹¹ and one state (Alaska) has actually recriminalized,²¹² drug-sentencing laws continue to vary enormously from state to state. As one commentator has observed with respect to marijuana laws:

In New York State possessing slightly less than an ounce of marijuana brings a \$100 fine, if it's a first offense. In Louisiana possessing the same amount of pot could lead to a prison sentence of twenty years. In Montana selling a pound of marijuana, first offense, could lead to a life sentence, whereas in New Mexico selling 10,000 pounds of pot, first offense, could be punished with a prison term of no more than three years.

... If you are caught with three ounces of marijuana in Union City, Ohio, you will probably be fined \$100. But if you're caught in the town of the same name literally across the road in Indiana, you could face six months to three years in prison . . .²¹³

Similar variations are also evident with respect to other drugs.²¹⁴ Indeed, such variations should hardly be surprising, given the

percent, while seven were below 25 percent. *Id.* Such data suggests that different local law enforcement agencies are differently prioritizing drug enforcement relative to other crime categories. Of course, the data is only suggestive, not conclusive; the different levels of drug enforcement may be driven by different underlying rates of drug crime. Yet, anecdotal evidence lends support to the hypothesis of diversity in enforcement effort. For instance, in the city of Milwaukee, marijuana possession cases have been routinely referred for criminal prosecution, while, traditionally, police in some suburban communities have only issued municipal citations for the same conduct. Felicia Thomas-Lynn, *County Crime Charging Policies Leveled Out*, MILWAUKEE J. SENTINEL, July 13, 2003, at 1B.

208. BENJAMIN & MILLER, *supra* note 7, at 264-65.

209. GEST, *supra* note 75, at 199.

210. Albert DiChiara & John F. Galliher, *Dissonance and Contradictions in the Origins of Marijuana Decriminalizations*, 28 LAW & SOC'Y REV. 41, 48 (1994).

211. Tom Gorman, *Nevada Gambling on Cannabis; Legalizing Marijuana on State Ballot*, MILWAUKEE J. SENTINEL, Aug. 26, 2002, at 2A.

212. DiChiara & Galliher, *supra* note 210, at 42.

213. SCHLOSSER, *supra* note 68, at 26-27.

214. See, e.g., O'Hear, *supra* note 7, at 749 (comparing cocaine laws in Oklahoma and California). For a comprehensive survey of state drug penalties, see THE GALE GROUP, NATIONAL SURVEY OF STATE LAWS 163-200 (Richard A. Leiter ed., 4th ed. 2003). While current

substantial regional differences in attitudes towards criminal punishment in this country.²¹⁵

2. Alternative Paradigms

With the possible exception of marijuana decriminalization (which essentially ended a quarter-century ago), the diversity in drug penal laws discussed above may matter little to federal policy. From the legalist perspective, it may matter less how long the prison terms are for drug offenses than that there *are* prison terms available; through providing for prison sentences, the law embodies a serious regard for the boundaries between the licit and illicit. To the extent that state penal laws are too lax, drug offenders may simply be referred for federal prosecution under the harsher federal laws. The only real threat from this perspective would be legalization or decriminalization, which would make it far more complicated politically and legally for local law enforcement to cooperate with federal drug enforcement efforts.

Viewed this way, meaningful state innovation ended—at least temporarily—in 1978, when new decriminalization laws were snuffed out by the burgeoning parents' movement.²¹⁶ It is thus perhaps understandable that, by the early 1990s, commentators could refer to a federal monopoly in drug policy.²¹⁷

Yet, beginning in the mid-1990s, states began to adopt a series of reforms that deviated markedly from federal norms, reflecting the influence of the public-health and cost-benefit paradigms. These reforms were made possible by a “chink” in the armor of federal influence: the ballot initiative, which permits political outsiders to make law, provided they have sufficient financial resources.²¹⁸ The

budgetary pressures have led to a wave of state penal reform since 2001, reforms vary considerably from state to state, perhaps exacerbating preexisting disparities. For a concise table summarizing recent reforms, see Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 FED. SENTENCING REP. 41, 45 (2002).

215. Professors Rossi and Berk, for instance, conducted a survey in which respondents from around the country were asked to sentence a variety of hypothetical crimes. They concluded: “[T]here are strong and consistent regional differences. Residents of the New England states were the most lenient in sentencing. In contrast, residents of the two South Central regions . . . gave almost consistently longer sentences to offenders of all kinds.” PETER H. ROSSI & RICHARD A. BERK, UNITED STATES SENTENCING COMM’N, PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 5 (1995), available at http://www.ussc.gov/nss/jp_exsum.htm.

216. See *supra* Part II.C.

217. BENJAMIN & MILLER, *supra* note 7, at 6.

218. For a more complete description of the ballot initiative, see Michael M. O’Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 285-88 (2003).

federal agenda has fared well in state legislatures, likely reflecting legislative solicitude for the interests of the local law enforcement establishment.²¹⁹ The federal agenda has not fared so well in the ballot initiative process, however, in which support of the local law enforcement establishment seems to carry less weight than a large campaign war chest.²²⁰

Before reaching the ballot initiatives, however, this Section will first consider the curious story of the drug court movement, representing a contrasting model of innovation. As the drug courts have evolved, it has become apparent that they are compatible with federal policies. Nonetheless, they represent a public-health-influenced innovation that became established in many local jurisdictions without federal support. In that sense, the drug courts tend to undermine the persuasiveness of the federal monopoly theory.

a. Insider Reform: The Drug Treatment Courts

As the war on drugs gathered force in the 1970s, some jurisdictions began to experiment with specialized drug courts in order to process the burgeoning volume of drug cases more efficiently.²²¹ Early drug courts developed expedited case management procedures but did not fundamentally alter the traditional criminal court functions of adjudicating guilt and imposing sentences in an adversarial proceeding.²²² As the drug war intensified in the 1980s, case management pressures continued to grow, setting the stage for a more substantial reform, the treatment-oriented drug court.

Miami pioneered the drug treatment court concept in 1989.²²³ The experiment was an attempt to cope with growing pressures on the criminal justice system in Dade County, which between 1985 and 1989 witnessed a 45-percent increase in adult arrests and a 93-percent increase in drug possession arrests—a growth in business that threatened a crisis in Dade County’s already overcrowded correctional facilities.²²⁴ A long-time observer describes the “sense of futility and desperation among criminal justice leaders” that developed in the 1980s:

219. See *supra* Part III.A.2.d.i.

220. See *infra* Part III.B.2.b.

221. New York City developed the nation’s first specialized drug courts in the early 1970s. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1460 (2000).

222. *Id.*

223. John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, in *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION* 19, 19 (W. Clinton Terry, III ed., 1999).

224. *Id.* at 21.

The various Dade County police agencies were devoting more resources to investigation of drug crimes and generating more arrests Yet, the availability of drugs, particularly cocaine and crack cocaine, seemed unrelenting As quickly as the State Attorney could prosecute, the cases kept coming, and the overcrowded jails and prisons had to release offenders at a rapid pace.²²⁵

Finally, the local judiciary initiated a study of alternative approaches to drug case management.²²⁶ With the participation of prosecutors and public defenders, the judges developed a new plan emphasizing drug treatment under court supervision,²²⁷ thereby melding the 1970s-era concept of the specialized drug court with the ideal of outpatient, community-based drug treatment.

A scholar of the Miami drug court describes key features of the court as follows:

First, and most significant, is the role of the drug court judge. In the Miami model, the judge presides over many brief hearings in which he or she engages in conversation directly with the defendant/participant, without the intervening or translating role of counsel as a mouthpiece. The judge-to-defendant exchanges may involve a defendant's entry into the [drug treatment] program, in-court reports on a defendant's progress, graduation of defendants from the program, or a variety of sanctioning decisions involving defendants who have absconded or been rearrested for new offenses. Defendants who have opted to enter the program are instructed by the judge to appear in court periodically for reviews of their progress in treatment. On the basis of input from the treatment agency . . . the judge hears reports of the defendant's progress, discusses his/her status in treatment with the defendant, and offers encouragement if appropriate. . . . The judge . . . is also called on to impose sanctions or otherwise encourage compliance with program requirements when the defendant has shown a poor record of performance On occasion, the judge will order the defendant confined for two weeks in jail ("motivational jail") . . . and will reassess the defendant's participation after that period of confinement. The judge may also transfer the cases of some defendants out of drug court to be tried in the normal fashion by other Circuit Court felony judges.²²⁸

In short, drug court offers both a carrot and a stick to motivate participation in drug treatment: participants remain in the community and avoid criminal justice sanction, but noncompliance with the treatment regimen may result in the imposition of graduated sanctions, up to and including transfer back into the traditional criminal justice system.

Early results were encouraging. On average, defendants remained in the twelve-month treatment program for about nine months, with 60 percent achieving a favorable outcome.²²⁹ Most defendants avoided incarceration, although about 37 percent

225. *Id.* at 22.

226. *Id.*

227. *Id.*

228. *Id.* at 24-25.

229. *Id.* at 36.

experienced some “motivational jail.”²³⁰ Drug court participants had lower rates of, and longer times before, rearrest than other drug offenders.²³¹ In all, there was at least some basis to conclude that the Miami experiment was rehabilitating some drug addicts without sacrificing public safety or adding to prison overcrowding.

The federal government reacted coolly to the Miami experiment, refusing a request for financial assistance with little discussion.²³² Nonetheless, a handful of other cities quickly adopted drug treatment courts of their own.²³³ Virtually none received federal assistance.²³⁴ By the mid-1990s, however, federal policies had changed considerably. Beginning in 1994, Congress specifically authorized the Attorney General to make grants to state and local governments to set up and operate drug treatment courts.²³⁵ The Department of Justice has since awarded tens of millions of dollars under this authority,²³⁶ with its budgetary request amounting to \$68 million for fiscal year 2004.²³⁷ With federal support, what began as a small grassroots movement has blossomed into a national phenomenon of considerable size. As of May 2003, local jurisdictions had set up more than 1000 drug courts across the country, with more than 400 additional drug courts in the planning stage.²³⁸ The vast majority have received federal grants.²³⁹

Federal money, however, comes at some cost, as grants are subject to a multitude of conditions. In order to qualify for aid, a drug court program must provide for the following:

- Exclusion of defendants with a prior conviction for a violent crime;²⁴⁰

230. *Id.* at 37.

231. *Id.*

232. *Id.* at 23.

233. Some of the early drug treatment courts followed the Miami model quite closely, while others deviated in significant ways. See *id.* at 38-39 (discussing structure of early drug courts). For a detailed description of early drug courts in Oakland; Broward County, Florida; Portland, Oregon; and Maricopa County, Arizona, see THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION, *supra* note 223, at 43-165.

234. Goldkamp, *supra* note 223, at 40.

235. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 5001(a)(3) (1994).

236. See Hoffman, *supra* note 221, at 1463-64 (noting that more than \$47 million was awarded through fiscal year 1997 alone).

237. DRUG STRATEGY, *supra* note 110, at 16.

238. UNITED STATES DEPT OF JUSTICE OFFICE OF JUSTICE PROGRAMS DRUG CT. CLEARINGHOUSE AND TECH. ASSISTANCE PROJECT, SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY 55 (2003), <http://www.american.edu/spa/justice/publications/drgchart2k.pdf>.

239. For a complete listing of which courts have received grants when, see *id.*

240. See 42 U.S.C. § 3797u(a)(1) (2000) (excluding “violent offenders”); *id.* § 3797u-2(a) (defining “violent offender”).

- Prosecutorial participation;²⁴¹
- Mandatory drug testing for participants;²⁴²
- Mandatory substance abuse treatment;²⁴³
- Sanctioning (up to and including incarceration) of participants who “fail[] to show satisfactory progress”;²⁴⁴
- Payment by the offender, “to the extent practicable,” of restitution and treatment expenses;²⁴⁵ and
- Payment from nonfederal sources of at least 25 percent of the costs of the drug court.²⁴⁶

The federal government has thus co-opted the drug court movement, using federal money as a tool to ensure that the movement develops in a manner consistent with the federal drug policy agenda. Federally funded drug courts cannot deviate too markedly from punitive, enforcement-oriented approaches: defendants are subject to mandatory economic sanctions and frequent drug testing;²⁴⁷ defendants who fail to meet treatment expectations face incarceration; and prosecutors are assured an integral role in the development and operation of the program. Additionally, criminal history restrictions limit the number of offenders eligible for drug court programs, while matching funding requirements encourage continued state and local financial contributions to drug enforcement. None of this is to suggest that the federally approved drug court model lacks merit. Rather, the point is that local jurisdictions face significant financial disincentives to experiment with alternative models.²⁴⁸

The development of the drug courts echoes the history of the federal narcotics hospitals.²⁴⁹ Both reforms responded to institutional pressures within the criminal justice system. Both attempted to blend treatment with punishment. In time, the punishment aspect of the narcotics hospitals came to dominate the treatment aspect. The drug courts, consciously or not, may be moving in the same direction.

241. *Id.* § 3797u(a)(2); *id.* § 3797u-3(d)(1).

242. *Id.* § 3797u(a)(3)(A).

243. *Id.* § 3797u(a)(3)(B).

244. *Id.* § 3797u(a)(3)(C).

245. *Id.* § 3797u(a)(3)(E)-(F).

246. *Id.* § 3797u-5(a).

247. Regular urine testing is time consuming and invasive, typically requiring close monitoring by a probation officer in order to prevent tampering. Lara A. Bazelon, *Testing Testing*, LEGAL AFFAIRS, July/August 2003, at 45, 45. Urine testing has been replaced in many jurisdictions by the less invasive sweat patch, but the accuracy of the patch has been questioned in court and in the press, raising doubts about the future of the technology. *Id.* at 49.

248. Judge Hoffman makes a similar point. See Hoffman, *supra* note 221, at 1528-29 (“Drug courts provide the federal government with an attractive vehicle through which to interfere unduly with the traditional role of state and local governments in dealing with crime.”).

249. For a description of the narcotics hospitals, see *supra* Part II.A.

Indeed, despite federal support and rapid growth, drug treatment courts have become rather controversial.²⁵⁰ Critics contend that “coerced” drug treatment is no more successful than voluntary treatment,²⁵¹ or that any additional benefits are outweighed by the costs.²⁵² In particular, there is evidence that drug courts actually increase incarceration rates for drug offenders through the so-called “net-widening effect.” Judge Morris B. Hoffman of Denver, one of the nation’s most prolific and eloquent drug court critics, describes this effect as follows:

In Denver, the number of drug cases nearly tripled two years after the implementation of drug court.

....

250. For a recent collection of articles reflecting a range of empirical and theoretical viewpoints on drug courts, see DRUG COURTS IN THEORY AND IN PRACTICE (James L. Nolan ed., 2002). A recent law review symposium issues helpfully places the drug court controversy within a wider movement towards “problem solving courts.” Symposium, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence*, 5 FORDHAM URB. L.J. 1755 (2002). The National Drug Court Institute publishes a comprehensive bibliography of drug court resources. THE NAT’L DRUG COURT INST., DRUG COURT PUBLICATIONS RESOURCE GUIDE (4th ed. 2002).

251. Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENTENCING REP. 172, 173 (2001-2002). Drug court proponents vigorously contest this claim. One recent evaluation of the empirical data concludes:

The literature on treatment effectiveness consistently shows that an addict who completes a treatment program—any program—either stops or markedly reduces his use of drugs after discharge. The problem is that only a small number of participants finish their programs Clearly, the biggest challenge to any treatment program is keeping patients in it.

. . . [P]atients who enter treatment involuntarily, under court order, fare as well as, and sometimes even better than, those who enroll voluntarily Not surprisingly, those under legal supervision stay longer than their voluntary counterparts.

....

Early data on more than 80 drug courts show an *average* retention rate (defined as the sum of all participants who either have completed or are still in drug-court programs) of 71 percent. Even the *lowest* rate of 31 percent greatly exceeds the average one-year retention rate of about 10-15 percent for noncriminal addicts in public-sector treatment programs.

Sally L. Satel, *Is Drug Addiction a Brain Disease?*, in DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE 118, 135-37 (Philip B. Heymann & William N. Brownsberger eds., 2001).

252. For a discussion of the costs, including increased burdens on the court system and conflicts between and within different branches of government, see Hoffman, *supra* note 221, at 1499-1533. Critics have also raised ethical concerns about the role of defense lawyers in drug treatment courts. See, e.g., Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000-2001); see also Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1216 (1998) (“[The] minimum requirements for responsible defense practice in drug treatment courts are unlikely to be met on a consistent basis.”). For a defense of drug courts, see William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENTENCING REP 179 (2001-2002).

It is clear that the very presence of drug courts is causing police to make arrests in, and prosecutors to file, the kinds of ten- and twenty-dollar hand-to-hand drug cases that the system simply would not have bothered with before. Because drug courts are about treatment and not adjudication, the arrest and prosecutorial functions have become methods to troll for reluctant patients, unrestrained by practical law enforcement or prosecutorial concerns.

....

Quite apart from the operational problems this massive net-widening has caused, perhaps its most disturbing impact is that drug courts are sending many more drug defendants to prison than traditional courts ever did. . . . [I]n a period of two and one half years, the number of drug defendants sent to prison out of Denver more than doubled.

The apparent paradox of more drug defendants going to prison out of courts specifically designed to save taxpayers lots of money by treating drug users instead of imprisoning them is not surprising at all. It is a direct and predictable consequence of massive net-widening coupled with dismal treatment results. Although in theory drug courts should reduce the numbers of prison sentences—by successfully treating some defendants—this theory assumes, quite incorrectly, that treatment will be moderately successful and that drug court dollars will be used to treat defendants already in the system rather than to triple the size of the intake.²⁵³

In short, whether intended or not, instituting a drug treatment court may have real-world effects similar to those created by simply increasing enforcement intensity under the old legalist paradigm.

b. Outsider Reform

Drug treatment courts represent “insider reform,” an experiment adopted by officials within the criminal justice system and intended to deal with institutional problems like caseload pressures and prison overcrowding. Outsiders have initiated competing reform movements. They have relied primarily on the ballot initiative, which allows voters in twenty-one states, as well as the District of Columbia, to enact statutes directly.²⁵⁴ This Section describes the four principal types of drug reform that have been sought through the initiative process: legalization of medical uses of marijuana, mandates for treatment of drug users in lieu of incarceration, forfeiture reform, and

253. Hoffman, *supra* note 251, at 174.

254. For a state-by-state summary of the varying initiative rules, see DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 295-311 (1989). Initiative proponents must typically collect tens or hundreds of thousands of signatures on a petition in order to place an initiative proposal on the ballot. *Id.* at 296-97. Then, the voters may decide by majority vote whether to accept or reject the proposal. Some states also permit voters to amend the state constitution through the initiative process. For a listing of these states, as well as the requirements for constitutional amendments in each, see *id.* at 296-97.

legalization or decriminalization of nonmedical uses of marijuana.²⁵⁵ Lastly, this Section considers the federal responses to outsider reform.

i. Medical Marijuana

Marijuana has long been used for medicinal, as well as recreational, purposes.²⁵⁶ Marijuana's federal classification as a Schedule I drug, however, precludes medicinal uses,²⁵⁷ prompting a long-running debate over marijuana's therapeutic benefits. In a much-cited 1999 study by the Institute of Medicine ("IOM"), initiated at the behest of the Office of National Drug Control Policy, researchers concluded, "Scientific data indicate the potential therapeutic value of [drugs that include chemical compounds associated with marijuana] for pain relief, control of nausea and vomiting, and appetite stimulation."²⁵⁸ Thus, the IOM report noted, such drugs might be "moderately well suited for particular conditions, such as chemotherapy-induced nausea and vomiting and AIDS wasting."²⁵⁹ At the same time, the IOM report cautioned that smoked marijuana is a "crude . . . delivery system that also delivers harmful substances," and that "in most cases there are more effective medications" available.²⁶⁰ The report also noted other risks associated with marijuana use, including withdrawal effects and the possibility that marijuana acts as a "gateway drug" to even more harmful substances.²⁶¹

Whatever the scientific merits, voters in eight states and the District of Columbia have approved ballot initiatives over the past seven years providing for medical uses of marijuana in contravention

255. While beginning as "outsider reform," some state legislatures have begun to take an interest in some of these reform proposals. For instance, the Kansas legislature recently adopted a mandatory treatment law for nonviolent offenders. Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1, A16. Other states have adopted more modest programs that are also intended to divert greater numbers of drug offenders into treatment. See, e.g., WILSON ET AL., *supra* note 80, at 4-6 (describing diversion program in New York). Other states have recently scaled back mandatory minimum prison terms and expanded early release options. See, e.g., Butterfield, *supra* (describing reforms in Washington, Michigan, and elsewhere); Michael Lawlor, *Reforming Mandatory Minimum Sentences in Connecticut*, 15 FED. SENTENCING REP. 10 (2002) (describing reforms in Connecticut).

256. For a concise history of medicinal uses of marijuana, see Marcia Tiersky, Comment, *Medical Marijuana: Putting the Power Where It Belongs*, 93 NW. U. L. REV. 547, 548-52 (1999).

257. *Id.* at 549-50.

258. Janet E. Joy et al., *Marijuana and Medicine: Assessing the Science Base* (1999), reprinted in A DOCUMENTARY HISTORY, *supra* note 48, at 542, 550.

259. *Id.* at 544.

260. *Id.* at 544-45.

261. *Id.* at 547.

of federal law.²⁶² The first two such campaigns, in Arizona and California in 1996, set the pattern for later initiatives.²⁶³

Arizona's Proposition 200 permitted the use of Schedule I controlled substances by seriously or terminally ill patients pursuant to a doctor's prescription.²⁶⁴ In order to provide a prescription, a doctor was required to document a scientific basis for the drug's therapeutic value and to obtain a written second opinion from another doctor.²⁶⁵ Wealthy businessmen, including John Sperling and George Soros, bankrolled the campaign for Proposition 200.²⁶⁶ Backed by nearly \$2 million in donations, initiative proponents advertised heavily in support of the measure, while opponents raised a mere \$32,000.²⁶⁷ Proposition 200 ultimately won passage by a nearly two-to-one margin.²⁶⁸

California's Proposition 215 applies only to marijuana, not to all Schedule I substances, but is otherwise somewhat less restrictive than Proposition 200.²⁶⁹ The California law protects from prosecution any patient or "primary caregiver" who possesses or cultivates marijuana "upon the written or oral recommendation or approval of a physician."²⁷⁰ Once again, proponents were well financed and

262. Alistair E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 CAL. L. REV. 1575, 1577 (2000). States adopting medical marijuana initiatives include Alaska, ALASKA STAT. § 11-71-090 (Michie 2002); California, CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2004); Colorado, COLO. CONST. art. XVIII, § 14; Maine, ME. REV. STAT. ANN., tit. 22, § 2383-B (West 2004); Nevada, NEV. CONST. art. IV, § 38; Oregon, OR. REV. STAT. § 475.309 (2003); and Washington, WASH. REV. CODE ANN. § 69.51A.005 (West Supp. 2004).

263. For a description of the content and politics of Proposition 200, see O'Hear, *supra* note 218, at 291-94. For a description of the campaign for Proposition 215, California's medical marijuana initiative, see Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 713-17 (1998). For a comparison of the medical marijuana laws adopted in Nevada, California, and Oregon, see Scott McKenna, *Medical Marijuana in the Silver State*, NEV. LAW., Aug. 2002, at 6, 36-37.

264. Proposition 200, Drug Medicalization, Prevention, and Control Act of 1996, § 6 [hereinafter Proposition 200], available at <http://www.sosaz.com/election/1996/General/1996BallotPropsText.htm>.

265. *Id.* § 7.

266. O'Hear, *supra* note 218, at 293.

267. *Id.*

268. *Id.* Arizona voters subsequently amended the law so that it would not take effect until the federal government rescheduled marijuana or otherwise authorized medical uses of the drug. Andrew J. LeVay, Note, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 710 n.70 (2000).

269. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1991).

270. *Id.* § 11362.5(d).

advertised heavily.²⁷¹ Proposition 215 ultimately passed with 56 percent of the vote.²⁷²

ii. Mandatory Treatment

Medical marijuana reform embodies the cost-benefit specificity paradigm, carving out a specific type of use of a specific drug for unique regulatory treatment. By contrast, the mandatory treatment initiatives embody public-health generalism: the use of *any* illicit drug triggers the same response (court-supervised treatment). In this sense, the mandatory treatment initiatives share the same general thrust as the drug court movement. The initiatives, however, deviate from the drug court model in one crucial respect: they either eliminate or dramatically curtail the ability of judges to incarcerate participants or return eligible defendants to the conventional criminal prosecution track. Because the sanctioning power of supervising judges is so limited, the initiatives represent a less coercive, more voluntary approach to treatment.

Arizona's Proposition 200, besides legalizing medical uses of marijuana, also incorporated mandatory treatment provisions. Specifically, the law mandates that "any person who is convicted of the personal possession or use of a controlled substance" be placed on probation and required to undergo drug treatment under court supervision.²⁷³ As originally enacted, Proposition 200 further specified that, if a defendant violated any of the conditions of probation, the court could impose additional conditions "short of incarceration."²⁷⁴ Thus, the defendant could undergo treatment secure in the knowledge that he or she would not suffer the ultimate sanction of incarceration.²⁷⁵

California's Proposition 36, adopted by the voters in 2000, operates similarly to Proposition 200. Like the Arizona law,

271. Vitiello, *supra* note 263, at 715-17.

272. Campaign for New Drug Policies, 17 Statewide Votes for Drug Policy Reform, <http://www.drugreform.org/docs/17votes.pdf> (last visited May 19, 2004).

273. ARIZ. REV. STAT. ANN. § 13-901.01(A), (D) (West 2003). The operative provisions of Proposition 200 will be cited herein as they have been codified. The initiative excludes several categories of defendants from mandatory treatment, including: (1) any defendant convicted of the trafficking offenses of possession for "sale, production, manufacturing, or transportation for sale"; (2) any defendant with one prior conviction (or indictment) for a violent crime; and (3) any defendant with two prior convictions for personal possession or use. *Id.* § 13-901.01(B)-(C), (G).

274. After a subsequent initiative campaign in 2002, judges are now authorized to incarcerate recalcitrant defendants under certain limited circumstances. O'Hear, *supra* note 218, at 294.

275. The defendant pays for his or her own treatment, but only to the extent of his or her financial ability. § 13-901.01(D).

Proposition 36 mandates probation and treatment in lieu of incarceration for eligible drug defendants.²⁷⁶ But, unlike Proposition 200, Proposition 36 provides for revocation of probation, albeit through a somewhat complicated process.²⁷⁷ A defendant who commits one drug-related probation violation may have his or her probation revoked (and hence face incarceration) only if the state proves by a preponderance of the evidence that the defendant "poses a danger to the safety of others."²⁷⁸ Revocation becomes progressively easier with successive violations.²⁷⁹ Thus, treatment under Proposition 36 has a somewhat more coercive face to it than it does under Proposition 200, but is still much less coercive than the drug court model.

Like the campaign for Proposition 200 in Arizona, the campaign for Proposition 36 in California was marked by a significant disparity in the financial resources of supporters and opponents. Proposition 36 supporters raised more than \$3,000,000, while opponents had less than one-tenth that amount.²⁸⁰ Prominent financial supporters included Soros, Sperling, and insurance executive Peter Lewis.²⁸¹ The state prison guards' union headed the opposition,²⁸² which also included Governor Gray Davis and most judges, law enforcement officials, and health care groups in the state.²⁸³ Voters adopted the initiative by a wide margin, as

276. CAL. PENAL CODE § 1210.1(a) (West 1982). With a few minor exceptions, the eligibility criteria generally parallel those in Proposition 200. O'Hear, *supra* note 218, at 294-95. Proposition 36 contains analogous provisions for parolees, generally prohibiting revocation of parole for the first-time violation of a drug-related condition. CAL. PENAL CODE § 3063.1(a).

277. *Id.* § 1210.1(e).

278. *Id.* § 1210.1(e)(3)(A).

279. *Id.* § 1210.1(e)(3)(B)-(C).

280. Timm Herdt, *Prop. 36 Supporters Want "War on Drugs" Out of Court*, VENTURA COUNTY STAR, Oct. 16, 2000, at A6. Despite this financial surplus, only 20 percent of voters had heard of the initiative just one month before the election. Lynda Gledhill, *Most Unaware of 2 Initiatives; Campaign, Drug Measures Not Well Known, Field Poll Finds*, S.F. CHRON., Oct. 14, 2000, at A23.

281. Bill Ainsworth, *Meddling Tycoons or Visionary Activists: 3 Push Drug Initiative*, COPLEYS NEWS SERVICE, Oct. 9, 2000, at *2-3. The trio was brought together by Ethan Nadelmann, director of the Lindesmith Center (now the Campaign for New Drug Policies), who eventually became the primary advisor for the Proposition 36 campaign. William Booth, *The Ballot Battle; Drug War Is in Fight of Its Life; Wealthy Trio Takes Aim with California Initiative to End Penalties for Users*, WASH. POST, Oct. 29, 2000, at A24. According to Nadelmann, none of the men support drug legalization, but, rather, they simply agree that the drug war has been a disaster. *Id.*

282. Peter Schrag, *Time for a New Approach to Drug Offenses: Prop. 36: Even if Ballot Initiative Isn't the Answer, Both Sides Agree the Existing System Is Flawed*, VENTURA COUNTY STAR, Sept. 17, 2000, at B11.

283. Jim Herron Zamora, *State Officials Clash Over Prop. 36; City Politicos Back Effort to Push Rehab Instead of Jail for Drug Offenses*, S.F. EXAMINER, Nov. 6, 2000, at A-7; *Proposition 36: Calif. Chooses Drug Treatment Over Prison*, AM. HEALTH LINE, Nov. 10, 2000, at *1. For an attempt to explain the opposition of judges to Proposition 36 on the basis of their desire to

Proposition 36 captured 61 percent of the vote in the 2000 general election.²⁸⁴

The proponents of mandatory treatment tried again in 2002, managing to place an initiative on the ballot in Ohio, but they lost in the general election.²⁸⁵ Voters in the District of Columbia, however, adopted a similar initiative.²⁸⁶ As these campaigns play out, initiative opponents persistently contend that a successful drug treatment program requires both carrots and sticks. Without a meaningful threat of incarceration, they argue, the initiatives merely deliver “revolving-door” treatment.²⁸⁷ Critics also question the initiative supporters’ true motives, suggesting that they are not interested in treatment, but eventual legalization of drugs.²⁸⁸ In short, they claim

preserve discretion in sentencing (particularly their discretion to incarcerate), see Alex Ricciardulli, *Getting to the Roots of Judges’ Opposition to Drug Treatment Initiatives*, 25 WHITTIER L. REV. 309, 396-402 (2003).

284. Anna Gorman, *The State; Judges Extend Drug Rehab for Felons; Courts; Appellate Justices Rule That Proposition 36 May Apply to Those Who Have Been Out of Prison Less Than Five Years*, L.A. TIMES, Jan. 16, 2002, at 8.

285. O’Hear, *supra* note 218, at 285 n.24. For a comparison of the Ohio initiative with other mandatory treatment initiatives, see Michael M. O’Hear, *When Voters Choose the Sentence: The Drug Policy Initiatives in Arizona, California, Ohio, and Michigan*, 14 FED. SENTENCING REP. 337, 337-39 (2002). Both sides attributed the loss in Ohio to the costs of publicly funding treatment. Alan Johnson, *Taft’s Celebrate State Issue I Defeat*, COLUMBUS DISPATCH, Nov. 6, 2002, at 1C, 2002 WL 102248927. Though outspent, as elsewhere, initiative opponents in Ohio did manage to raise \$1 million and received the support of state and local law enforcement. *Id.*

286. O’Hear, *supra* note 218, at 284.

287. James Milliken, Editorial, *Proposition 36 Would Sabotage the State’s Drug Courts*, SAN DIEGO UNION-TRIB., Sept. 14, 2000, at B-13:1:7, B-9:2; O’Hear, *supra* note 285, at 340. Dean Leipold has recently suggested a more subtle, yet equally provocative, critique:

Proposition 36, like the criminal law regime, fails to “sort” those whom the law can deter—the casual user who enjoys the intoxication, or those heading for addiction but still able to control their behavior—from those who truly are addicted and are willing to take even unreasonable risks. The result may be the same as what occurred following the passage of the Harrison Act—the medical system lacks the ability to handle everyone and, as a result, is overwhelmed.

Put less charitably, now even casual users and those who would like to experiment face substantially less risk of being caught—the police are unlikely to focus much enforcement effort on rounding up people for medical treatment—and less severe consequences if they are. By the same token, by the time Proposition 36’s jail provision kicks in, on the defendant’s third conviction, there is an increased chance that the person arrested is addicted, and thus has a reduced chance of being deterred by prison.

Proposition 36’s general approach of using both criminal and medical resources to attack the drug problem is attractive, but it is worth considering whether the ordering of sanctions is backwards.

Andrew D. Leipold, *The War on Drugs and the Puzzle of Deterrence*, 6 J. GENDER, RACE & JUST. 111, 126-127 (2002).

288. *No on 36; Drug Courts Are Working, Why Scrap System?*, SAN DIEGO UNION-TRIB., Oct. 17, 2000, at B-8. Critics of treatment initiatives typically state a preference for the drug court model. O’Hear, *supra* note 285, at 340. Proponents respond that drug courts are underfunded and reach only a small percentage of drug offenders. *Id.* The initiatives are touted as a way to

that the initiatives further a rights-based agenda disguised as a public-health approach.

iii. Forfeiture Reform

A third set of outsider reforms targets asset forfeiture rules and law enforcement practices. As discussed above, asset forfeiture provides a significant incentive for state and local governments both to allocate substantial resources to drug enforcement and to cooperate with federal agencies.²⁸⁹ The forfeiture initiatives, adopted by voters in Oregon and Utah in 2000, dramatically reduce these incentives.

Oregon's Measure 3, the Property Protection Act of 2000, framed as an amendment to the state constitution,²⁹⁰ discourages forfeiture by making it more difficult to accomplish under state law (e.g., by requiring that the owner of the property first be convicted criminally²⁹¹) and by preventing state and local law enforcement agencies from profiting financially from forfeiture.²⁹² Additionally, Measure 3 prevents state and local agencies from working in concert with federal agencies to circumvent the law by prohibiting the

make "every courtroom in [the state] capable of being a drug court." O'Hear, *supra* note 285, at 340. Proponents also question whether the threat of incarceration actually makes a treatment program more effective, noting that early data from Arizona suggests that treatment participants have complied with program requirements at rates that are comparable to those in drug courts. *Id.*

289. See *supra* Part III.A.2.d.i.

290. In 2003, an intermediate court of appeals in Oregon held that Measure 3 was unconstitutional because it failed to comply with state procedural requirements for amendment of the state constitution. *Lincoln Interagency Narcotics Team v. Kitzhaber*, 72 P.3d 967, 982-83 (Or. Ct. App. 2003). In January 2004, the Supreme Court of Oregon agreed to hear the case. *Lincoln Interagency Narcotics Team v. Kitzhaber*, 84 P.3d 1080 (Or. 2004). The matter is still pending.

291. More specifically, no judgment of forfeiture may be entered "unless [1] the owner of the property is convicted of a crime in Oregon or another jurisdiction and [2] the property is found by clear and convincing evidence to have been instrumental in committing or facilitating the crime or to be proceeds of that crime." OR. CONST. art. XV, § 10(3). Measure 3 further incorporates a demanding proportionality requirement: the value of the property forfeited must be "substantially proportional to the specific conduct for which the owner of the property has been convicted." OR. CONST. art. XV, § 10(3). Measure 3 also protects the interests of third parties in forfeited property; their interests are not forfeited "unless [1] The forfeiting agency proves by clear and convincing evidence that the person took the property or the interest with the intent to defeat the forfeiture; or [2] A conviction . . . is later obtained against the [third party]." OR. CONST. art. XV, § 10(4).

292. Specifically, Measure 3 prohibits law enforcement use of the proceeds from the sale of forfeited property: after the satisfaction of liens and security interests in the property and the reimbursement of the forfeiting agency's costs, proceeds must be used for drug treatment. OR. CONST. art. XV, § 10(7). For an argument in favor of this sort of restructuring of forfeiture laws, see Eric Blumenson, *Recovering From Drugs and the Drug War: An Achievable Public Health Alternative*, 6 J. GENDER RACE & JUST. 225 (2002).

transfer of forfeiture proceeds to the federal government “unless a state court has affirmatively found that: (a) [t]he activity giving rise to the forfeiture is interstate in nature and sufficiently complex to justify the transfer; (b) [t]he seized property may only be forfeited under federal law; or (c) [p]ursuing forfeiture under state law would unduly burden the state forfeiting agencies.”²⁹³

Utah’s Initiative B, the Utah Property Protection Act, shares many of the objectives of Measure 3, but is structured somewhat differently. A prior criminal conviction remains unnecessary, but the new law requires that the elements of forfeiture be proven by clear and convincing evidence.²⁹⁴ Property owners are given the right to a jury trial in forfeiture proceedings, as well as access to appointed counsel.²⁹⁵ An innocent owner’s interest in property may not be forfeited, and the state has the burden of proving that a person is not an innocent owner by clear and convincing evidence.²⁹⁶ Initiative B also contains restrictions on the transfer and use of seized assets that are substantially similar to the restrictions in Measure 3.²⁹⁷

Proponents of the initiatives focused on apparent abuses of the forfeiture process, highlighting cases in which seemingly innocent owners lost their property to overzealous law enforcement (“the government shouldn’t get a dime, unless it can prove the crime”), as well as the conflicts of interest that arise when police get to keep the proceeds (“imagine if IRS auditors were paid a commission for every deduction they threw out”).²⁹⁸ Opponents, including many local law enforcement officials, argued that the initiatives would undermine the effectiveness of drug enforcement and starve drug task forces of needed funds.²⁹⁹ Yet, both initiatives were passed with more than two-thirds of the vote.³⁰⁰

293. OR. CONST. art. XV, § 10(9).

294. UTAH CODE ANN. § 24-1-4(6)(c) (2003). Like Measure 3, Initiative B also contains a heightened proportionality requirement (the state has the burden of proving that the forfeiture is “substantially proportional”). *Id.* § 24-1-14.

295. *Id.* §§ 24-1-4(6)(d), 24-1-9. Property owners may also obtain pretrial release of property in hardship cases, as when the owner needs the property in order to retain counsel. *Id.* § 24-1-7.

296. *Id.* § 24-1-6. A prevailing owner is entitled to reimbursement of attorneys’ fees and costs. *Id.* § 24-1-11.

297. *Id.* § 24-1-15, 24-1-16. A federal district court upheld these latter provisions against various constitutional challenges by local law enforcement officials in *Kennard v. Leavitt*, 246 F. Supp. 2d 1177 (D. Utah 2002).

298. The arguments in favor of Measure 3, as printed in the official state hallot pamphlet, are available at <http://www.sos.state.or.us/elections/nov72000/guide/mea/m3/3fa.htm>.

299. The arguments against Measure 3, as printed in the official state ballot pamphlet, are available at <http://www.sos.state.or.us/elections/nov72000/guide/mea/m3/3op.htm>.

300. Campaign for New Drug Policies, *supra* note 272. A similar initiative in Massachusetts, however, was defeated in the 2000 election. Blumenson, *supra* note 292, at 230. Professor

Where adopted, the forfeiture initiatives have had a striking effect on state law enforcement practices. Indeed, in Utah, forfeiture proceedings under state law have largely ceased since passage of Initiative B,³⁰¹ underscoring the responsiveness of law enforcement to forfeiture incentives.

iv. Marijuana Decriminalization and Legalization

In contrast to the victories of the foregoing reform efforts, and despite success in getting onto state ballots, liberalizing initiatives for nonmedical marijuana use have been repeatedly and decisively defeated. Initiatives in Alaska, Nevada, Arizona, and South Dakota failed to gain more than 43 percent of the vote.³⁰² While each initiative was structured differently, the Nevada campaign is illustrative.³⁰³

Nevada's Ballot Question 9 in 2002 would have legalized possession of three ounces or less of marijuana by adults over the age of 21, and would have required that the legislature enact laws to provide for the legal distribution of marijuana (subject to regulation,

Blumenson believes that the Massachusetts initiative failed because of its mandatory drug treatment provisions. *Id.*

301. Jennifer Dobner, *Asset-Forfeiture Plan "Is Dead,"* DESERET NEWS, Feb. 16, 2003, at B1. Forfeiture reform has also had important effects in Oregon. See, e.g., Gillian Flaccus, *Oregon County Becomes Haven for Drug Crimes; Traffickers Use Major Roads that Cross the Region*, SAN DIEGO UNION-TRIB., July 13, 2003, at A4 (discussing shrinking budgets for state and local drug enforcement in wake of forfeiture reform).

302. Alaska's Ballot Measure 5 won 40.88 percent of the vote in 2000. Alaska Division of Elections, Election Summary Report 5 (2000), <http://www.gov.state.ak.us/ltgov/elections/elect00/00genr/data/results.htm>. Nevada's Ballot Question 9 won 39.13 percent of the vote in 2002. Nevada Secretary of State, Election Summary 8 (2002), <http://www.sos.state.nv.us/nvelection/2002General/ElectionSummary.htm>. Arizona's Proposition 203 won 42.7 percent of the vote in 2002. Ariz. Secretary of State, 2002 General Election Unofficial Results (2002), <http://www.sosaz.com/results/2002/general/BM203.htm>. South Dakota's Initiated Measure 1 won 37.97 percent of the vote in 2002. South Dakota Secretary of State, Initiated Measure 1 (2002), <http://www.state.sd.us/sos/2002/02init1.htm>.

303. Alaska's Ballot Measure 5 provided not only for full-blown legalization of marijuana, but also amnesty and possibly restitution for people formerly prosecuted under the state's marijuana laws. For a copy of the initiative text, see Alaska Division of Elections, 2000 General Election Ballot Measures 14 (2000), <http://www.gov.state.ak.us/ltgov/elections/oe2000/bm00.htm>. Arizona's Proposition 203 would have decriminalized possession of two ounces or less of marijuana, provided for state distribution of marijuana for medical purposes, modified drug sentencing laws, and made drug-related forfeitures more difficult under state law. For a copy of the initiative text, see Arizona Secretary of State, 2002 Ballot Propositions (2002), <http://www.sosaz.com/election/2002/Info/pubpamphlet/english/prop203.htm>. South Dakota's Initiated Measure 1, the most narrowly targeted of the decriminalization measures, sought to legalize "industrial hemp" with a THC content of 1 percent or less. For a copy of the initiative text, see South Dakota Secretary of State, 2002 Ballot Question Texts (2002), <http://www.state.sd.us/sos/2002/2002bq.htm>.

taxation, and various other limitations).³⁰⁴ Proponents argued that the measure would generate “substantial tax revenues” and induce law enforcement “to focus resources on more serious crimes.”³⁰⁵ Opponents contended that marijuana was a “gateway drug” to more harmful substances, and that passage of the measure would lead to more substance abuse and addiction in the state.³⁰⁶ Opponents further argued, “[T]he tourism industry will be negatively impacted, as Nevada will become the nation’s marketplace for drug sale and usage.”³⁰⁷ Finally, opponents pointed to the federal marijuana prohibition, and contended that, as a result, “effective regulation will be impossible to enact and enforce.”³⁰⁸

The Nevada campaign was largely financed by Soros and Sperling, and, following the general pattern for the recent drug reform initiatives, proponents raised far more money for their campaign than opponents.³⁰⁹ Yet, this initiative was soundly defeated. Proponents blamed the defeat on campaigning by the federal drug czar,³¹⁰ although medical marijuana initiatives had previously been adopted in the face of vocal federal opposition.³¹¹ Others attributed the defeat to the opposition of local law enforcement and the death of a prominent journalist in a drug-related accident just a few months before Election Day.³¹²

v. Direct Democracy and Public Opinion

Despite the failures with nonmedical marijuana, reformers have won at least 17 statewide initiative campaigns since 1996. While each initiative has been unique, the campaigns, both wins and losses, have followed a similar pattern: federal, state, and local law enforcement officials have been aligned together against a sophisticated, well-funded campaign in support of the initiative. Indeed, initiative opponents have been repeatedly outspent by wide

304. For a copy of the initiative text, see Nevada Secretary of State, Ballot Question # 9, § 1 (2002), http://www.sos.state.nv.us/nvelection/2002_bq/bq9.htm [hereinafter Nevada Ballot Pamphlet].

305. *Id.* § 2.

306. *Id.*

307. *Id.*

308. *Id.*

309. Donna Leinwand, *Super-Rich Trio Put Cash into Marijuana Initiatives*, USA TODAY, Nov. 5, 2002, at A8.

310. Adam Satariano, *Federal Tactics Behind Defeats, Groups Assert*, LAS VEGAS REV.-J., Nov. 7, 2002, at 3B.

311. See *infra* Part III.B.2.b.vi.

312. Ed Vogel, *Legalizing Marijuana: Backers Blame Election Loss on Fear*, LAS VEGAS REV.-J., Nov. 9, 2002, at 1B.

margins, raising charges that wealthy backers are abusing the initiative process. Thus, the *National Drug Strategy* characterizes the success of the initiatives as follows:

[M]isinformation has taken on the force of law in states where legalization groups have pushed through a series of state referenda to legalize “medical” marijuana. Legalization lobbyists have portrayed their agenda as a representation of popular will, as though parents and communities were seeking to bring more drugs into their schools and homes. Operating with the benefit of slick ad campaigns, with virtually no opposition, and making outlandish claims that deceive well-meaning citizens, campaign proponents have tallied up an impressive string of victories.³¹³

This abuse theory, if true, might have important implications for the normative issues addressed in the next Part.³¹⁴ More specifically, if heavy spending can fool the electorate into voting for ballot initiatives that actually contradict true public preferences, then direct democracy would appear to be a particularly poor way of making drug policy. The availability of the initiative at the state—but not the federal—level might then constitute a good reason to minimize state policymaking authority. (This assumes, perhaps contrary to experience, that Congress itself exhibits a high degree of responsiveness to public preferences in drug policy.³¹⁵)

While money has been shown to play an important role in the initiative process,³¹⁶ the significance of the spending gaps in the drug reform context has been greatly overstated. In general, disproportionate spending is more effective in *opposition* to an initiative than in support.³¹⁷ Moreover, in the drug reform context, the amount spent by proponents should not be weighed merely against the *campaign* budgets of opponents. Instead, some weight must also be given to the national advertising and other support that has been provided for decades by the federal government in advancing the

313. DRUG STRATEGY, *supra* note 110, at 9.

314. Alternatively, one might view the Administration’s “explanation” of the successful initiative campaigns as another instance of its Manichean legalist viewpoint: any relaxation of drug laws amounts to a capitulation to the forces of legalization.

315. For a compelling illustration of conventional lawmaking gone awry in this area, see GEST, *supra* note 75, at 120 (discussing lack of deliberation in Congress prior to enactment of crack mandatory minimums). Professor Stuntz has identified particular “pathologies” of criminal lawmaking in the legislature, which may undermine the trustworthiness of Congress’s punitive drug laws as a reflection of actual public preferences. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (identifying dynamic that “always pushes towards broader liability rules, and towards harsher sentences as well”). Thus, for some years now, public opinion has been shifting towards treatment and greater tolerance, see *supra* Part III.B.2.a, but without a corresponding shift in the content of federal drug laws.

316. For a discussion of the literature, see O’Hear, *supra* note 218, at 287-88.

317. Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 22 (1997).

legalist paradigm. Proponents must arguably outspend opponents by a wide margin just to level the playing field.

This analysis finds support in the actual record of the drug reform initiatives. Disproportionate spending has not guaranteed victory, and, in particular, the public has consistently drawn the line at decriminalizing or legalizing nonmedical marijuana. Moreover, it is important to note that the initiatives themselves vary in important respects, not only across the four broad categories (medical marijuana, nonmedical marijuana, asset forfeiture, and mandatory treatment), but also within the categories (e.g., the Arizona and California initiatives dealing with medical marijuana and mandatory treatment differ in a number of important respects).³¹⁸ This diversity among initiatives suggests that the reformers themselves do not believe that they can “sell” a single preferred reform model to the voters, but, rather, need to tailor a reform package to the particular needs and preferences of each individual state. Finally, the initiatives, once adopted, have generally remained in place notwithstanding continued efforts to secure a repeal.³¹⁹ In short, the evidence is far from compelling that the successful drug reform initiatives have been adopted contrary to true public preferences.

vi. Federal Opposition and Acquiescence

These drug reform initiatives represent rejections of the federal policy preferences. Thus, it should come as no surprise that, in contrast to the federal conversion on drug courts, Washington has maintained its opposition to the various outsider reform efforts. Indeed, Washington has made no particular distinction among the different types of initiatives, labeling them collectively as “self-indulgent social engineering” and characterizing them as part of a covert campaign for full legalization.³²⁰

Federal opposition to the initiatives has been expressed most visibly in the efforts to stamp out the distribution of medical marijuana in California. The DEA denied a formal petition made in the wake of the medical marijuana initiatives to move marijuana from Schedule I to Schedule II, which would permit medical uses.³²¹

318. For a comparison of these laws, see *supra* Parts III.B.2.B.i-ii.

319. See, e.g., O’Hear, *supra* note 218, at 294 (describing continued skirmishing in Arizona over Proposition 200 since its passage in 1996).

320. DRUG STRATEGY, *supra* note 110, at 10 (discussing failed initiatives in Ohio (mandatory treatment), Nevada (marijuana legalization), Arizona (marijuana decriminalization and forfeiture reform), and South Dakota (industrial hemp legalization)).

321. Notice of Denial of Petition, 66 Fed. Reg. 20,038 (April 18, 2001).

Federal prosecutors have undertaken civil and criminal enforcement actions (including the Rosenthal prosecution) in order to stop marijuana distribution authorized under state law.³²² The federal government also determined that it would revoke the license to prescribe controlled substances of any physician who recommended the use of marijuana.³²³

Moreover, even before their enactment, federal officials attempted to defeat the initiatives by actively campaigning against them. While federal campaigning against drug reform has recently become the focus of controversy, federal efforts in this area date back to the first successful initiatives in 1996.³²⁴ In 2002, drug czar John Walters campaigned against all five drug reform initiatives, ranging from marijuana legalization (Nevada) to marijuana decriminalization (Arizona) to mandatory treatment (Ohio).³²⁵ Walters' campaigning activities survived subsequent legal challenges under state campaign finance laws and the federal Hatch Act, which regulates political activities by federal employees.³²⁶ DEA Administrator Asa Hutchinson also campaigned in Ohio against the Ohio initiative.³²⁷

Federal opposition to the treatment initiatives, in particular, contrasts tellingly with federal enthusiasm (and financial support) for drug courts, despite important similarities between the two projects.

322. *Rosenthal* is not the only example of such enforcement efforts. Federal agents have raided medical marijuana distribution organizations in West Hollywood, San Francisco, Oakland, and Sebastapol. Charlie LeDuff & Adam Liptak, *Defiant California City Hands Out Marijuana*, N.Y. TIMES, Sept. 18, 2002, at A22. Also, the United States brought a successful civil suit to shut down the Oakland Cannabis Buyers' Cooperative, which was organized to distribute marijuana under Proposition 215. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486-87 (2001). The Cooperative attempted to invoke a necessity defense in the litigation, based on the purportedly medical uses of the marijuana at issue, but was rebuffed by the United States Supreme Court. *Id.* at 499. In other states, though, federal authorities have apparently allowed medical marijuana programs to be implemented without such interference. McKenna, *supra* note 263, at 36-37 (discussing Oregon and Nevada experiences). Explanations for the federal focus on California range from the large scale of California cultivation operations to the unique national visibility of the state. LeDuff & Liptak, *supra*, at A16.

323. *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002). The Ninth Circuit has invalidated this policy on First Amendment grounds. *Id.* at 639.

324. See, e.g., Thomas A. Constantine, *Drug Enforcement Administration Makes Announcement*, BUS. WIRE, October 17, 1996, LEXIS, News Library, Wire Service Stories; see also BARRY R. MCCAFFREY, STATEMENT BY THE DIRECTOR OF THE OFFICE OF NATIONAL DRUG CONTROL POLICY, reprinted in DOCUMENTARY HISTORY, *supra* note 48, at 534.

325. *Ohio Voters Soundly Reject Drug Reform Ballot Initiative*, ALCOHOLISM & DRUG ABUSE WKLY., Nov. 11, 2002, at 1.

326. *ONDCP Reauthorization Becomes Lightning Rod for Controversy: Committee Bill Would Ban Use of Campaign Funds to Fight Ballot Initiatives*, ALCOHOLISM & DRUG ABUSE WKLY., June 9, 2003, at 1 [hereinafter *ONDCP Reauthorization*].

327. Alan Johnson, *Federal Drug Official Against Amendment*, COLUMBUS DISPATCH, Oct. 3, 2002, 2002 WL 100600266.

At least two considerations likely play a role in this federal policy. First, the central difference between the treatment initiatives and the drug courts is precisely the sort of characteristic that would matter a great deal under the legalist perspective: the availability of severe criminal sanctions in drug court reinforces the legalist belief that drug use is a morally wrong choice (not the symptom of a disease) and that drug use should accordingly be subject to stern moral condemnation. Second, the drug court movement is insider reform—a product of the political establishment of many local jurisdictions—and is therefore well positioned to win favor with the federal drug enforcement establishment.

While federal opposition to the initiatives has been vocal, Washington has, in another sense, largely acquiesced to the reforms once adopted (excepting the vigorous federal efforts against medical marijuana in California). The federal government *could* override state drug reform by increasing its own drug enforcement resources so as to offset new gaps in state and local enforcement. At the extreme, federal enforcement might replace state and local enforcement altogether. But Washington has not moved in this direction.³²⁸ Indeed, as recently as June 2003, Congress specifically rejected a proposal to increase federal enforcement resources in the medical marijuana states so as to close the loophole in state and local enforcement.³²⁹ Except in California, it does not appear that medical marijuana has become a priority for federal enforcers.³³⁰ In effect, despite its rhetoric, Washington generally allows the policy experiments to proceed.

3. Summary: A Pattern of Constrained Diversity

State-to-state drug policy does not display the level of uniformity suggested by the federal monopoly theory. States can, and do, adopt policies over federal opposition that deviate significantly from federal norms. The federal government has not allocated nearly the enforcement resources necessary to render these policy deviations

328. See ZIMRING & HAWKINS, *supra* note 7, at 165 (“It therefore is best to characterize the policy position of the national government in drug control as one of contingent supremacy, with the primary contingency being the willingness to commit independent federal resources.”).

329. *ONDCP Reauthorization*, *supra* note 326, at 3. Congress likewise rejected a proposal to allow the drug czar to use money from his anti-drug advertising budget to buy ads opposing drug reform initiatives. *Id.* at 2. The drug czar may still campaign in person, but he cannot use the advertising budget to support his efforts.

330. See McKenna, *supra* note 263, at 36.

irrelevant. National drug policy, in short, is characterized by meaningful diversity.³³¹

At the same time, there is good reason to believe that, on the whole, state policies cluster more closely around federal norms than would be the case in the absence of federal inducements to conform.³³² If this proposition is true, then the policy diversity that does exist might best be characterized as a “constrained diversity.” What is the evidence of constraint? First, consider historical trends in marijuana regulation. In the 1970s, when decriminalization was taken seriously as a policy option by federal officials (and even publicly endorsed by President Carter), eleven states did, in fact, decriminalize. Since the 1980s, when legalism triumphed in Washington and federal policy turned decisively against marijuana, only one state has decriminalized and another has actually recriminalized.³³³ These developments occurred despite the absence of any clear consensus that decriminalization was a failure in the states that adopted it.³³⁴

Second, American drug policy does not display the degree of diversity generally found in the western world.³³⁵ The Netherlands, for instance, recently legalized marijuana, while Portugal recently eliminated jail time for possession of small amounts of all illegal drugs.³³⁶ Even within North America, the Canadian government has announced plans to decriminalize possession of small amounts of

331. Similar patterns of state innovation and diversity have been observed in other fields marked by cooperative federalism. See, e.g., Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 558 (2001) (“[T]he federal government has implemented relatively few environmental initiatives. Instead, innovative approaches have come primarily from the state level, with a number of states taking actions that go well beyond federal requirements.”).

332. See *supra* Part III.A.2.

333. In their analysis of the history of marijuana decriminalization, DiChiara and Galliher also emphasize the importance of the federal role. DiChiara & Galliher, *supra* note 210, at 66.

334. For instance, there are similar patterns of frequency in marijuana use in states that decriminalized as in states that did not. *Id.* at 68.

335. For a recent survey of policy developments in Europe, see UNITED STATES DRUG ENFORCEMENT ADMIN., DRUG INTELLIGENCE BRIEF: THE CHANGING FACE OF EUROPEAN DRUG POLICY (2002), <http://www.dea.gov/pubs/intel/02023/02023p.html>. The limited diversity of American drug policy might be contrasted with the wide diversity in American gun control policy. For a survey of state and local gun laws, see JAMES B. JACOBS, CAN GUN CONTROL WORK? 32-34 (2002). For instance, while handgun possession is banned outright in some jurisdictions, handguns may be purchased without so much as a permit or license in others. *Id.* at 32-33. Indeed, despite the permissive reputation of the United States as to gun ownership, there are some United States jurisdictions (like the District of Columbia) that are stricter than almost any European state. *Id.* at 35.

336. Warren Hoge, *Britain to Stop Arresting Most Private Users of Marijuana*, N.Y. TIMES, July 11, 2002, at A3.

marijuana³³⁷ and to provide medical marijuana directly to patients with prescriptions for the drug.³³⁸ (This is not to say, of course, that the United States ought to adopt any of these policies, but merely to observe that the range of politically viable policy options seems comparatively cramped in this country.³³⁹)

Third, the most significant state deviations from federal policy in recent years have emerged from the initiative process. This fact may suggest that the federal government has been more successful in controlling state political establishments than in controlling public opinion. Yet, the initiative is only available in a little more than 40 percent of the states.³⁴⁰ One might conclude that if more states had the initiative process (or if the federal government were less effective in obtaining the cooperation of state legislatures), there would be greater degrees of deviation from federal norms.

Fourth, the principal players in the reform movements themselves seem to regard the federal tools as effective. Drug reformers attribute initiative losses to federal interference,³⁴¹ and claim that they must outspend initiative opponents by large margins to counteract the effects of federal anti-drug propaganda.³⁴² For its part, the federal government would presumably not wield its tools of influence if they were viewed as ineffective in influencing public attitudes towards reform.

C. *The Cooperative Federalism Model*

While not well appreciated in the drug policy literature, the structure of federal-state relations in this area (and the resulting pattern of constrained diversity) roughly parallels the arrangements in many other policy areas, from education to welfare to the environment. These arrangements, referred to as “cooperative federalism,” involve a combination of federal policy mandates and inducements (such as conditional grants) that require or provide

337. Clifford Krauss, *Canada Introduces Measure Adjusting Penalties for Marijuana*, N.Y. TIMES, May 28, 2003, at A7.

338. Clifford Krauss, *Canada to Offer Marijuana to Medical Patients*, N.Y. TIMES, July 10, 2003, at A4. Canada has also approved on a trial basis a “safe injection site” in Vancouver. *Id.*

339. These international policy experiments contrast markedly with the dismal showing of nonmedical marijuana legalization and decriminalization efforts in this country. See *supra* Part III.B.2.iv.

340. See Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 113-14 (1995) (noting that only 21 states have an initiative process).

341. Satariano, *supra* note 310.

342. Leinwand, *supra* note 309.

strong financial incentives for states to implement the federal policy.³⁴³ Public choice theorists have explained the emergence of cooperative federalism as a product of political-support-maximizing decisions by politicians at all levels.³⁴⁴ This Section will use such models of cooperative federalism as a way to explain federal-state relations in drug policy.

1. Why Not Full Federal Control over Drug Policy?

The public choice account of cooperative federalism starts with an hypothetical interest group that desires a particular governmental program, but is able to secure that program in only some states, not in all states or at the federal level.³⁴⁵ States that enact the desired program soon join with the interest group to demand national enactment.³⁴⁶ This occurs because the enacting states will hope to shift some of the expense of the program, to which they are already committed, to the federal level.³⁴⁷ Enacting states may also be concerned about their ability to maintain the integrity of the program if neighboring states do not have the same commitments.³⁴⁸ At the

343. Greve, *supra* note 130, at 558. In addition to conditional grants, the other commonly noted inducement is conditional preemption. "Under this system, Congress enacts a general regulatory scheme, delegating the implementation to the states on the condition that the states submit an acceptable implementation plan to the federal government." Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 866 (1998). While conditional preemption has played an important role in other policy areas, like the environment, it has not been employed in drug policy. For a history of cooperative federalism, see Daniel J. Elazar, *Cooperative Federalism, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 65, 65-69 (Daphne A. Kenyon & John Kincaid eds., 1991).

344. Professors Bratton and McCahery succinctly describe the basis thrust of public choice theory as follows:

The theory asserts that actors rationally employ the government and form groups to influence, or "capture" it. As risk averse lawmakers respond to the dominant voices, legislation reflects the demand patterns of these interest groups. This private rent-seeking activity prompts competition among government actors (who occupy a monopolist's position respecting scarce public goods) to become rent distributors and receive interest group favors.

William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 214 (1997). For similar accounts of the model, see Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, in *THE NEW FEDERALISM: CAN THE STATES BE TRUSTED?* 3, 28-34 (John A. Ferejohn & Barry R. Weingast eds., 1997); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 269-74 (1990).

345. The description here is derived from Greve, *supra* note 130, at 594-98.

346. *Id.*

347. *Id.*

348. *Id.*

federal level, enactment in some states increases the attractiveness of the program, in part because the federal government now has the opportunity to leverage state resources in rolling out a national program.³⁴⁹ Federal legislators can accommodate the interest group (and hence gain its political support) without the need to pay the full cost of the program.³⁵⁰

A cooperative federalism arrangement, in which the costs are shared between the federal government and the states, thus holds considerable appeal for both the original enacting states (which get federal money and protection from competition from nonenacting states) and the federal legislators (who get to claim credit for addressing the underlying problem, but can do so on the cheap). States that resisted the program initially will, by and large, go along with it after federal enactment because of the promise of federal aid, but they will demand some residual policymaking autonomy so that state legislators may also claim some political credit for the program's successes. Thus, a program lacking sufficient support to be fully adopted nationally may become a quasi-national program when implementation costs are split between the federal and state levels and politicians at both levels can claim credit for addressing a social problem.³⁵¹

Consider how this model might explain the evolution of federal drug policy. Some states began regulating opiates and marijuana long before the federal government did.³⁵² States with stringent

349. *Id.*

350. *Id.*

351. Phrased thus, there seems to be a certain alchemy in all of this—costs are divided and political credit is multiplied—that depends on voters' inability to understand clearly who is responsible for what in a cooperative federalism scheme. Professor Hills, however, offers a more sanguine account of cooperative federalism, suggesting that intergovernmental transfers of money and authority occur in a competitive "market" that leads to the least expensive implementation of federal policies. Hills, *supra* note 343, at 872, 876-77. He does, however, acknowledge that agency costs—here, the unresponsiveness of state and local policymakers to constituents' preferences—may interfere with the efficiency of the market. *Id.* at 886-87. The next Subsection of this Article suggests that such unresponsiveness—specifically, by local law enforcement—may undermine the suitability of current arrangements.

352. *See supra* Part II.A. The public choice model suggests that governments regulate to win the political support of interest groups. Historically, parents groups have been a particularly important interest group seeking tough drug laws. *See, e.g., supra* Part II.C (discussing parents' movement in 1970s). Courtwright offers a nice public choice account of why middle-class parents support the war on drugs, recasting their issue advocacy as a kind of rent-seeking behavior:

[M]iddle-class parents [are] politically important constituents who are concerned with the danger to their children posed by cannabis and other illicit drugs. Drug prohibitions may produce heavy social costs, but they do so only in the aggregate. The heaviest burdens fall on poor communities where the users, dealers, and police street sweeps are concentrated. Affluent and suburban voters see aggressive enforcement as protecting their own families. In supporting firm sanctions against trafficking and

regulations, however, found the integrity of their programs undermined by the easy availability of drugs in neighboring states with more lenient regulations,³⁵³ so the stricter states requested that the federal government adopt a nationwide ban.³⁵⁴ The federal government did so, but neither preempted state law nor dedicated the level of resources necessary for comprehensive federal enforcement, implicitly relying on state and local law enforcement to carry most of the load.³⁵⁵ Gradually, as the war on drugs heated up in the 1970s and 1980s, the cooperative arrangements grew more complicated and more explicit, as the federal government developed law enforcement assistance grants, multi-jurisdictional drug task forces, and equitable sharing of forfeited assets.³⁵⁶

The scenario currently looks something like this: local law enforcement supplies a lion's share of the personnel and street-level intelligence necessary in order to implement federal drug policies. In return for this contribution, the federal government supplies cash and specialized law enforcement services, and makes available federal prosecutors, courts, and prisons for the most difficult, important, or high-profile cases. The costs of the federal war on drugs, in short, are split. The federal contribution is designed to make pro-enforcement policies at the local level more cost-effective, and hence more attractive to policymakers.³⁵⁷

To put the arrangement in different terms, we might imagine that Congress has a choice among four options for drug policy: (1) do nothing, leaving the issue entirely for the states (no money/no control); (2) provide the states with unconditional grants to deal with the drug problem, allowing the states to make drug policy free from constraints (some money/no control); (3) provide the states with conditional funding that steers the states towards federally favored policies (some money/some control); or (4) take full responsibility for making and implementing drug policy (all money/all control).³⁵⁸ The first option

use they consider themselves to be acquiring a kind of insurance, the costs of which are absorbed by people who shouldn't be behaving like that anyway.

COURTWRIGHT, *supra* note 124, at 202.

353. See, e.g., *supra* note 49; *infra* note 444.

354. See, e.g., BERTRAM ET AL., *supra* note 23, at 80 (discussing pressure by state governors and local police departments for federal marijuana ban).

355. See GEST, *supra* note 75, at 109-10.

356. See *supra* Parts III.A.2.c-d.

357. Professors Zimring and Hawkins estimate that the federal government pays somewhere between 35 and 50 percent of the total costs of the war on drugs. ZIMRING & HAWKINS, *supra* note 7, at 167.

358. In theory, other policy options are available that would offer the federal government control without cost, but such options may run afoul of the anticommandeering rule, which, as a

(no money/no control) holds little appeal because federal legislators would lose the opportunity to gain political credit for responding to the drug issue. The fourth option (all money/all control) likewise holds little appeal because of the enormous expense of creating a federal police force that could enforce drug laws effectively down to the street level. Rather than creating a redundant police infrastructure, Congress will find it far less expensive to leverage existing local law enforcement capabilities.

Congress will thus be drawn to the intermediate policies that allow it to claim political credit for responding to the drug problem without bearing the full cost of enforcement. But how much control will Congress exercise? On the one hand, more control means greater opportunities to adopt policies that maximize political support; commentators thus note that, in practice, "federal *funding* inevitably leads to federal *control*."³⁵⁹ On the other hand, some degree of state autonomy may well be the political price of a national drug policy; state legislators, after all, will want to be able to make policy choices that maximize *their* political support too.³⁶⁰

Consider, for instance, a hypothetical proposal in Congress that would condition all federal drug enforcement grants on state adoption of a five-year mandatory minimum sentence for crack possession. Faced with this condition, a state might choose to walk away from the federal money because (1) the mandatory minimum might result in significant incremental costs to the state's court and prison systems,³⁶¹ or (2) the state's voters are strongly opposed to such harsh treatment of drug users.³⁶²

matter of constitutional law, prohibits the federal government from taking control of local law enforcement. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (holding that legislation requiring states and local law enforcement officers to conduct background checks on prospective handgun purchases violates the constitution).

359. McKinnon & Nechyba, *supra* note 344, at 32.

360. See Hills, *supra* note 343, at 872 ("If Congress is willing to pay the price—in federal money or implementing discretion—demanded by each state, then Congress can use each state's regulatory machinery to implement federal law; if not, then Congress must rely on purely federal methods of implementation.")

361. Such costs may represent a considerable burden. Thus, for instance, New York softened its Rockefeller drug laws shortly after adoption because of the burdens that were being imposed on the state criminal justice system. See *supra* note 80.

362. Professor Klein has made a similar point:

When the state and the federal governments share the same view on the norm underlying a criminal prohibition subject to concurrent jurisdiction, though they may disagree as to the details, the punishment, or the means best suited to implement the norm, the states should be relatively easy to bribe with conditional grants of funding. On the other hand, where a state has strongly expressed an independent norm, it may choose to forgo federal money rather than capitulate.

In order to keep states on board with the new condition, Congress would likely have to increase the amount of the grant considerably. Despite its own preference for mandatory minimums—the political-support-maximizing policy on a national level—Congress might well conclude that the benefits of the new grant condition are not worth the costs. After all, as long as the mandatory minimums are in place at the federal level, federal prosecutors, working with local law enforcement, can ensure that they are applied in the most suitable cases.³⁶³

In short, there should be little surprise that our national drug policy displays a pattern of constrained diversity, which represents a balancing of the federal desires for control (and hence political support) and for engagement of state and local law enforcement in the war on drugs (and hence minimization of costs to the federal budget).

2. Why Not Simply Conditional Grants?

At a general level, federal-state relations in drug policy look quite similar to many other instances of cooperative federalism, but, at a more specific level, cooperative federalism in this context has taken on some unusual features. In particular, federal aid is not simply in the form of cash grants doled out by centralized bureaucracies in Washington, D.C.; instead it is more in the form of in-kind aid, chiefly delivered on a local level by the ninety-four different United States Attorneys' Offices.³⁶⁴ Federal prosecutors in these offices hold the keys to the local federal courthouse. As such, they not only provide local law enforcement with access to federal prisons and the stricter federal sentencing laws, but they also play a lead role in asset forfeiture, equitable sharing, and organizing and coordinating the MJDTFs.³⁶⁵ These sorts of in-kind assistance provided by the local United States Attorney may, in fact, be far more important in promoting the participation of local law enforcement in the war on drugs than the Byrne Grants (representing the more conventional tool of cooperative federalism).³⁶⁶

Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1551 (2002). I suggest here, though, that the state may have an "independent norm" with respect to the punishment, too, at least as to punishments as extreme and as controversial as crack mandatory minimum.

363. See *supra* Part III.A.2.b.

364. See *supra* Parts III.A.2.b, d.

365. See *supra* Parts III.A.2.b, d.

366. Additional in-kind assistance is provided by federal laws that deny federal rights and benefits to drug offenders; these laws magnify the punitive and deterrent effects of a drug conviction. Examples of such "invisible punishment" include deportation, denial of food stamps

Viewed through the lens of cooperative federalism, there is something odd about the degree to which the federal government uses in-kind aid, which requires it to maintain its own parallel drug enforcement infrastructure alongside state and local enforcement bodies. To draw an analogy with another area of cooperative federalism, it would be as if the federal government attempted to contribute to national educational goals by running its own school system. This Section will suggest two distinct, but not inconsistent, explanations for the reliance on in-kind assistance in drug policy: reduction of agency costs and liberation of local law enforcement from state control.³⁶⁷

a. Reduction of Agency Costs

The purpose of federal drug enforcement assistance is to increase the overall level of enforcement effort by local agencies, but it is costly for the federal government to ensure that an infusion of federal assistance has the desired effect. For instance, as Professors Zimring and Hawkins have observed, "If states and localities are satisfied with prior levels of effort, they can disinvest their own money in order to balance the larger federal spending."³⁶⁸ In a grant program, the federal government might minimize such concerns by attaching rigorous conditions to the grant, requiring detailed reporting by the recipient, and assigning bureaucrats to monitor recipient performance. But such measures may be both financially and politically costly.³⁶⁹

From the standpoint of minimizing these agency costs while maximizing state and local enforcement effort, in-kind aid offers at least three important advantages over grant aid. First, in-kind aid is provided by federal law enforcement officials in the field who work

and other forms of federally funded public assistance, loss of public housing, denial of access to student loans, loss of parental rights, and loss of driver's license. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 23-24 (Marc Mauer & Meda Chesney-Lind eds., 2002). For an argument that such collateral consequences undermine the successful reintegration of the drug offender into society, see Demleitner, *supra* note 3, at 1047-48.

367. Professor Richman has similarly observed that federal enforcement against street crimes ought to be thought of as in-kind aid, which he contends works chiefly to the benefit of state and local law enforcement. Richman, *supra* note 152, at 786-87.

368. ZIMRING & HAWKINS, *supra* note 7, at 167.

369. See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures' Control*, 97 MICH. L. REV. 1201, 1226 (1999) ("It is a familiar point that state and local officials frequently act as faithless agents of the federal government, violating conditions attached to federal funds whenever the federal government fails to monitor their compliance.").

directly with the local recipients, and are better positioned than bureaucrats in Washington to ensure that aid is used in a way that increases overall enforcement effort. The federal government already has an elite, decentralized law enforcement bureaucracy (the United States Attorneys' Offices) on the ground ready to perform this monitoring task.

Second, aid is distributed in many discrete units, rather than in the form of, say, a single check. If state and local policymakers were inclined to offset increased federal aid through decreases in their expenditures, they would need to know something about the magnitude of the federal aid. While this measurement is easy when a single check is delivered through a grant program, measurement may be much more difficult when it comes in a host of other forms: federal prosecution of cases referred from the local police, contribution of DEA undercover expertise to an MJDTF, distribution of forfeited assets, and so forth.

Third, in-kind aid is not as fungible as cash. Recipients may easily convert cash to their own purposes; a federal grant to a local agency, for instance, may be dissipated on perks for its employees and patronage hiring. These risks are reduced through reporting requirements and careful monitoring, but such measures, again, are costly. If federal agencies are assumed to be more ethical or efficient, then it might appear safer on the whole to give the money to federal agencies, who then provide specific services to local agencies.

b. Liberation of Local Law Enforcement

The agency costs rationale assumes that the federal government is attempting to further its drug policy agenda in the most cost-effective fashion. Alternatively (or in addition), the federal reliance on in-kind assistance may reflect a desire to liberate local law enforcement from state control. Absent a federal role, the scale and effectiveness of local law enforcement would be subject to various state-determined constraints. State institutions, not localities, determine substantive criminal law, rules of criminal procedure, sentencing law, and the number of prison beds available for serious offenders. States provide financial support for local courts, local jails, local prosecutors, and local police. Local law enforcement relies on state agencies for various specialized law enforcement services, ranging from the maintenance of criminal records to sophisticated forensic techniques.

Federal assistance frees local law enforcement from complete dependence on the state.³⁷⁰ If a state's penal laws are too lenient, cases may be referred for federal prosecution.³⁷¹ Indeed, just the threat of federal prosecution may give local prosecutors enough leverage to compensate for the shortcomings of state law. If state prisons are overcrowded, federal prosecution, which will lead to incarceration in a federal prison, offers a solution. If the state legislature cuts payments to local government, equitable sharing may make up the difference. If a state drug enforcement agency is underfunded or concentrates resources in jurisdictions that have more clout in the state legislature, the federal DEA is there to help.

If the objective is to liberate local law enforcement, in-kind aid is preferable to grant aid for at least two reasons. First, as discussed above, in-kind aid flies under the radar screen of external budget-makers, who are thus less likely to respond to in-kind federal aid by making corresponding budget cuts.³⁷² Second, federal in-kind aid supplies benefits to local law enforcement that no amount of money can buy: access to a potentially more favorable system of laws, courts, and prisons.³⁷³ As one local police officer put it in explaining how his agency chooses to take a case to federal or state prosecutors: "[I]t's like buying a car: we're going to the place where we feel we can get the best deal. We shop around."³⁷⁴

Why might the federal government want to liberate local law enforcement from state constraints? First, the federal government may be pursuing a policy of maximizing decentralization, enhancing local autonomy to encourage localized decision making in determining the level of enforcement in their community. As will be discussed further below, there are many good reasons to move policy decisions from the state to the locality.³⁷⁵

Second, federal policy may be designed to minimize legislative control over law enforcement bureaucracies. Federal in-kind assistance allows the unelected leaders of these agencies to circumvent policy decisions made by the elected state legislators. When state laws on defendants' rights, maximum sentences, and the

370. This is an instance of what Professor Hills calls "dissecting the state," i.e., the use of federal regulatory or spending power to "unpack[] the black box of the 'the state' to liberate certain state or local institutions from the control of state laws." *Id.* at 1203.

371. *See supra* Part III.A.2.b.

372. *See supra* Part III.C.2.a.

373. *See supra* Part III.A.1.

374. Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 930 (1998).

375. *See infra* Part V.B.

like are inconvenient or unpalatable for the police, federal court beckons.³⁷⁶ Likewise, federal aid flying below the radar screen may undermine the state legislature's decisions about the level of effort that ought to be expended on drug enforcement. In general, the local police become less accountable to legislatures and elected executive officers, and more accountable to—if anyone—an unelected United States Attorney.³⁷⁷ Thus, current arrangements may not reflect principled policymaking so much as the simple political clout of local law enforcement agencies in lobbying Congress.³⁷⁸ In this account, local law enforcement is a special interest group, like any other, seeking rents through legislative action.

In the end, the form of cooperative federalism in drug policy likely results from a combination of considerations, both principled and unprincipled. As will be shown in the next Part, the precise nature of federal-state-local relations at present matters a great deal when deciding how such relations ought to be reformed in the future.

376. See O'Hear, *supra* note 7, at 755-63 (discussing federal-state forum shopping by law enforcement agents).

377. In this sense, drug enforcement embodies what has been referred to as the "picket fence" model of cooperative federalism. The model has been described as follows:

Officials specializing in a single program area, such as public welfare, have closer attachments to their functional (program) counterparts at all levels of government than to various mayors, governors, and legislators. For example, welfare officials in the federal Department of Health and Human Services share professional training, education, goals, and values with state, county, and municipal social welfare employees. They tend to be more responsive to these associates than to the president, governor, mayor, county executive, or various legislative bodies. As a consequence, coordination and implementation of social welfare policies are likely to be influenced more by functional specialists than by elected officials.

ANN O'M. BOWMAN & RICHARD C. KEARNEY, STATE AND LOCAL GOVERNMENT 37, 38-39 (1990).

378. Professor Richman seems to have something of this view:

Viewed this way, the breadth of the delegation to federal enforcers in areas of traditional state authority emerges not as an intrusion, but as a form of aid-in-kind to state enforcers. [This] may well serve state enforcer interests better than would direct grants With direct grants comes the obligation to account for expenditures Coordinated operations with federal agencies bring assistance without any such accountability. If any entities are indeed being "commandeered" when politically rewarding "overfederalization" puts federal agents and prosecutors into the battle against street crime, they are federal, not state and local.

Richman, *supra* note 152, at 786-87. Thus, Professor Richman observes, local law enforcement rarely complains to Congress about the apparent intrusiveness of the federal enforcement role in street-level crimes. *Id.* at 784.

The federal policies liberating local law enforcement from legislative control may also be motivated by a belief that law enforcement agencies will, by their very nature, be more inclined to support the enforcement-oriented federal drug policy preferences than would a legislative body.

IV. THE "CONSTITUTIONAL ALTERNATIVE"

Notwithstanding the various mechanisms of federal domination of drug policy, a number of states have developed innovative legal reforms in recent years. While some innovations, particularly the drug treatment courts, fit comfortably within the parameters of federal policy preferences, others pose a more fundamental challenge to federal preferences. Such developments make it increasingly important for the federal government to adopt a clear, coherent policy towards state innovation. At the most basic level, the federal government must choose among three alternative stances when states embark on new paths: (1) active support; (2) neutrality; or (3) active discouragement. Under current federal practice, federal response to a particular state policy seems largely determined by the extent to which the new policies conforms to the legalist paradigm. Drug courts, for instance, receive active federal support, while medical marijuana is subject to vigorous federal opposition.

Disagreeing with this selective approach (support in some instances, neutrality or discouragement in others), various commentators have argued that the federal government should be supportive, or at least neutral, to all state experimentation. Two economists, Daniel K. Benjamin and Roger Leroy Miller, have offered the most detailed and thoughtful proposal along these lines, which they call the Constitutional Alternative.³⁷⁹ This Part summarizes Benjamin and Miller's proposal, places it into the context of the public choice model of federalism that current drug policy reflects, and then explains why the Constitutional Alternative should be rejected on public choice grounds.

A. *The Proposal*

In essence, the Constitutional Alternative would regulate drugs at the federal level in the same way that alcohol has been regulated under the Twenty-First Amendment since the end of Prohibition. Thus, under the Constitutional Alternative, "the power to control the manufacture, distribution, and consumption of all psychoactives

379. BENJAMIN & MILLER, *supra* note 7, at 194. Professor Carrington advocates a similar position, Carrington, *supra* note 7, at 339-41, as does Judge Gray, JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 234 (2001). Professors Rasmussen and Benson also make a similar proposal, for similar reasons, with respect to the federal marijuana prohibition. Rasmussen & Benson, *supra* note 7, at 728-29.

[would] revert to the states."³⁸⁰ The federal government would repeal its prohibition on psychoactive drugs, but would retain jurisdiction over interstate drug distribution: "the transportation or importation of any psychoactives in violation of state laws would also be a federal crime."³⁸¹ This residual drug jurisdiction parallels the residual alcohol jurisdiction preserved for the federal government under the Twenty-First Amendment.³⁸²

The Constitutional Alternative is intended to provide states with greater autonomy by "permit[ing] the states to choose drug-control strategies more in tune with the preferences and circumstances of their citizens."³⁸³ While critical of the war on drugs, Benjamin and Miller emphasize that their purpose is not legalization *per se*.³⁸⁴ The Constitutional Alternative, for some states,

may (and probably will) mean a relaxation of legal strictures against some drugs. But there is nothing in [the] proposal that would prevent states from adopting as *state law* the current provisions of the [federal] Controlled Substances Act. . . . Moreover, the Constitutional Alternative will actually *enhance* political pressures for more stringent drug laws in states in which antidrug sentiment is greatest, at the same that it permits a relaxation of drug laws in states in which the prevailing sentiment favors such a move.³⁸⁵

In short, Benjamin and Miller envision a state-by-state patchwork of drug laws, akin to the current patchwork of alcohol regulations among the states.³⁸⁶

Benjamin and Miller offer two chief arguments in support of decentralized policymaking.³⁸⁷ First, decentralization helps to ensure that each citizen has an opportunity to live under a set of laws that corresponds to his or her policy preferences:

The founding fathers . . . recognized the need to guard against the "tyranny of the majority." Even in a democratic society, when the interests and circumstances of different citizens differ markedly, it may be possible for one faction to obtain the support

380. BENJAMIN & MILLER, *supra* note 7, at 194.

381. *Id.*

382. U.S. CONST. amend. XXI, § 2. This may be one reason Benjamin and Miller have selected the name "Constitutional Alternative"; their proposal would, in fact, be implemented by statute, not constitutional amendment.

383. BENJAMIN & MILLER, *supra* note 7, at 196.

384. *Id.* at 195.

385. *Id.* at 196.

386. *Id.* at 190, 196-98.

387. Benjamin and Miller also find support for their proposal in constitutional norms of federalism, *id.* at 188-89, 194, but they do not go so far as to suggest that the Constitution mandates a constriction of federal drug jurisdiction. In light of the Supreme Court's current federalist leanings, there may be some basis to conclude that the Court would, in the right circumstances, limit federal jurisdiction. Professor Klein suggests that the Court might be most receptive to Commerce Clause challenges in cases involving marijuana growers who cultivate the drug for personal use. Klein, *supra* note 362, at 1589-90.

of "50 percent plus one" of the voters, and thereby impose its wishes upon the remaining minority.

...

... [R]eserving powers to the states and the people . . . helps ensure that people *within* our nation will have the greatest choice of the majorities to which they must subject themselves. If a resident of one state does not like the rules imposed by the majority there, he is free to move to a state whose laws better suit his preferences or circumstances.³⁸⁸

Second, decentralization promotes policy innovation:

No government is all-knowing. Governments, like human beings, fail to recognize problems when they develop, and fail to grasp the correct solutions to known problems. Under a unitary system of government, the citizenry get only one shot at having the government recognize and solve problems; and if the national government fails in either endeavor, the people are stuck. Under our federal system of government, there are fifty sets of eyes watching for problems, and just as many legislative bodies and executive branches searching for solutions.³⁸⁹

Benjamin and Miller trace current dissatisfaction with the war on drugs to its character as a centrally mandated policy:

The crux of the current failure in the war on drugs lies in the fact that we have a policy of uniformity imposed upon a nation of diversity. American is comprised of an incredibly heterogeneous set of individuals who have radically different attitudes toward the best policies for dealing with drugs. . . . Yet drug strategy in America is fundamentally a policy of the federal government. It is a monopoly policy driven by decisions made in Washington, D.C., rather than in the states and cities and neighborhoods in which we live. As such, drug policy in America goes too far for many of us and not far enough for the rest of us. Forged by the forces of compromise at the national level, it is an ungainly and ineffective strategy that imposes tremendous costs on all Americans, while accomplishing almost none of the goals we seek.³⁹⁰

Benjamin and Miller contend that the nation's fourteen-year experience with alcohol Prohibition provides an object lesson in the "costly consequences" of centralized policymaking.³⁹¹ They further argue that current drug policy has parallels to Prohibition that are "simply too compelling to ignore."³⁹² Much as the Twenty-First

388. BENJAMIN & MILLER, *supra* note 7, at 192-93.

389. *Id.* at 193.

390. *Id.* at 6. Benjamin and Miller also contend that national uniformity has facilitated domination of the drug trade by large, well-organized criminal enterprises:

The nationwide uniformity in laws and enforcement methods is a dream come true for the leaders of national drug gangs. It didn't take the Jamaican posse long to learn that business practices that beat the law and the police in New York would beat them in Fort Wayne and Richmond and Charleston. . . . Just as national safety and auto pollution standards . . . make it easier to mass-produce cars on a national scale, the heavy federal involvement in drug enforcement makes it easier to mass-market illicit drugs on a national scale.

Id. at 99.

391. *Id.* at 194.

392. *Id.* at 15.

Amendment ended America's costly "liquor wars," Benjamin and Miller propose the Constitutional Alternative as the solution to the current failures of American drug policy.³⁹³

B. *The Public Choice Model of Federalism*

The Constitutional Alternative falls neatly within the public choice tradition of federalism theory. In its normative mode, public choice theory uses assumptions and analytical methodologies borrowed from economics in order to determine at which level of government different sorts of policy decisions ought to be made.³⁹⁴ Leading public choice models suggest, much like Benjamin and Miller's analysis, a presumption in favor of decentralized policymaking within a federal system for many types of government services, including those related to public health and safety.³⁹⁵

393. *Id.* at 186.

394. What I refer to as the normative strand of public choice theory embraces different schools of thought sometimes referred to as public finance economics, fiscal federalism, public economics, jurisdiction competition theory, and positive political theory. See Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1467 (1995); Bratton & McCahery, *supra* note 344, at 213; McKinnon & Nechyba, *supra* note 344, at 4. This *normative* strand of public choice theory contrasts with the sorts of *descriptive* public choice models discussed above in Part III.C. The normative strand seeks to ameliorate the deadweight social losses caused by the rent-seeking behavior of interest groups that is predicted by the descriptive strand. Bratton & McCahery, *supra* note 344, at 214-15.

The normative project, which has been pursued in a variety of forms by economists, political scientists, and legal scholars, descends from the classic work of Charles Tiebout, who hypothesized that under certain conditions citizen mobility between jurisdictions would result in a Pareto efficient level of provision of public goods by local governments. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 424 (1956). While influential, Tiebout's work has been criticized on many grounds. See, e.g., Bratton & McCahery, *supra* note 344, at 219-39 (summarizing theoretical and practical problems with Tiebout's assumptions); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 415-25 (1990) (criticizing Tiebout's reliance on mobility as tending to produce less efficient local government and as biased in favor of business and the affluent). The model used here, reflecting the more modest aims of public economics scholars following in Tiebout's wake, does not claim Pareto optimality. See Bratton & McCahery, *supra* note 344, at 261-62 (contrasting Tiebout hypothesis with public economics' "decentralization theorem").

395. See, e.g., THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS, at xv-xvii (1990); PAUL E. PETERSON, BROOKINGS INST., THE PRICE OF FEDERALISM 17-19 (1995) (arguing for local responsibility for "developmental functions" of government, including providing for public health and safety); HARVEY S. ROSEN, PUBLIC FINANCE 512 (2d ed. 1988); Hills, *supra* note 343, at 869 (discussing theory that lower levels of government have comparative advantage in delivery of "labor-intensive services," while higher levels have advantage in "capital-intensive" services); Wallace E. Oates, *An Economist's Perspective on Fiscal Federalism, in THE POLITICAL ECONOMY OF FISCAL FEDERALISM* 3 (Wallace E. Oates ed., 1977); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536-37, 547-49 (1997). Decentralization, though, does have its critics. Professor Briffault, for

A simple example conveys the essence of the analysis.³⁹⁶ Consider a nation containing one hundred people, sixty of whom desire a policy of strict mandatory minimum sentences for all drug offenders, and forty of whom prefer a policy of treating, rather than incarcerating, first-time nonviolent drug offenders. Under majority rule, the nation will enact the mandatory minimum, leaving sixty of its citizens satisfied and forty dissatisfied. However, if the nation were a federation of separate states, more of its citizens' preferences would likely be satisfied. Assume, for example, that one state contains fifty citizens desiring a mandatory minimum and ten citizens preferring treatment, but the second state contains ten citizens desiring a mandatory minimum and thirty citizens preferring treatment. The policies adopted by each state would then satisfy the preferences of eighty citizens, leaving only twenty citizens dissatisfied. The satisfaction effects would grow even more if dissatisfied citizens from each state moved to the state that better satisfied their preferences. Ideally, twenty people would move, and everyone would be satisfied.³⁹⁷ Thus, the public choice model suggests that overall citizen welfare generally will be enhanced when policy decisions are left to smaller units of government.³⁹⁸

This analysis assumes that citizens know their own preferences, and that those preferences remain stable over time. In reality, however, many citizens lack important information, or change their minds based on new information. In these circumstances, state decision making offers an additional advantage: the possibility of experimentation. As Justice Brandeis observed, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."³⁹⁹

Consider how this dynamic might work in the simple hypothetical discussed above.⁴⁰⁰ In time, the first state will gain

instance, notes that allocating power to local governments may exacerbate income inequalities due to the concentration of wealth in some communities. Briffault, *supra* note 394, at 422-23.

396. This illustration, adapted from Bednar & Eskridge, *supra* note 394, at 1467-68, was also used in O'Hear, *supra* note 7, at 757-58.

397. Bednar & Eskridge, *supra* note 394, at 1468.

398. Citizen satisfaction with criminal justice policies is good in and of itself. More speculatively, citizen satisfaction may enhance the legitimacy of criminal law, and thereby promote compliance with the law. See Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1841 (2000).

399. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

400. Once again, here I closely follow the hypothetical discussed in Bednar & Eskridge, *supra* note 394, at 1468.

experience with mandatory minimum sentences. If they are successful, the second state may create its own mandatory minimum. If the second state is unsuccessful, the first state might repeal the policy. Moreover, under a federal system the first state has incentives to monitor the efficacy of its policy, because citizens dissatisfied with it might move to the second state.

The model here thus posits that decentralized decision making in many instances provides better policy and greater citizen satisfaction than federal decision making. This results from the interplay of several factors: voice (the ability of citizens to influence state policy through democratic decision making); exit (the ability of dissatisfied citizens to vote with their feet); and state experimentation.⁴⁰¹

While suggesting a presumption in favor of decentralization, public choice models also indicate that the presumption may be overcome in a variety of circumstances. In particular, national policymaking may be preferred when states individually confront perverse incentives to adopt policies that are harmful from a collective standpoint.⁴⁰² The most familiar of these perverse incentive scenarios involve either spillover effects or “race to the bottom” pressures.⁴⁰³

State policy choices have spillover effects, sometimes referred to as negative and positive externalities, when they give rise either to

401. DYE, *supra* note 395, at 16-17, 20-21. The analysis makes assumptions, of course, that are almost certainly not fully met in the real world. *See, e.g., id.* at 31 (“The model assumes that consumer-taxpayers are mobile, that they have information about the policies and public services of governments, and that they employ this information in their locational decisions.”). In fact, as noted above, there are good reasons to question the validity of these assumptions in regard to the current forms of decentralization in drug policy. *See supra* Part III.C.2.b (discussing concerns about accountability of local law enforcement due, for instance, to public invisibility of important decisions). As Professor Dye notes, though, real-world deviations from the model do not necessarily mean that the model should be discarded, but that attention should be focused on ameliorating the real-world impediments to the model’s efficient functioning. DYE, *supra* note 395, at 31. The Competitive Alternative described below in Part V is just such an effort to address important flaws in the current decentralization scheme.

Other considerations may also support decentralization. For instance, Professor Peterson argues that the delivery of public services seems to display important diseconomies of scale. PETERSON, *supra* note 395, at 20-21. Others have argued that “bringing democracy closer to the people” leads to greater participation and civic-mindedness by citizens. *See* Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2009 (2000) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999) and discussing the tradition of “democratic localism”).

402. ROSEN, *supra* note 395, at 512; Oates, *supra* note 395, at 5-6; Stacy & Dayton, *supra* note 147, at 288-89. Another important exception to decentralization is for welfare and other redistributive programs. Bratton & McCahery, *supra* note 344, at 212. This exception, however, does not appear relevant to the analysis of drug policy and so will not be discussed further.

403. *See* Bednar & Eskridge, *supra* note 394, at 1470; Stacy & Dayton, *supra* note 147, at 288-92.

harms or benefits in other states. Because states do not themselves experience these spillover effects, each state has an incentive to adopt policies that overproduce negative externalities and underproduce positive externalities. These incentives justify federal intervention in order to implement policies that are more efficient from a collective standpoint. The regulation of interstate air pollution provides a classic example. When pollution originating in one state is carried by natural forces into another, the state of origin has little incentive to regulate because it receives the economic benefits of the polluting activity without suffering any of the pollution costs. Thus, for instance, in the early 1970s, many states permitted polluters to build tall smokestacks, which dispersed pollutants high into the atmosphere for eventual deposition onto downwind states and Canada.⁴⁰⁴ Responding to the problem, Congress ultimately amended the Clean Air Act in 1977 to subject tall smokestacks to more stringent federal regulation.⁴⁰⁵

The “race to the bottom” describes another form of systemic failure in decentralized policymaking: in certain circumstances, states tend to adopt weaker regulations than they really prefer because they fear that otherwise businesses will gravitate towards other states with more favorable regulations.⁴⁰⁶ Competition for business and tax dollars thus threatens to drive down regulation across the nation—a fear that has been used to justify federal intervention in a variety of contexts, perhaps most notably in the environmental field.⁴⁰⁷

C. A Public Choice Critique of the Constitutional Alternative

Benjamin and Miller justify the Constitutional Alternative on the basis of classic public choice reasoning. Yet, the Constitutional Alternative suffers at least two major defects from the public choice perspective: the proposal may *reduce* the degree of decentralization in national drug policy by consolidating state control, and the proposal may produce just the sort of perverse incentives that warrant federal intervention.

404. Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It to the “Bottom”?*, 48 HASTINGS L.J. 271, 285 n.31 (1997).

405. *Id.*

406. Bednar & Eskridge, *supra* note 394, at 1470 & n.99; Stacy & Dayton, *supra* note 147, at 290-92.

407. This classic justification for federal environmental law has recently come under attack, sparking a vigorous theoretical and empirical debate. For a review of the debate, see Revesz, *supra* note 395, at 549-56; Scott R. Saleska & Kirsten H. Engel, “Facts Are Stubborn Things”: An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting, 8 CORNELL J.L. & PUB. POL’Y 55, 55-60 (1998).

1. Consolidation of State Control

The public choice model does not favor state control per se, but, rather, decentralization. Indeed, within our system of government, state control stands not as an endpoint on the decentralization spectrum, but as a midpoint between federal and local control. The same sorts of arguments that might justify the devolution of authority from the national government to state governments might equally well justify devolution from state to local (say, to county or municipal government).⁴⁰⁸ Individual citizen voice grows as the size of the electorate shrinks; exit opportunities are more realistic within a state than across state lines; and, if fifty state-level “laboratories of democracy” are good, then the tens of thousands of laboratories provided by local government might be even better.⁴⁰⁹ As to drug policy, anyway, Benjamin and Miller offer no reason why state control should be preferred to local control. Quite the contrary, the arguments they offer in favor of state control would seem to provide even greater support for local control. Indeed, Benjamin and Miller themselves write favorably of local alcohol regulation.⁴¹⁰

To provide a more concrete example, consider the state of California. With a population of more than 34 million,⁴¹¹ it would be hard to characterize state-level decision making in California as being any significantly “closer to the people” than federal decision making. Indeed, with wide cultural gaps between north and south, coast and interior, urban and suburban, California seems likely to experience just the sort of “tyranny of the majority” that is of concern to Benjamin

408. See Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967) (“[W]henver we are compelled to choose between city and state, we should always keep in mind, I think, that the city, not the state, is the better instrument of popular government.”).

409. Local governments in the United States number more than 82,000. Briffault, *supra* note 394, at 346.

410. BENJAMIN & MILLER, *supra* note 7, at 190-91. One potential objection to local control, not discussed by Benjamin and Miller, is the perception that local government officials are less capable than state and federal officials. Of course, capabilities vary enormously; many cities and counties are no doubt led by officials of considerable ability. At the same time, there may be reason to believe that local officials in some jurisdictions (especially small, rural communities) are systematically less likely to be capable of making and implementing effective public policy than state and federal counterparts. For instance, officials in such communities are apt to be part-time government employees and may lack any professional support staff. On the other hand, such characteristics may offer as many advantages as disadvantages. “Amateur” politicians and administrators are uniquely close to the people, and so may be especially responsive to public preferences. Moreover, in the absence of a sizeable local government bureaucracy, new or experimental policies may be implemented more quickly. In short, despite negative perceptions of small-time local government, it is far from clear that local government is incapable of playing a leadership role in policymaking.

411. United States Census Bureau, *State and County Quick Facts: California* (2003), <http://quickfacts.census.gov/qfd/states/06000.html>.

and Miller.⁴¹² For instance, while Proposition 36 received overwhelming support in urban counties, like Los Angeles and San Francisco, the measure was rejected by wide margins in many more rural counties.⁴¹³

None of this is to suggest that drug policy necessarily ought to be made locally; rather, the point is that decentralization alone does not support the choice of state government as the unit with ultimate control. Other considerations, though, do suggest some state superiority as against localities, particularly in the implementation of enforcement-oriented policies. Local governments lack not only the financial resources of states,⁴¹⁴ but also a criminal code and prison system of their own. Furthermore, while drug sellers and purchasers may easily crisscross municipal boundaries, the local enforcement authorities are geographically limited to their municipality or county. Finally, local police may lack the ability to use sophisticated law enforcement technology and investigative tactics, and have insufficient economies of scale to justify developing such capabilities.⁴¹⁵

In short, while decentralization values might favor local over state policymaking, local governments will often lack the resources necessary for implementing policy choices.⁴¹⁶ Does this lead us back in

412. This is not to suggest that the existence of California should necessarily dominate discussions of federal-state relations; California is admittedly unique in its size and, perhaps, also in its heterogeneity. But nor should federal-state relations be driven by the existence of tiny states like New Hampshire and Montana that better adhere to the model of close-to-the-people state government. Indeed, the great variation among states is itself an important reason to be skeptical of proposals like the Constitutional Alternative that diminish flexibility in intergovernmental relations.

413. For instance, the measure received less than 45 percent of the vote in Colusa, Glenn, Modoc, Sutter, and Tulare Counties. Drug Policy Alliance, County-by-County Breakdowns of the 2000 Initiative Votes (2001), available at http://www.prop36.org/county_results.html.

414. Indeed, local units of government typically depend on the state for the bulk of their income, and may face various state law constraints on their ability to increase taxes. BOWMAN & KEARNEY, *supra* note 377, at 418, 422. Moreover, because local fiscal resources are tied to local taxing capacity, handing policy responsibility over to local governments may particularly disadvantage the poorest communities. See Briffault, *supra* note 394, at 422-23 (“[T]he quantity and quality of . . . local services . . . vary directly with local fiscal capacity.”).

415. Treatment-oriented responses might also suffer. To be sure, large urban jurisdictions have a long history of developing innovative drug treatment programs on their own, from the maintenance clinics in the early years of the Harrison Act to the drug treatment courts in the early 1990s. See *supra* Parts II.A, III.B.2.a. But, lacking economies of scale, smaller communities may face insurmountable financial obstacles in developing a comprehensive treatment infrastructure on their own, including in-patient and out-patient programs, regular testing, counseling services, and appropriate supervision.

416. Based on such considerations, Professor Briffault argues that, in general, states ought to exercise their power more fully and “take a state-centered approach in policy making.” Briffault, *supra* note 394, at 447-51.

a circle to state control and the Constitutional Alternative? Not necessarily. A distinction should be made between which level of government makes policy, and which level of government funds implementation. There is no reason, for instance, why a state government could not allow each county within the state to choose among three alternative drug policies: long prison terms for drug offenders, mandatory treatment, or decriminalization. To counties choosing the first, the state might offer ample prison space, in-kind law enforcement assistance, and favorable sentencing laws. To counties choosing the second, the state might offer space in state-funded treatment programs and appropriate guidance to prosecutors and judges that ensure both the diversion of drug offenders from prison and proper supervision while in treatment. Finally, to counties choosing the third, the state might simply keep its hands off, or perhaps offer other forms of grant aid (say, for education) to compensate for the lack of state financial support for enforcement. In this way, while policy choices remain local, state financial resources and economies of scale are available to support the implementation of those choices.

The Constitutional Alternative, of course, might permit just this outcome: handed policymaking authority by the federal government, states might simply pass that authority on to local government, while providing the necessary resources for local implementation. But the Constitutional Alternative does not *require* that outcome. States might instead monopolize drug policy to the exclusion of localities.

Indeed, the Constitutional Alternative might very well provide less local autonomy than is available under the present system. That (perhaps surprising) conclusion stems from the fact that many forms of federal support for drug control efforts go directly to localities, and do not pass through the state's hands. Through a variety of means of support, from monetary grants to referral for federal prosecution, the federal government empowers local officials who are so inclined to implement tougher drug policies than would be possible under state auspices alone.

New York City's "Federal Day" program in the 1980s provides a good case in point. Under this program, local law enforcement in New York City referred all drug arrests for one day each week for federal prosecution.⁴¹⁷ The program, which was intended to increase deterrence of drug crimes, allowed local law enforcement to opt out of

417. O'Hear, *supra* note 7, at 733.

state sentencing laws in favor of stricter federal laws.⁴¹⁸ Such initiatives free local prosecutorial, judicial, and correctional resources for other purposes, thereby providing the functional equivalent of a grant in support of the locality's enforcement-oriented drug policies.

In short, current federal policy is of great benefit to get-tough localities that happen to be situated in more lenient states. Such localities would, if anything, likely lose autonomy under the Constitutional Alternative. Moreover, if get-tough localities would lose under the Constitutional Alternative, lenient localities would not necessarily gain. As discussed above, federal law enforcement resources are quite limited, particularly on the street level.⁴¹⁹ Federal agents count on the local police acting as their eyes and ears. Without local cooperation, tough federal policies have more bark than bite.⁴²⁰ Assuming that local law enforcement agencies in lenient jurisdictions are responsive to local policy preferences (and, hence, do not cooperate), one would expect little dissatisfaction with current arrangements.

The Constitutional Alternative could, to some extent, preserve some of the current local autonomy by allowing the federal government to make direct grants to local governments in order to facilitate the implementation of policies that run counter to state preferences. But it is not clear that Benjamin and Miller would condone the resulting constriction of state autonomy. Moreover, federal money cannot fully substitute for some of the opportunities offered to localities by the current system. Under the Constitutional Alternative, for instance, get-tough local law enforcement would clearly lose access to strict federal sentencing laws and could not "buy" a reasonable substitute. No city could implement anything like Federal Day.

Thus far, in arguing that the current system advances decentralization values at least as well as the Constitutional Alternative, the analysis has made a critical—and admittedly unsupported—assumption: that local law enforcement is responsive to local policy preferences. If it is not, then the local autonomy under the current system only works to the benefit of the local law enforcement agenda, and does not necessarily enhance overall citizen satisfaction.

418. Cf. Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. TIMES, Dec. 29, 1989, at A1.

419. See *supra* Part III.A.2.b.

420. Thus, for instance, local police in Whitefish Bay, Wisconsin, have effectively decriminalized marijuana by issuing municipal citations for possession, instead of referring cases to prosecutors. Thomas-Lynn, *supra* note 207.

On the other hand, local autonomy—whether or not responsive—may advance the cause of policy innovation.⁴²¹

There are a number of good reasons to doubt police responsiveness to citizen preferences on the local level.⁴²² As discussed above, many features of the current system signal federal leadership on drug policy, which diminishes local accountability and discourages real deliberation about alternatives to federal preferences.⁴²³ Additionally, federal grants and equitable sharing insulate local drug enforcement units from normal budgetary politics and offer material rewards for localities to adopt enforcement-oriented policies without regard to local preferences. Finally, a great deal of drug enforcement occurs behind a veil of secrecy: few members of the public know—or have any way of gaining information—about the operation of MJDTFs; the establishment of, and relationship between, federal, state, and local drug enforcement priorities; local policies governing referral of cases to federal prosecutors; federal policies governing which cases will be taken; sentencing practices in state and federal courts; the availability and quality of drug treatment programs for state and federal defendants; and so forth.

On the other hand, considerable anecdotal evidence supports the view that local police are responsive to local political pressures.⁴²⁴ Moreover, it is important to note that responsiveness may occur not only on the local side, but also on the federal side. While much of

421. Professor Klein, for instance, responds to criticisms of burgeoning federal criminal jurisdiction by noting that local experimentation has nonetheless “flourished,” citing, as examples, boot camps, drug courts, shaming devices, community policing, and civil commitment for sexually violent predators. Klein, *supra* note 362, at 1556-57. Indeed, the Office of National Drug Control Policy recently launched a “25-Cities Initiative” intended, among other things, to help identify and replicate innovative local-level drug control strategies. United States Office of National Drug Control Policy, 25-Cities Initiative Fact Sheet (2003), available at <http://www.whitehousedrugpolicy.gov/metroindicator>.

422. This lack of responsiveness may be reflected in the curious disconnect observed by Professor Wright between public perceptions of the drug problem and the number of drug charges filed. Ronald F. Wright, *Are the Drug Wars De-escalating*, 14 FED. SENTENCING REP. 141, 145 (2001-2002). While indicators of popular opinion suggest that the public views drugs as a lower priority today than in the early and mid-1990s, *id.* at 141, drug charges have gone up or stayed the same, *id.* at 143. Professor Wright suggests that the explanation may have something to do with bureaucratic inertia. *Id.* at 145.

Related questions have been raised in the literature on community policing. In particular, a number of scholars have investigated the nature and importance of “value conflicts” between police institutions and community preferences, with some suggesting that value conflicts are intractable. For a summary of the literature, see David Thatcher, *Conflicting Values in Community Policing*, 35 LAW & SOC’Y REV. 765, 768-69 (2001).

423. See *supra* Parts III.A.2.a-b.

424. See, e.g., MASSING, *supra* note 45, at 57-58 (describing success of community activist and Congressman Charles Rangel in inducing New York City police to devote resources to eliminating drug trade on one particular block).

federal drug policy is made centrally by the ONDCP and other Washington-based agencies, criminal enforcement is ultimately the responsibility of the ninety-four different United States Attorneys spread across the country. While not elected, the United States Attorneys are subject to political pressures.⁴²⁵ They may, in fact, harbor political ambitions of their own,⁴²⁶ a possibility nicely illustrated by Rudolph Giuliani's rise from United States Attorney to Mayor of New York City. Moreover, as Professor Richman has observed, United States Attorneys are typically beholden to elected legislative patrons, and legislators are not shy about demanding that federal prosecutors act to address local needs.⁴²⁷ Thus, in a get-tough locale, we would expect that federal prosecutors would be more likely to emphasize drug enforcement and to provide the sorts of in-kind drug enforcement assistance described above.⁴²⁸ In a more lenient locale, federal prosecutors might be more likely to focus resources elsewhere, lessening incentives and opportunities for local law enforcement to adopt get-tough policies. Either way, the decentralized and politically sensitive federal prosecutorial function helps to make the current system more locally accountable than might otherwise appear to be the case.⁴²⁹

425. For a discussion of the mechanisms by which federal prosecutors are made accountable to legislators, see Richman, *supra* note 152, at 789-93.

426. Glaeser et al., *supra* note 157, at 279.

427. Richman, *supra* note 152, at 785.

428. Federal Day, instigated by Giuliani while still a federal prosecutor, may be a case in point. Indeed, Giuliani as candidate and mayor, continued his emphasis on drug enforcement. For an account of the drug policies of the Giuliani Administration, see MASSING, *supra* note 45, at 246-57.

Another example outside the drug area may be the federal Project Exile program in Richmond, Virginia, in which federal prosecutors responded to a spike in the city's homicide rate by taking as many gun prosecutions as possible. See Richman, *supra* note 154, at 370, 398. The Virginia legislature eventually increased sentences and adopted other get-tough reforms, but only after Project Exile was acclaimed a success, suggesting that the local federal prosecutors had been more responsive to local preferences than the state legislature. *Id.*

429. The sensitivity of federal prosecutors to local drug policy preferences may be reflected in district-to-district drug sentencing variations. Even taking into account variables such as the different mix of drug types in different districts, Professors Bowman and Heise have found a significant downward trend in drug sentence lengths in most districts since 1992, but also a substantial minority in which sentence lengths have held steady or increased. Bowman & Heise, *supra* note 5, at 554-56. They suggest that downward trends indicate that "front-line actors in the sentencing system [including prosecutors] employed their discretion to an ever-increasing degree to lower drug sentence length." *Id.* at 554.

It should be noted, however, that, under Attorney General Ashcroft, "main Justice" has recently sought to curtail the charging and plea-bargaining discretion of the United States Attorneys. See, e.g., Memorandum from Attorney General Ashcroft, United States Department of Justice, to All United States Attorneys 2 (Sept. 22, 2003) (stating general policy that "federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case").

In the end, it is difficult to say with any confidence whether the Constitutional Alternative would do a better job of advancing decentralization objectives than the current system. This uncertainty greatly diminishes the appeal of the Constitutional Alternative, for decentralization is its chief selling point. In any event, what *is* certain is that both the Constitutional Alternative and the current system could do a better job of ensuring local accountability and decentralized policymaking. Part V below offers suggestions for improvement.

2. Perverse Incentives

Notwithstanding the benefits of decentralization, federal control may still be justified on the basis of “race to the bottom” pressures or spillover effects.⁴³⁰ As detailed below, the interstate effects of the Constitutional Alternative are difficult to project, but there is some basis to conclude that spillover effects, at least, will be much more significant than Benjamin and Miller suggest.

a. Race to the Bottom

Under the Constitutional Alternative, interstate competition may influence the state-level drug policy debate in at least two important ways. First, states will no doubt be attracted to the tax revenue potential of the drug trade, which might amount to billions of dollars a year.⁴³¹ If a state were to legalize and tax popular illicit drugs, the state might be able to use the revenue to reduce other tax burdens, enhance government services, or make other changes that would help the state compete more effectively in the interstate market for business location. Faced with interstate competitive pressures, states might “succumb” one-by-one to drug legalization, much as states have increasingly liberalized restrictions on gambling in order to capture a share of the profits from that vice.⁴³²

A countervailing competitive pressure, though, may diminish or even overwhelm the appeal of legalization and taxation. Whatever the fiscal and other benefits, legalization would almost certainly increase overall drug use and make the legalizing state a magnet for

430. See *supra* Part IV.B.

431. BENJAMIN & MILLER, *supra* note 7, at 231-32.

432. See Theresa A. Gabaldon, *John Law, with a Tulip in the South Seas: Gambling and the Regulation of Euphoric Market Transactions*, 26 J. CORP. L. 225, 250 (2001). Indeed, as Courtwright documents, from the seventeenth through the nineteenth centuries, the dominant regulatory strategy of governments across the world towards psychoactive drugs was taxation (or the functional equivalent, a government-run monopoly). COURTWRIGHT, *supra* note 124, at 152-65.

addicts from across the country.⁴³³ As legalization critics often note, per capita alcohol consumption more than doubled in the decade after Prohibition.⁴³⁴ Because of the stigma attached to intoxication and addiction, states will be wary about becoming havens for open and notorious drug use. Association with drugs may hurt a state's reputation and impair the state's ability to attract and retain business. Indeed, one of the principal arguments raised against the Nevada legalization initiative was the possibility of adverse effects on the state's tourism industry.⁴³⁵ Thus, under state control, drug use might not necessarily be broadly legalized (like alcohol use) or partially legalized (like gambling), but might instead be regulated like a different vice: prostitution. Although it is, like drugs, potentially a major revenue-generator, the sex-for-hire business remains illegal in every state save one.⁴³⁶

The interstate competition effects of the Constitutional Alternative therefore defy clear projection. The Constitutional Alternative may prompt a race to legalization (the "bottom"?) if states tend to believe that the expected tax revenues will outweigh any of the disadvantages. Or the Constitutional Alternative may prompt a race to increasingly punitive policies (the "top"?) if states tend to fear the stigma associated with drugs. Or the two countervailing pressures may largely cancel each other out, or otherwise prove insignificant.⁴³⁷

433. BENJAMIN & MILLER, *supra* note 7, at 233, 236. Thus, for instance, Zurich and Amsterdam, with relatively quite liberal drug laws, have been magnets for drug users in Europe. Stanley Neustadter, *Legalization Legislation: Confronting the Details of Policy Choices*, in HOW TO LEGALIZE DRUGS 388, 393 (Jefferson M. Fish ed., 1998).

An analogous argument has been used in support of federal, as opposed to state, determination of welfare benefits. According to the so-called "welfare magnet" theory, each state, in the absence of federal intervention, would adopt less generous welfare policies than it would otherwise prefer in order to avoid attracting welfare recipients from other states. For the leading statement of this theory, see PAUL E. PETERSON & MARK C. ROM, BROOKINGS INST., WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD (1990). The empirical evidence, however, casts some doubt on a race to the bottom in welfare policy. Craig Volden, *Entrusting the States with Welfare Reform*, in THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 65, 73-75 (John A. Ferejohn & Barry R. Weingast eds., 1997).

434. MASSING, *supra* note 45, at 10.

435. Nevada Ballot Pamphlet, *supra* note 305, at 2.

436. Nevada is the only state to legalize prostitution. Kathy J. Steinman, *Sex Tourism and the Child: Latin America's and the United States' Failure to Prosecute Sex Tourists*, 13 HASTINGS WOMEN'S L.J. 53, 74 (2002). And Nevada has not done so merely because of tax revenue benefits: the state has not traditionally taxed the sex trade (although a budget crisis may be changing that policy). Charlie LeDuff, *Nevada Turns to Brothels as a Budget Fix*, N.Y. TIMES, June 28, 2003, at A7.

437. Thus, for instance, the interstate competition pressures may be swamped in public policy debates by any of a number of other considerations, such as the legalist inflexibility or rights-based libertarianism. Additional empirical work in this area would be helpful. For

While the effects are uncertain, interstate competition does at least represent a potential pitfall for the Constitutional Alternative.

b. Spillover Effects

Under the Constitutional Alternative, states that adopt less punitive or enforcement-oriented drug policies may cause adverse spillover effects in neighboring get-tough states.⁴³⁸ At present, drug prices reflect risk premiums charged at each stage of the manufacturing and distribution process: drug traffickers demand greater compensation to offset the risks of apprehension and incarceration.⁴³⁹ As a result, street prices are much greater than the actual costs of production.⁴⁴⁰ If a state liberalizes its drug laws, however, the risk premiums will be reduced and street prices will fall.⁴⁴¹ By one estimate, for instance, legalization would cause the price of cocaine to drop by more than 85 percent, marijuana by more than 90 percent, and heroin by more than 98 percent.⁴⁴²

The lower prices and lower risks in a liberalizing state may become quite attractive to users in nearby get-tough states. Drugs would be easily purchased in a liberalizing state and carried back home across our open interstate borders.⁴⁴³ Thus, liberalizing the laws in one state may make drugs cheaper and more readily available to the residents of other states, thus undermining the ability of get-tough states to achieve their preferences to be drug-free.⁴⁴⁴ This effect might

instance, it may be helpful to study the international effects of the current round of liberalization in Canada and Western Europe. These recent reforms are discussed above in Part III.B.3.

438. State-to-state variation already exists, *see supra* Part III.B, so the new spillover effects created by the Constitutional Alternative might be more a matter of a change in the degree of the problem than a change in kind.

439. *See* RASMUSSEN & BENSON, *supra* note 103, at 68; STALEY, *supra* note 78, at 164. One expects that these risk premiums would be greater for drugs that pass through more complicated international distribution networks than for those drugs that are readily produced domestically close to the end users, such as marijuana and methamphetamine.

440. *See, e.g.*, BENJAMIN & MILLER, *supra* note 7, at 231 ("It costs less than \$1 to manufacture an amount of cocaine that carries a street price of \$50.")

441. *Id.* at 233.

442. RASMUSSEN & BENSON, *supra* note 103, at 185.

443. The mobility and resourcefulness of drug trafficker operations have been well documented. *See, e.g.*, STALEY, *supra* note 78, at 156-57 (describing changing patterns of distribution in response to law enforcement efforts). For instance, Mexican drug gangs are now increasingly moving their manufacturing and distribution centers from border towns to suburban communities in the nation's interior, where they are closer to the ultimate consumer. Tim Golden, *Mexican Drug Dealers Turning U.S. Towns into Major Depots*, N.Y. TIMES, Nov. 16, 2002, at A1.

444. This dynamic may already be emerging on an international scale between Canada and the United States. It is estimated that about 95 percent of the marijuana grown in British Columbia, valued at \$4 billion to \$6 billion annually, is shipped to the United States. Clifford

be exacerbated to the extent that price competition from suppliers in liberalizing states caused a price drop within the get-tough state.⁴⁴⁵

Such spillover problems plagued state drug enforcement before the Harrison Act,⁴⁴⁶ and may be observed today in a variety of analogous contexts, such as gun control. For instance, many jurisdictions have banned handgun commerce and possession.⁴⁴⁷ Yet, banned weapons may still be purchased with ease in other jurisdictions and, like drugs, are easily transported across state lines. As a result, handguns are readily available even in cities with stringent gun control laws, and citizen preferences to live in handgun-free communities are thwarted.⁴⁴⁸

Benjamin and Miller acknowledge the potential for interstate drug shipments, but suggest two reasons why the spillover effects will not be large.⁴⁴⁹ First, they contend that refocused federal enforcement resources will contain interstate trafficking:

Instead of being spread thinly across all fifty states and all conceivable forms of activities, federal resources will be targeted on one function—illegal interstate drug shipments—and on only a subset of the fifty states—those that decide to get tough. This targeting of federal resources, in conjunction with the added law enforcement resources

Krauss, *Canada Parts with U.S. on Drugs*, N.Y. TIMES, May 19, 2003, at A9. Decriminalization in Canada may increase such exports, leading the United States to threaten tightened border security. *Id.*

445. These spillover effects may be mitigated, however, by the permanent relocation of some users (and perhaps some dealers) to liberalizing states. One imagines that some addicts, for instance, will find it less costly and risky to move to a liberalizing state than to make frequent trips across the border. See *supra* note 433 (discussing movement of drug users in Europe). Dealers may be less likely to move. Research suggests that drug dealers are very territorial; movement into another dealer's territory is apt to produce a violent confrontation. RASMUSSEN & BENSON, *supra* note 103, at 102-03. Thus, instead of moving, many dealers in the get-tough state will likely either (1) remain and try to compete with the out-of-state suppliers on price or quality (to the detriment of the get-tough state); or (2) get out of the business entirely (to the benefit of the get-tough state, assuming that the ex-dealer does not then take up an even more dangerous criminal activity as an alternative livelihood). In short, the full magnitude of the spillover effects would be a function of many complex variables, and hence quite difficult to predict.

Interestingly, the permanent relocation of users and dealers may itself be characterized as a spillover effect of the policy choices of the *get-tough* state. To the extent that the get-tough policies of one state impose additional drug-related costs on other states (e.g., treatment costs for relocated addicts), federal control of drug policy may be appropriately justified: federal control reduces the risk that one state will adopt get-tough policies with the intent of exporting its social undesirables (users and dealers) to other states.

446. See, e.g., MUSTO, *supra* note 48, at 9 ("New York State reformers bitterly criticized New Jersey's lax narcotic regulations, which vitiated enforcement of New York's carefully framed legislation.")

447. Anthony A. Braga et al., *The Illegal Supply of Firearms*, 29 CRIME & JUSTICE: A REVIEW OF RESEARCH 319, 323 (2002).

448. See *id.* at 330-33.

449. BENJAMIN & MILLER, *supra* note 7, at 231.

utilized in get-tough states, will be a formidable barrier to illegal interstate drug shipments.⁴⁵⁰

Yet, several considerations suggest that this federal effort may be somewhat less than "formidable." Interstate gun trafficking demonstrates the difficulty of preventing portable contraband from crossing state lines in this country.⁴⁵¹ Indeed, the illicit interstate gun trade proceeds notwithstanding the fact that the federal government has jurisdiction over gun trafficking in violation of state and local gun laws.⁴⁵² The ineffectiveness of this enforcement authority does not bode well for the comparable federal jurisdiction offered by the Constitutional Alternative.

Quite apart from this precedent, it is apparent that the Constitutional Alternative would impair federal drug enforcement in a number of respects. Federal convictions would be harder to obtain because federal jurisdiction would be limited to interstate drug trafficking in violation of a state law. Thus, while federal prosecutors at present need only prove mere possession of a controlled substance in order to gain a conviction, under the Constitutional Alternative they would need to prove several additional elements, and they would need to do so beyond a reasonable doubt.⁴⁵³ If a trafficker were apprehended with drugs in a liberalizing state, federal prosecutors would have to prove intent to transport the drugs into a get-tough state. If a trafficker were apprehended in a get-tough state, prosecutors would have to prove that the trafficker imported the drugs from another state. More stringent evidentiary burdens at trial diminish the prosecutor's leverage in plea bargaining, and hence reduce the ability of the prosecutor to extract a defendant's

450. *Id.*

451. See also Gross & Barnes, *supra* note 2, at 751 (arguing that "highway drug interdiction is doomed to fail").

452. Under 18 U.S.C. § 922(b)(2) (2000), it is unlawful "to sell or deliver any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition." To be sure, gun control is more controversial in Washington than drug control, which may help to explain some of the federal ineffectiveness in stopping illicit gun trafficking. See JACOBS, *supra* note 336, at ix ("Guns present a tougher regulatory challenge than drugs because they are more widely used and are more politically and socially acceptable.").

453. The concerns here would be somewhat mitigated if the evidentiary burdens were restructured. For instance, the interstate transportation elements might be converted into an affirmative defense. While lessening the burden on prosecutors, however, this sort of approach would raise difficult logistical and fairness issues in the conduct of trials in drug cases. In order to show an absence of intent to transport drugs across state lines, a defendant might effectively have to concede the underlying drug violations. Otherwise, the defendant would be in the difficult position of asserting, "I did not have any drugs . . . and I was only going to use them in-state." Trial bifurcation might alleviate the fairness concerns, but at the cost of making trials harder to manage.

cooperation in convicting coconspirators.⁴⁵⁴ Indeed, federal law enforcement officials may redirect their limited resources from drug cases to other sorts of cases that offer a better chance of success.⁴⁵⁵

These tendencies may be exacerbated by changes in asset forfeiture practices under the Constitutional Alternative. Federal jurisdiction over drug-related property would presumably be constricted in the same manner as federal criminal jurisdiction: property would be immune from federal forfeiture without proof of a connection to illicit interstate transportation.⁴⁵⁶ Federal officials would thereby find it much more difficult to wield an important tool in their enforcement arsenal, and would also lose a significant source of financial support for their drug enforcement efforts. Gone, too, would be a critical inducement for cooperation from state and local law enforcement. In short, while Benjamin and Miller assume that the scale and effectiveness of federal enforcement would remain constant under the Constitutional Alternative, there are good reasons to expect just the contrary.⁴⁵⁷

In addition to federal enforcement, Benjamin and Miller would rely on taxation as an impediment to spillover effects.⁴⁵⁸ More specifically, they argue that liberalizing states will impose taxes on drug transactions that will offset the loss of the risk premium and thereby keep street prices at high levels everywhere.⁴⁵⁹ This argument, though, rests on two dubious assumptions: that *liberalizing* states will legalize the drug trade and that *legalizing* states will impose weighty taxes on drugs. As the blossoming of state reform in

454. See Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 15-21 (2003) (describing relationship between cooperation and plea bargaining); Stuntz, *supra* note 315, at 537 ("If crimes are defined in ways that make guilt hard to prove, the threat of trial will be less serious to many defendants, and the inducements to plead will be accordingly less substantial.")

455. See Stuntz, *supra* note 315, at 534, 543 (discussing prosecutorial objectives of winning cases and advancing professional reputation and noting unique power of federal prosecutors "to set their own agendas, to decide what cases they wish to spend time on and what cases they wish to ignore").

456. Benjamin and Miller do not address this point directly, but it would be odd to have a system in which federal agents could seize property based on its connection to an activity that is legal under federal law and possibly under state law. Federal drug forfeiture jurisdiction is currently triggered by the violation of a federal drug law. 21 U.S.C. § 881(a) (2000).

457. Their argument might have more appeal if current federal efforts were wholly ineffective; in that case, the impairment of federal capabilities under the Constitutional Alternative would not amount to any real loss for get-tough states. However, federal enforcement efforts are, in fact, substantial in their own right, and also do facilitate state and local enforcement. See *supra* Parts III.A.2.b & d. Put differently, there is something meaningful to be lost by impairing federal capabilities.

458. See BENJAMIN & MILLER, *supra* note 7, at 233.

459. See *id.*

the past decade demonstrates, states may adopt any of a broad range of reforms short of full legalization. Indeed, the failure of recent marijuana legalization efforts in Alaska, Nevada, and South Dakota,⁴⁶⁰ coupled with the drug stigma effects discussed above,⁴⁶¹ suggest that legalization might be quite uncommon under the Constitutional Alternative. Instead, liberalizing states might opt for other sorts of reform, such as decriminalization and asset forfeiture reform, which would diminish the scale or effectiveness of drug enforcement efforts without offering taxation opportunities.⁴⁶²

Even in states that choose legalization and taxation, it is far from clear that tax rates will be uniformly high enough to offset the loss of the risk premium. Tax rates for substances that are already legal, like alcohol and tobacco, vary enormously from state to state.⁴⁶³ While some legalizing states might very well wish to wring maximum tax revenue from the drug trade, others might reject high taxes on any number of grounds. From a public-health perspective, high drug prices make it difficult for addicts to live as law-abiding citizens and impair the effectiveness of maintenance programs. From a rights-based perspective, high taxes may look like an unjustifiable penalty imposed on a perfectly lawful activity. From a tax policy perspective, high drug taxes may operate regressively; that is, their burden may fall disproportionately onto lower-income citizens. From a libertarian perspective, high taxes may be objectionable *per se*.

In sum, neither federal enforcement nor taxation are satisfactory responses to the threat of spillover effects. If the preferences of states with strong anti-drug feelings are to be taken seriously, reformers should look for alternatives to the Constitutional Alternative.

460. See *supra* Part III.B.2.b.iv.

461. See *supra* Part IV.C.2.a.

462. Even medical marijuana laws may undercut the effectiveness of drug enforcement, as marijuana prosecutions may become bogged down in litigation over whether the drug was being produced or used for medical purposes. See LeDuff & Liptak, *supra* note 322 (quoting DEA official as saying, "It's hard to tell the difference between a so-called club [for distribution of medical marijuana] and an operation that cultivates and traffics in marijuana.").

463. See, e.g., BENJAMIN & MILLER, *supra* note 7, at 232 (noting 33-cent tax on pack of cigarettes in New York, in comparison with 2-cent tax in North Carolina). Additionally, Nevada, the only state to legalize prostitution, has not traditionally taxed the sex business. LeDuff, *supra* note 436.

V. A DIFFERENT DECENTRALIZATION AGENDA: THE COMPETITIVE ALTERNATIVE

If not the Constitutional Alternative or the status quo, then what? In the tangled web of federal-state-local relations, what sorts of changes (if any) would represent sensible improvements over the existing arrangements? This Part offers preliminary suggestions for an alternative reform agenda. Like the Constitutional Alternative, the agenda here is built on a presumption in favor of decentralized decision making.

The case for a decentralized drug policy is strong, provided that spillover effects may be held to acceptable levels.⁴⁶⁴ Opinions as to critical questions, such as whether drug addiction is better characterized as a disease or a vice, remain as divided today as they were a century ago.⁴⁶⁵ With such fundamental questions in doubt, communities may choose from among a range of distinct policy paradigms that are each reasonably coherent and defensible. Given this diversity of options and the localized nature of the harms flowing from drug use, there seems to be little reason to deny different communities the opportunity to select their own policy responses. Decentralized policymaking, moreover, carries the ancillary benefit of promoting the sort of policy innovation and real-world testing that may contribute to resolving some of the longstanding theoretical and empirical disputes in the field.

The Constitutional Alternative has been proposed as a decentralizing reform, but, as discussed above, suffers potential spillover problems and (in light of its emphasis on states to the possible detriment of localities) does not clearly advance the goals of decentralization. Accordingly, this Part suggests a different reform agenda, the Competitive Alternative. The Competitive Alternative is also intended to enhance the decentralization of drug policy, but with greater attention to the objectives of respecting local-level preferences and of preserving an effective federal enforcement role against cross-

464. In addition to Benjamin and Miller, several other commentators have touted the benefits of decentralization in national drug policy. See, e.g., RASMUSSEN & BENSON, *supra* note 103, at 183 (advocating federal decriminalization of marijuana possession "because it [would] provide[] an environment for effective local experimentation"); ZIMRING & HAWKINS, *supra* note 7, at 174 ("[T]he case for uniformity of policy seems weak . . . not only because different places have different types of problems but also because there is little support for a single orthodox set of drug control strategies and priorities."); Haaga & Reuter, *supra* note 7, at 72 ("State and local decisionmakers should be given latitude to make and implement drug control policy."). *But see* Neustadter, *supra* note 433, at 394 (arguing that, in light of spillover effects, "the country's core drug policy would be determined at the national level").

465. See *supra* note 51 (discussing division of opinion in 1918).

jurisdictional drug transportation. Broadly speaking, this reform agenda has three components: (1) reducing the federal distortion of drug policy debates at the state and local level; (2) subjecting federal drug enforcement decisions to a greater degree of local political control; and (3) increasing the accountability of local law enforcement to local political institutions.

A. Overview

The problem with existing federal-state-local arrangements is not one of monopolistic domination by the center, but rather a pattern of decentralization that is fragmentary, incoherent, and opaque. Current arrangements seem to do a reasonably good job of empowering communities that wish to emphasize enforcement and legalism. Similar support, however, is not available to communities that wish to develop alternative approaches to drug control. Quite the contrary, the federal government sometimes actively seeks to undermine such efforts (as it is currently doing with medical marijuana in California).

The reform agenda described below aims to create a more level playing field for the competing approaches to drug control. More specifically, the goals are to encourage local communities to deliberate in new ways about drug control policy, and to give more room for communities to deviate from the federal model. At the same time, reforms should also attempt to minimize the burdens on federal drug enforcement in communities where it is welcome.⁴⁶⁶

B. Reducing Federal Distortion of the Policy Debate

As discussed above, federal policies and practices discourage innovation that deviates from the legalist paradigm and induce higher levels of enforcement than many states and localities would otherwise choose.⁴⁶⁷ The federal role distorts policy debates along at least three dimensions. First, federal assertions of leadership blur lines of

466. As suggested by the analysis of the previous Part, the need for an ongoing federal enforcement presence stems from two considerations. First, federal enforcement represents an irreplaceable form of in-kind aid to get-tough communities located within liberalizing states. Second, the federal government has a unique capability, through its specialized law enforcement resources and ability to operate on a national or international scale, to enforce against multi-state and multinational drug trafficking enterprises. Whether or not located in liberalizing states, get-tough communities may have difficulty defending themselves against such enterprises without a robust federal enforcement presence.

467. See *supra* Part III.B.3. For a summary of the evidence on the distorting effects of federal aid generally, see DYE, *supra* note 395, at 107-12.

accountability and relieve pressures on state and local officials to develop different or more effective drug policies.⁴⁶⁸ Second, nonstop federal marketing of the starkly Manichean legalist message not only drowns out alternative approaches to the drug problem, but actually stigmatizes the advocates of these alternative approaches.⁴⁶⁹ Third, asset forfeiture and other financial incentives have given law enforcement agencies a compelling interest in lobbying in support of drug enforcement.⁴⁷⁰

In order to advance the objectives of decentralization, state and local governments ought to be able to deliberate about drug policy in ways that are less systematically tilted towards federal preferences. Distorting the debate likely results in missed opportunities for policy innovation and for better satisfying overall citizen preferences.⁴⁷¹ Moreover, these distortions do not, in any clear or focused manner, serve to advance federal interests in controlling spillover effects.

Any of a number of specific reforms might lend more balance to the federal role. For instance, the federal government might turn over the entirety of its anti-drug advertising budget to the states, leaving each state to determine the content of the anti-drug message within its borders.⁴⁷² In turning one of the most visible elements of the government anti-drug campaign over to the states, public perceptions of federal hegemony would be diminished. At the same time, message content might grow more diverse. While states *could* continue to emphasize legalism, some states might not. To the extent that states

468. For example, opponents of the Nevada marijuana initiative successfully argued that the initiative could not be implemented due to federal opposition. See *supra* Part III.B.2.b.iv. Perceptions of federal dominance may lead the public to believe that state-level reform is futile.

469. For instance, in recent years, the federal government has often castigated the diverse state-level reform efforts as a concealed legalization campaign. See *supra* Part III.B.2.b.vi.

470. The success of these efforts may be indicated by the consistent opposition of law enforcement officials (federal, state, and local) to the drug reform ballot initiatives. See *supra* Part III.B.2.b.

471. The analysis here assumes that state and local governments, left to their own devices, will be more or less responsive to constituent preferences. A great body of public choice scholarship casts doubt on the strong form of this proposition. See, e.g., DYE, *supra* note 395, at 61 (summarizing criticisms of “median voter model”); McKinnon & Nechyba, *supra* note 344, at 28-30 (discussing likelihood of “unhealthy” collusion among lower-tier governments). Yet, despite shortcomings in the theoretical model, considerable empirical evidence suggests that state and local governments are not wholly unresponsive to voter preferences. DYE, *supra* note 395, at 61-62.

472. Advertising funds might also be turned over to local government, which would provide even greater decentralization. On the other hand, in light of the possibilities of economies of scale and the regional organization of media markets, creating and implementing an advertising campaign might be the sort of activity best handled at the state level. To the extent that local governments could utilize the funds effectively, however, there seems no good reason to disqualify them from receiving federal grants for their own anti-drug campaigns.

chose to base their advertising on, for instance, the public-health paradigm (characterizing drug addiction as a disease, rather than as a moral failure), public debates on drug policy might grow richer and more productive.

Likewise, Washington should restructure its anti-drug grants so as to achieve greater neutrality among policy approaches, and thereby promote greater innovation and diversity. The Byrne Program, drug court grants, and similar federal programs should be folded together into a single Substance Abuse Prevention Grant Program. Grants should be awarded without bias among enforcement, treatment, and education initiatives. Police departments should have to compete for grants with drug treatment agencies, school districts, prisons, and other agencies that are capable of using federal funds in innovative and effective ways to control substance abuse. Moreover, grants should be available not only for proposals addressing illicit substances, but also for programs addressing alcohol and other licit substances, thereby allowing communities to adopt and implement a coherent public-health approach (if they wish) in lieu of legalism.⁴⁷³

In order to enhance the neutrality of the Program, it should be administered by an agency outside of the law enforcement bureaucracy. Thus, for instance, the ONDCP would be preferable to the DEA for this purpose. In all events, federal "strings" should be minimized, although evaluation and reporting requirements should be rigorous so as to discourage waste and facilitate the dissemination of successful policy innovations.⁴⁷⁴

473. One difficult question for the redesigned grant program would be the relative roles of state and local governments. Professor Hills has offered a thoughtful account of the advantages and disadvantages of "state supremacy" in the administration of federal grant programs (i.e., state control over how local recipients use federal funds, even as against countervailing federal policies). Hills, *supra* note 369, at 1216-30. On the one hand, state supremacy creates, in effect, a state monopoly, whereas robust intergovernmental competition for federal funds would tend to promote a more efficient use of the funds. *Id.* at 1228-30. On the other hand, there may be advantages to preserving a role for state legislatures between Congress and local agencies, because state legislatures are better qualified than Congress to oversee matters of local self-governance. *Id.* at 1223-25. In any event, Professors Zimring and Hawkins suggest that the answer to the question may be predetermined: "Until cities elect senators, the likely recipients of bloc grants will be state governments." ZIMRING & HAWKINS, *supra* note 7, at 176.

474. Professors Rasmussen and Benson argue that federal anti-drug block grants should be discontinued:

Political processes inevitably cause such [block grant] funds to be widely distributed among jurisdictions, guaranteeing that the funding formula will assure that places without a serious drug problem will "find" a problem in order to receive funds. Since marijuana is the illicit drug that is most widely used, such assistance provides local law enforcement officials with an incentive to conduct their drug war against this relatively benign drug because to do otherwise is to forfeit federal grants for law enforcement.

C. Enhancing Local Political Control over Federal Enforcement

Federal prosecutors have considerable power to override local drug policy preferences, with the *Rosenthal* case providing a telling illustration. This power, of course, is not without its constraints: federal enforcement resources are limited, local United States Attorneys have reasons to be sensitive to local political considerations,⁴⁷⁵ and convictions may be difficult to get from juries when prosecutions transgress community values. Yet, the risks of federal preemption of local preferences are sufficiently real that a genuine decentralization program ought to establish more systematic checks on federal enforcement discretion. At the same time, federal enforcement capacity should be preserved in communities that welcome such enforcement, particularly with respect to drug trafficking that crosses jurisdictional boundaries.⁴⁷⁶

One reform that might strike a suitable balance would be to require, as a condition of federal prosecution in drug cases, written approval from an appropriate, politically accountable local official. The local District Attorney, who is typically a county-level official, would probably fit the bill in most jurisdictions.⁴⁷⁷ In enforcement-minded locales, the DA's approval would probably be granted as a matter of course, imposing no significant burden on federal enforcement authority. In locales with different policy preferences, the approval process would likely function as a more substantial barrier. One imagines, for instance, that the *Rosenthal* prosecution would have been difficult to bring if local approval had been necessary.⁴⁷⁸ Over time, in most jurisdictions, the required regular

Rasmussen & Benson, *supra* note 7, at 728. In light of these concerns, it may indeed be preferable to end, rather than reorganize, the federal anti-drug grants. However, these considerations should be balanced against the dependence of many local jurisdictions on federal funds in order to make and implement their own preferred drug policies. Not only are many of the communities that are most damaged by substance abuse among the poorest in nation, but the wealth inequalities are also exacerbated in many states by state control over local revenue-raising. BOWMAN & KEARNEY, *supra* note 377, at 422.

475. See *supra* Part IV.C.1.

476. See *supra* note 466 and accompanying text.

477. This sort of certification requirement has been considered previously in other contexts. For instance, in a 1983 bill authorizing federal prosecution of "armed career criminals," Congress required that federal prosecutors get the approval of a District Attorney before prosecuting a typically local case. GEST, *supra* note 75, at 49. While enacted by Congress, the bill was ultimately vetoed by the President and did not become law. *Id.*

478. One difficulty in implementing this reform would be to determine *which* DA's approval would be necessary. Federal districts typically encompass many counties. On the one hand, there should be some constraint on the ability of federal prosecutors to select the friendliest DA in each case without regard to the actual geographical locus of the offense. On the other hand, many drug offenses involve some travel of people or drugs across county lines; federal

communication between the DA and the United States Attorney's Office over drug enforcement would likely lead to efficient working relationships with minimal transaction costs. Indeed, both sides would likely find it to their advantage to negotiate clear, written guidelines in advance as to the scope of federal enforcement authority. Moreover, such guidelines would not only promote effective working relationships, but also facilitate public review and debate.

If formulated in a rational, public-spirited manner, negotiated guidelines would presumably leave the federal government with a free hand to prosecute interstate trafficking cases. In these cases, the federal enforcement interests seem most compelling, while the risks of spillover effects resulting from lax local enforcement seem most worrisome. Yet, based on politics, ideology, turf-protection sensitivities, or personal enmity, a DA might refuse to approve federal prosecution of some truly interstate cases. Or a DA might require such a strong showing of interstate dimensions that the approval process would become a burdensome weight on federal enforcement capacity.

Accordingly, to counter these possibilities, there should be a "safety valve," permitting federal prosecution even in the absence of DA approval when federal prosecution is justified by substantial spillover concerns. This might operate as a new jurisdictional element for federal drug prosecutions lacking DA approval. The government would be required to prove something to the effect that the defendant transported, attempted to transport, or caused to be transported drugs across state lines. The government might be relieved of this burden in cases in which circumstances strongly suggest interstate trafficking, such as cases in which especially high quantities of drugs were involved, or cases in which the defendant was apprehended on an interstate highway or at a national border crossing.

In any event, the safety valve would have close to the same effect as the Constitutional Alternative insofar as it would impose new evidentiary burdens on the government. The proposal here, though, is far less burdensome on federal enforcement as a whole because the new burdens could be avoided altogether by obtaining DA approval. Based on the high levels of federal-local law enforcement cooperation that are currently observed in many jurisdictions, DA approval would likely impose no significant obstacle across much of the nation.

prosecutions should not be unduly bogged down by metaphysical inquiries into the "location" of such offenses. Venue doctrines might supply a pragmatic compromise based on legal principles already familiar to judges and prosecutors: DA approval might be sought from any county in which venue would be proper for a federal prosecution if the county were a federal district unto itself. *See* FED. R. CRIM. P. 18 (setting forth venue rule).

D. Increasing the Accountability of Local Law Enforcement to the Local Community

As discussed above, federal policies, particularly those related to forfeiture and MJDTFs, tend to co-opt local law enforcement in the war on drugs.⁴⁷⁹ These policies likely result in local law enforcement agencies devoting more resources than they would otherwise to drug enforcement, and raise concerns that such agencies are contravening the actual drug policy preferences of the communities they nominally serve. Normal political controls over local police departments may malfunction for any of a variety of reasons: the police may participate in MJDTFs that are beyond formal local control; police activities may be funded outside the normal budget-making process through equitable sharing and federal grants; or the role of local police may be masked if cases are prosecuted federally.

The presumption in favor of decentralization is premised on the assumption that local decision makers will be responsive to local preferences; when it comes to drug enforcement, however, federal policies may significantly diminish responsiveness. A decentralizing reform agenda should thus seek to enhance the accountability of local law enforcement to the local community.⁴⁸⁰

Forfeiture reform ought to be a particular point of focus. One possibility might be to eliminate equitable sharing altogether. However, this would leave all local communities at the mercy of state forfeiture laws; get-tough communities that view easy forfeiture as an appropriate law enforcement tool might see their preferences thwarted under such a sweeping reform. Federal enforcement capacity might also be impaired in such communities by the loss of an important tool for promoting multi-jurisdictional cooperation.

Rather than ending equitable sharing altogether, sharing payments should be redirected. Instead of law enforcement agencies directly, the immediate beneficiaries of equitable sharing should be the most appropriate governmental units of general jurisdiction. The "share" of state police should go to the state general fund. The share

479. See *supra* Part III.A.2.d.

480. The critique here mirrors the critique of other instances of "picket fence federalism." See *supra* note 377. As Professor Hills observes: "It became a cliché in the late 1960s and early 1970s to denounce such arrangements as immune from democratic control, inefficient, uncoordinated, chaotic, and generally unaccountable." Hills, *supra* note 369, at 1216. While he contends that some of these criticisms were overblown, he nonetheless concludes, "[W]hatever their advantages for the pursuit of national goals, there is little doubt that the structures imposed by the federal government were not well-suited for local self-governance." *Id.* at 1218.

of the county sheriff should go to the county general fund. The share of city police should go to the city general fund.⁴⁸¹

In many jurisdictions, this formal reallocation of funds will not make a difference to the enforcement effort. The general budget-making authority (e.g., the city council) will have an incentive to return much or all of the share to the police agency whose work generated the money; otherwise, the agency may not pursue forfeitures aggressively in the future. Assuming that the police continue to have a financial stake in drug enforcement and forfeiture, a steady stream of dollars would likely be channeled through the budget-making authority. By returning the money to police, budget makers will at least be able to claim political credit for increasing drug enforcement expenditures without raising taxes.

While formally diverting equitable sharing proceeds will not make much practical difference in many jurisdictions, the reform would provide an opportunity for change in other jurisdictions that would prefer to deemphasize drug enforcement. Resource allocation decisions would be moved from within the police agency into a more open budget-making process. Where drug enforcement is unpopular, budget makers would be reluctant to return equitable sharing funds to the police for that purpose; increased enforcement (even without cost to the taxpayer) might be more of a political liability than an asset in such jurisdictions. Thus, budget makers might sometimes be willing to constrict or even shut down the equitable sharing pipeline.

In short, in order to retain access to forfeiture proceeds, local police would become answerable not only to federal law enforcement authorities, but also to local leaders who stand outside the law enforcement establishment. The diversion of proceeds would thus enhance the accountability of local drug enforcement efforts to local political institutions.

MJDTFs should be subject to the same regime. Rather than giving forfeiture proceeds directly to an MJDTF, funds should be divided equitably among the different jurisdictions contributing personnel to the MJDTF. Once again, in many cases, one expects that the money would be returned to the MJDTF, but it need not be.

481. Professors Rasmussen and Benson make a similar proposal. Rasmussen & Benson, *supra* note 7, at 731-32. Many states already have laws that direct forfeiture proceeds to the general fund or some specified nonpolice purpose. GURULÉ & GUERRA, *supra* note 177, §§ 17-1(d), 17-2(g)(1). However, such laws are easily evaded at present because local law enforcement can simply turn seized assets over to the federal government for adoption and equitable sharing. Robyn E. Blumner, *Police Too Addicted to Lure of Easy Money*, ST. PETERSBURG TIMES, Aug. 17, 2003, at 7D. Thus, federal law would have to be reformed before the state laws could become effective. While earlier reform efforts have had some success in Congress, durable changes in the law have proven elusive. *See supra* note 191.

Financially self-sufficient MJDTFs, standing outside any established structure of political accountability, would be a thing of the past.

VI. CONCLUSION

This Article has addressed two questions of drug policy, which can now be seen as closely related. First, in answer to the empirical question (what *is* the federal role), the recent blossoming of state and local innovation casts considerable doubt on the federal monopoly theory. At the most basic level, the federal monopoly theory misses the reliance of the federal government on the cooperation of *local* law enforcement in order to advance the federal objectives of legalism and enforcement. This reliance diminishes federal control in at least two ways. First, federal enforcement is in some respect constrained by the local political forces that shape the priorities and capabilities of local police. These decentralizing tendencies, in turn, may be exacerbated by the decentralized nature of the federal prosecutorial function. Second, federal reliance on local law enforcement requires that each state have its own drug-related penal laws, because it is *state* law that empowers local law enforcement to address drug issues. Consequently, there must necessarily be at least some state autonomy in drug policy. Put differently, without federal *preemption*, there will always be the possibility that, no matter the degree of federal *discouragement*, some states will choose to deviate from federal norms. The federal government could counteract such deviations by devoting more federal resources to drug enforcement, either increasing the financial incentives for state conformity or increasing direct enforcement capabilities in liberalizing states. However, Washington has not indicated a willingness to undertake such measures, which, if pushed to the extreme, would violate the whole premise of the cooperative federalism “deal” (shared costs/shared credit).

In considering the second, normative question (what *should* the federal role be), the federal-*local* relationship again takes center stage. Even granting the desirability of decentralization, current arrangements may be perfectly satisfactory inasmuch as they liberate local law enforcement from the constraints of state policy through a combination of federal financial and in-kind assistance. Local law enforcement has the freedom to choose between state and federal policy preferences, allowing the development of a locally tailored response to drug problems. The attractiveness of this scenario will depend in no small part on one’s views of the trustworthiness of local law enforcement. On the one hand, the local police might be seen as reliable agents of the public will, uniquely close to the people and well

positioned to discern community needs and preferences. On the other hand, the local police might be viewed as hopelessly co-opted by federal policies, with compelling financial interests in drug enforcement and little real accountability. Anecdotal evidence may be cited in favor of either position. Here lies an empirical question worthy of further scholarly investigation.

Even taking the more sanguine view, though, there may still be good reason to wish reform of current arrangements. Lines of public accountability are blurred by federal assertions of leadership and by the complex and largely invisible day-to-day interactions of federal, state, and local enforcers. Clarifying lines of accountability may promote even greater responsiveness and innovation in policymaking. The challenge is how to accomplish this, while at the same time preserving the effectiveness of necessary federal protections for the get-tough communities.

With an eye to these competing objectives, the Article has proposed a preliminary, three-part reform agenda (the Competitive Alternative), intended to: (1) reduce the federal distortion of drug policy debates at the state and local level; (2) subject federal drug enforcement decisions to a greater degree of local political control; and (3) increase the accountability of local law enforcement to local political institutions.

Among other things, the analysis here seeks to highlight the importance of *local* governmental institutions in a cooperative federalism scheme. Local institutions often play a crucial role in implementing federal and state policy choices, not just in drug and crime policy, but also in other areas ranging from education to welfare to housing to the environment. Adding local institutions to the mix may dramatically change the way that federalism problems are viewed. Policies that appear quite centralized from a federal-state perspective alone may seem much less so from a federal-state-local point of view.

At the same time, the local role may considerably complicate the normative structural issues. Not only do local governments differ dramatically in size and wealth, but they are ultimately institutions of state law, with limited and idiosyncratic legal powers of their own. Thus, where the federal government does not wish to assume exclusive responsibility, tripartite divisions of authority seem inevitable. How to structure these federal-state-local relationships so as to maximize local autonomy and accountability, while at the same time making available necessary state and federal support, emerges as a question of great importance and difficulty.