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WE NEED A COLE MEMORANDUM FOR MAGIC MUSHROOMS

*Robert A. Mikos**

In fall 2020, as the nation elected Joe Biden to be our Forty-Sixth President, Oregon voters also passed a noteworthy new drug law reform. Known as Measure 109, Oregon's path-breaking law legalizes the use of psilocybin, a hallucinogenic substance found in magic mushrooms.¹ Measure 109 is designed to unlock the therapeutic potential of psilocybin, which advocates tout as an effective and safe treatment for depression and other psychological conditions.²

Given the burgeoning interest in psychedelics, many people are excited to see how Oregon's psilocybin experiment pans out. But at this point, it remains unclear whether the experiment will even get off the ground. The main reason: we still do not know how the new Biden Administration will respond to Measure 109.

Federal law currently takes a very dim view of psilocybin. The federal Controlled Substances Act (CSA) classifies the drug as a Schedule I controlled substance, making it unlawful to possess, manufacture, or distribute outside the narrow confines of a federally approved clinical research trial.³ Federal law also proscribes a staggering array of activities related to supplying and using psilocybin, such as providing space where people can consume the drug.⁴ Federal law thus casts a long and dark shadow over Oregon's road to reform and anyone taking a trip on that road.

President Biden and his Attorney General, Merrick Garland, have yet to disclose how they plan to respond to Measure 109. But as we mark the 100th day of the Biden Administration, let me offer the Administration some friendly advice: decline to prosecute anyone that participates in Oregon's nascent psilocybin program, as long as Oregon keeps the program under tight control. The

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1. The full measure can be found at *Measure 109, OR. VOTES*, <http://oregonvotes.org/irr/2020/034text.pdf> (last visited Apr. 20, 2021) [<https://perma.cc/C876-GYMR>].

2. *Id.* §§ 1–2. See also generally MICHAEL POLLAN, *HOW TO CHANGE YOUR MIND: WHAT THE NEW SCIENCE OF PSYCHEDELICS TEACHES US ABOUT CONSCIOUSNESS, DYING, ADDICTION, DEPRESSION, AND TRANSCENDENCE* (2018); *Magic Mushrooms: Trip Through the Science*, GIMLET (Dec. 10, 2020), <https://gimletmedia.com/shows/science-vs/76h8a7o> [<https://perma.cc/7P3X-82A3>].

3. 21 U.S.C. § 841.

4. *Id.* § 856.

Constitution and Congress have given the Department of Justice (DOJ) broad discretion regarding how to enforce the CSA. In fact, the DOJ has already exercised that discretion by declining to prosecute crimes involving another federally proscribed drug: marijuana. In a series of memoranda issued during the Obama Administration, the most important of which is the Cole Memorandum, DOJ leadership urged United States Attorneys not to prosecute individuals who used, made, or sold marijuana in strict compliance with state marijuana reforms unless certain federal enforcement priorities (like selling the drug to minors) were implicated.⁵ My recommendation is simple: the Biden Administration should issue similar enforcement guidance for state-authorized psilocybin activities.

I recognize that President Biden has previously championed more hawkish drug policies, including long prison sentences for drug offenders.⁶ However, even for a drug hawk who remains wary of legalizing psilocybin, eschewing enforcement of the federal ban might be the best policy. To make the case for tolerating Measure 109, I will draw upon lessons learned from the federal government's response to state marijuana reforms over the past twenty-five years. That experience demonstrates that attempting to quash state drug reforms is unlikely to succeed and might even prove counterproductive and that tolerating such reforms better serves the interests of the federal government.

When California adopted its pioneering medical marijuana law in 1996, the Clinton Administration immediately sought to quash the state's program and the budding reform movement. President Clinton's drug czar General Barry McCaffrey issued a call to arms to all federal agencies—from the DOJ to the Department of Transportation(!)—imploping them to use every weapon at their disposal to disrupt California's experiment.⁷ Heeding the call, the DOJ raided medical marijuana grow sites throughout the state, and it threatened physicians and landlords who assisted individuals participating in California's (then) novel program.⁸ This overt federal hostility toward state marijuana reforms continued until late 2009, when the Obama Administration first signaled a truce in the federal government's long-standing war on marijuana.

History has shown that this hostile federal response was misguided. For one thing, it failed to produce the desired effect: stopping states from legalizing marijuana. Notwithstanding ongoing threats from the DOJ, a steady stream of new

5. See Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys 1–3 (Aug. 29, 2013) [hereinafter Cole Memorandum], <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/5WUB-8P57]. See also Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633 (2011) (analyzing DOJ enforcement guidance).

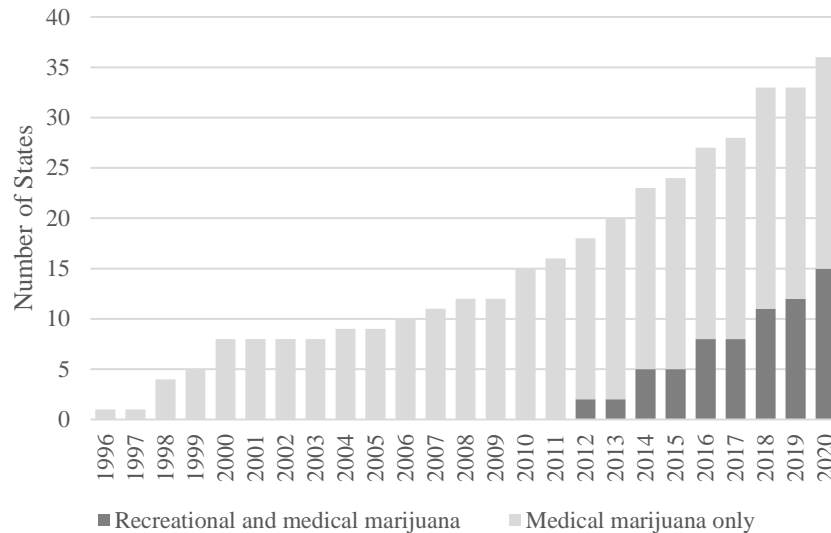
6. See, e.g., German Lopez, *Joe Biden's Long Record Supporting the War on Drugs and Mass Incarceration, Explained*, VOX (July 31, 2019, 10:24 PM), <https://www.vox.com/policy-and-politics/2019/4/25/18282870/joe-biden-criminal-justice-war-on-drugs-mass-incarceration> [https://perma.cc/2NAD-FK8Y].

7. See Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 5–10 (2020) (discussing early federal response).

8. *Id.*

states followed California's lead and legalized medical marijuana, as shown in Figure 1.⁹

FIGURE 1: STATES LEGALIZING MARIJUANA



During more than a decade of federal hostility, twelve additional states would pass their own laws legalizing medical marijuana. (The movement, of course, never stopped. As of this writing, thirty-six states have legalized medical marijuana, and seventeen of them have legalized the drug for recreational purposes as well.)

I have explained in detail elsewhere why federal hostility failed to stop states from legalizing marijuana.¹⁰ In a nutshell, the federal campaign was hampered by two mutually reinforcing limits on federal power. First, as a practical matter, the DOJ did not have enough resources to make much of a dent in the marijuana market on its own.¹¹ Historically, the states have handled the vast majority of all criminal drug cases. Thus, when states like California stopped arresting and prosecuting people for using or growing marijuana, there was very little the DOJ could do to pick up the slack and restore the deterrent effect state prohibitions had previously provided. Second, the federal government could not simply force states like California to help fight its war on marijuana. Pursuant to a constitutional federalism doctrine known as the anti-commandeering rule, states may refuse to assist federal regulatory programs. The anti-commandeering rule explains why states do not have to ban marijuana under state law and why they also may refuse to help federal agents track down, arrest, prosecute, or

9. The chart is an updated version of Figure 1. *Id.* at 2.

10. See generally Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).

11. *Id.* at 1463–69.

punish residents who flout federal law.¹² These twin limits on federal supremacy enabled the states to make marijuana legal for all practical purposes, even though federal law continued to ban the drug outright.

The DOJ's hostility not only failed to stem the tide of state legalization, it may have also caused states to eschew restrictions they might have otherwise willingly imposed on marijuana. For example, in the early years of state reforms, states did not attempt to license medical marijuana suppliers, monitor their inventories, or subject them to myriad other regulations that are now commonplace.¹³ The states understood that a tightly regulated commercial market would pose an easy target for the DOJ, limited though its resources might be. The DOJ might even try to exploit state regulations for its own ends, for example, by commandeering state-gathered data (inventory tracking reports, etc.) to build federal criminal cases against state-licensed marijuana suppliers.¹⁴ But states also knew that the DOJ could not shut down a grey market comprised of thousands of producers operating in the shadows. So rather than establishing a tightly regulated industry, states instead relied upon largely unregulated suppliers to meet the needs of medical marijuana patients.¹⁵ This arrangement was hardly ideal for the states *or* the federal government. For example, without measures like inventory tracking, states could not easily prevent medical marijuana from being diverted into the recreational market. But federal belligerence had given the states no other viable choice: unable to establish a regulated market—the approach states would have preferred—and unwilling to abandon their reforms altogether—the response federal officials might have hoped for, states adopted a very *laissez faire* policy toward marijuana supply. This example illustrates how federal hostility toward state drug reforms can backfire: it can widen the gap between federal and state policy and undermine the interests of the federal government (and the states) in the process.

After more than a decade pursuing this failed and counterproductive response to state reforms, the DOJ eventually relented. Under the Obama Administration, the agency called a truce, the terms of which were spelled out in the Cole Memorandum noted above. In particular, the Cole Memorandum announced that United States Attorneys should leave marijuana users and suppliers at peace so long as they strictly complied with state regulations designed to address federal enforcement concerns, like keeping marijuana out of the hands of minors.¹⁶

12. *Id.* at 1445–50. *See also* Robert A. Mikos, *Murphy's Mistake, and How to Fix It*, in *MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE* 103 (Jonathan H. Adler ed., 2020) (discussing implications of Supreme Court's decision in *Murphy v. NCAA*, invalidating congressional statute that barred states from legalizing sports gambling).

13. *See* Mikos, *supra* note 7, at 5–7.

14. *See generally* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103 (2012) (discussing federal demands for state data, but also explaining why such demands violate the anti-commandeering rule).

15. *See* Mikos, *supra* note 7, at 5–7.

16. Cole Memorandum, *supra* note 5, at 2.

This new approach quickly paid dividends: it prompted states to rein in the burgeoning grey market for marijuana. Starting in 2009, they began to license commercial marijuana suppliers and impose a litany of regulations on the industry. For example, states began to require vendors to track their inventories from seed to sale, barred them from selling across state lines, restricted advertising that could appeal to minors, and capped the amount of psychoactive THC found in marijuana edibles.¹⁷ Regulations like these helped address many of the concerns raised by legalization in the first instance, and the states' sudden willingness to impose them demonstrated how a more conciliatory federal response to state drug reforms could serve federal interests.

The Biden Administration should heed these lessons. The same factors that foiled early federal attempts to quash state marijuana reforms would likely hinder the efficacy of any attempt to quash Oregon's Measure 109 as well. The DOJ cannot force Oregon to reinstate the state psilocybin ban that Measure 109 partially repealed—such a move would plainly run afoul of the anti-commandeering rule.¹⁸ To be sure, the DOJ could try to prosecute the clients, facilitators, and providers who participate in Oregon's program. Given that the number of such people is likely to be small, the agency's limited enforcement resources pose less of a constraint on its efficacy.¹⁹ But allocating the DOJ's scarce resources is a zero-sum game. The agency cannot devote more agents to enforcing the federal psilocybin ban unless it devotes fewer agents to some other federal drug priority, like the opioid epidemic which is killing 50,000 Americans annually.²⁰ This suggests that unless President Biden is willing to lose some ground in the war on opioid abuse, he will need to tolerate a little more psilocybin use in Oregon.

Perhaps even more importantly, President Biden should consider how states like Oregon might respond to a federal crackdown on state-authorized psilocybin use. *As presently written*, Measure 109 takes several steps to address possible federal objections. It stipulates, for example, that clients must be advised of health risks before being administered psilocybin; that administration sessions must be conducted by licensed and trained psilocybin service facilitators; that psilocybin may only be supplied by state-licensed providers, which are subject to regulations akin to those now governing the marijuana industry (including spore to sale tracking); and that psilocybin may only be used at licensed centers, *i.e.*, the state does not allow retail sales or home use.²¹ A DOJ crackdown could tempt Oregon to abandon many of these controls. After all, the state's regulations make clients, facilitators, providers, and centers sitting ducks for federal agents. Thus, to lessen the threat posed by the DOJ, Oregon might allow clients to obtain

17. For a survey and discussion of the various regulations legalization states now impose on the marijuana industry, see ROBERT A. MIKOS, *MARIJUANA LAW, POLICY, AND AUTHORITY* 443–78 (2017).

18. See sources cited *supra* note 12.

19. Usage statistics show that psilocybin is a far less popular drug than marijuana. See *How Many People Use Psilocybin Mushrooms?*, DRUG POL'Y ALLIANCE, <https://drugpolicy.org/drug-facts/how-many-people-use-psilocybin-mushrooms> (last visited Apr. 20, 2021) [<https://perma.cc/4Q4L-UNS5>].

20. See *Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates> (last visited Apr. 20, 2021) [<https://perma.cc/J4PC-DLEU>].

21. See *Measure 109*, *supra* note 1.

psilocybin from unlicensed suppliers, to use it at home, and to forego the assistance of trained facilitators. For anyone who is wary of psilocybin, such an unregulated state program would be far worse than the tightly controlled program Oregon now envisions under Measure 109.

In a perfect world, of course, Congress would resolve the conflict between state and federal psilocybin policies. But Congress is unlikely to act anytime soon. Consider that Congress has failed to adjust federal marijuana laws, notwithstanding strong popular support for federal legalization and the dramatic transformation of state laws governing that drug over the past twenty-five years.²² Until Congress gets around to addressing this latest drug reform movement, the Executive Branch needs to do something to bridge the gap between state and federal psilocybin laws.

To that end, Attorney General Garland should issue a memorandum for psilocybin modeled on the Cole Memorandum for marijuana.²³ The psilocybin memorandum could specify the steps Oregon would need to take (or keep taking) to address the DOJ's concerns and secure federal forbearance. The time is ripe for the agency to issue such a memorandum. The Oregon Health Authority is currently writing implementing regulations, and Measure 109 asks for federal input.²⁴ If Attorney General Garland accepts this olive branch and works with—rather than against—state officials, both Oregon and the federal government are likely to be better off.

22. See Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP (Nov. 9, 2020), <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx> [<https://perma.cc/YR7D-FTXK>] (reporting that 68% of Americans support legalizing marijuana for recreational purposes).

23. The Attorney General could also initiate rescheduling proceedings to move psilocybin off of Schedule I, but such proceedings would take time and the outcome is not guaranteed. See Robert A. Mikos, *POTUS and Pot: Why the President Could Not Legalize Marijuana Through Executive Action*, 89 U. CIN. L. REV. 668, 674–79 (2021) (discussing limits on Executive's scheduling authority under the CSA).

24. See *Measure 109*, *supra* note 1, at § 7(11).